Military aid to the civil power

By James Renwick

Military aid to the civil power involving the use of force is a common, and to that extent, unremarkable, occurrence in many countries. This is not so in Australia. While before federation soldiers were commonly used in the colonies as gaolers for the convict settlements, and later to deal with unrest at the Eureka Stockade in 1854 and in the 1891 shearers' strike,[1] since federation there has only been a call out of the army in 1970 on the island of New Britain (then part of the Australian Territory of Papua New Guinea) and in 1978 following the Hilton Hotel bombing. In the first case the troops were not needed, and in the latter no force was used.[2] Nevertheless, the latter case provoked public discussion on the topic of military aid to the civil power, and this was considered by Mr Justice Hope in his *Protective Security Review Report* issued the following year, which made a number of recommendations on the topic.[3] But it was not until 12 September 2000, three days before the opening of the Sydney 2000 Olympic Games that the *Defence Legislation Amendment (Aid to Civil Authorities) Act 2000* (Cth) ('the amendments'), which deals in detail with this topic, and also with protection to those Defence Force members involved in anti-terrorist operations, came into force.[4] The passage of the Bill for the amending Act, although initially uncontroversial, later become so.[5]

This article notes the constitutional foundations for the Act, and explains its essential structure.

The Constitution

Before federation, the colonies had limited local responsibility, under the United Kingdom, for defence. At federation, the Department of Defence was established under s64 of the Constitution, and within a few weeks, the former colonial departments of Naval and Military Defence were transferred to the Commonwealth.[6] The Command in Chief of the naval and military forces was vested in the Governor-General by s68 of the Constitution. (The Governor-General also exercises the executive power of the Commonwealth which, under s61, extends to the execution and maintenance of the laws of the Commonwealth.) By operation of s114 of the Constitution, the States were prohibited from raising or maintaining any naval or military force without the consent of the Commonwealth Parliament.

The principal source of Commonwealth legislative power in this respect is s51(vi) of the Constitution, which gives the Parliament power to make laws with respect to 'the naval and military defence of the Commonwealth and of the several States and the control of the forces to execute and maintain the laws of the Commonwealth'.

Finally, s119 of the Constitution states: 'The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.' Section 119 finds a parallel in Article IV, s4 of the Constitution of the United States, except that under the latter, the application to the Federal Government is to be made by the State Legislature, or, if it cannot be convened, the State Executive.[7] The United States provision has been invoked on many occasions.[8]

The current terms of s119 appeared in the 1891 Draft Bill for the Constitution. The draft terms were not subsequently altered, and the debate throughout the constitutional conventions concerning s119 was almost non-existent (although see below).[9]

In nearly 100 years of federation, there has never been a call out of the Defence Force for the purposes of s119. Although there were requests to the Commonwealth by Queensland in 1912, Tasmania in 1916, Western Australia in 1919, Victoria in 1923 and South Australia in 1928, only the first of those was expressly made under s119. All of the requests were declined.[10]

The mechanism for invoking s119 was amplified by s51 of the Act in its original form, which required a proclamation by a State Governor that domestic violence existed in a State and for the Governor-General to make a corresponding proclamation and then to call out the permanent Defence Forces.[11]Section 51 also provided a limitation on that power, namely a prohibition on the emergency or Reserve Defence Forces being called out or utilised in connection with an industrial dispute. All of s51 bar that prohibition has been replaced by the amendments.

The amendments have three main aspects, namely, call out of the Defence Force at the requests of the States (and the self-governing Territories) for protection against domestic violence, call out of the Defence Force by the Commonwealth to protect its own interests, and the powers and immunities given to members of the Defence Force when called out in

each case, and in dealing with terrorist incidents.

The Defence Force protecting States against domestic violence

Under the amendments, a State Government can apply for protection against actual or probable domestic violence within the State: s51B.[12] The Prime Minister, the Attorney-General and the Defence Minister must then consider whether they should form the opinion that the State is not, or is unlikely to be, able to protect itself from the violence and that the Defence Force should be called out and utilised to protect the State against the domestic violence. If the opinion is formed, the Governor-General, on that advice, so orders. The order can only last for 20 days, although further orders can be made: s51B(4)(d), (9).

Although in the 1898 convention debates Mr Barton said, '…the State should be entitled to demand protection', the Commonwealth has taken the view, notwithstanding the use of the word 'shall' in s119, that it is not obliged, legally, to respond to every such request by providing military aid. So, when the State of Queensland invoked s119 in 1912, the Governor-General, on advice, responded that:

> …whilst the Commonwealth Government is quite prepared to fulfil its obligations to the States if ever the occasion should arise, they [sic] do not admit of the right of any State to call for their[sic] assistance under circumstances which are proper to be dealt with by the Police Forces of the States.[13]

Section 51B also provides a discretion whether to accede to the request, so that even if a court regarded the formation of the s51B(1) opinion as justiciable, and it may not, a court could not, in a judicial review application, compel the making of a call out order.

After call out, the Chief of the Defence Force, who commands the Defence Force,[14] is to utilise the defence force, *inter alia*, 'in such manner as is reasonable and necessary' for the purpose of protecting the specified State against the specified domestic violence: s51D.

The Chief of the Defence Force is required as far as practicable to ensure the Defence Force co-operates with the State Police Force and only acts in accordance with its requests, although the Defence Force is neither required nor permitted to be placed 'to any extent' under the command of the Police Force or one of its members: s51F.

There is a civil liberties protection under s51G, in that while utilising the Defence Force the Chief of the Defence Force must not 'stop or restrict any protest, dissent, assembly or industrial action, except where there is a reasonable likelihood of the death of, or serious injury to, persons or serious damage to property'.[15]

Finally, when the State request for assistance is withdrawn, the call out order must be revoked: s51B(5).

It was emphasised in evidence by Defence Force members before the Senate Foreign Affairs Defence and Trade Legislation Committee which examined the Bill, that a call out under the Act is likely to be wholly exceptional and would only arise where the State Police Force (if necessary supplemented by the Federal Police) was dealing with a violent situation which was beyond its control and needed to request military aid.[16]

The Commonwealth protecting its own inter ests

Section 119 of the Constitution says nothing about the Commonwealth protecting its own interests. As mentioned above, the executive power of the Commonwealth mentioned in s61 of the Constitution extends to the execution and maintenance of the Constitution and the laws made under it and the defence power under s51(vi) permits legislation for the control of the Defence Force to that end.

Section 51A of the Act permits the three authorising Commonwealth ministers mentioned above, acting through the Governor-General, to have the Defence Force called out to protect 'Commonwealth interests' located in a State or self governing Territory from domestic violence against which the State or Territory is, or is likely to be, unable to protect the Commonwealth interests.

Some State Governments, making submissions to the Senate Committee considering the Bill, criticised the lack of a definition of 'Commonwealth interests' in the Bill. They submitted that some 'Commonwealth interests' may be so tenuous as to fail to provide a constitutional underpinning for a particular order under s51A. That submission may underestimate the wide scope of Commonwealth interests which could justify intervention. As Dixon J put it in *R v Sharkey* (1949) 79 CLR 121 at 151:

> If ... domestic violence within a State is of such a character as to interfere with the operations of the Federal Government, or with the rights and privileges of Federal citizenship, the Federal Government may clearly, without a summons from the State, interfere to restore order. Thus if a riot in a State interfered with the carriage of the Federal mails, or with interstate commerce, or with the right of an elector to record his vote at Federal elections, the Federal Government could use all the force at its disposal, not to protect the State, but to protect itself. Were it otherwise the Federal Government would be dependant on the Governments' of the States for the effective exercise of its powers.[17]

Further, as Isaacs J put it in *Farey v Burvett* (1916) 21 CLR 433 at 451: 'The Constitution is not so impotent a document as to fail at the very moment when the whole existence of the nation it is designed to serve is imperilled.'

In addition to the matters referred to by Dixon J, one can imagine 'Commonwealth interests' encompassing Commonwealth property, including buildings and indeed Parliament House itself or, as in the aftermath of the Hilton Hotel bombing, the interest it has in giving effect to its international law obligations to protect internationally protected persons.[18]

To say this is not to deny that the use of this power might not be politically controversial, but the history of federation suggests that the extreme reluctance to call out the Defence Force by the Commonwealth is likely to continue.

Movement Control, the power to recapture buildings and free hostages and protection of Defence Force Members from the consequences of the use of deadly force

Perhaps the most dramatic part of the Bill is the anti-terrorist aspect whereby, when the Defence Force is called out to protect Commonwealth interests or the State or Territory from domestic violence, members of the Defence Force may be used to:

i recapture premises or means of transport (for example an aircraft);

ii detain persons found on those premises reasonably suspected of having committed an offence against the law of the Commonwealth, a State or a Territory for the purpose of placing them in Police custody as soon as possible;

iii freeing any hostage;

iv evacuating anyone from the premises; and

v searching for dangerous things and seizing any dangerous things found.[19]

Furthermore, there are powers when the Defence Force is called out to create a 'general security area' within which premises and means of transport can be entered and searched, or a 'designated area' within which movement by people and vehicles can be controlled or prohibited.[20]

In all of these situations, members of the Defence Force are given authority under s51T to use 'such force against persons and things as is reasonable and necessary in the circumstances'. The section anticipates the possibility of lethal force being used, although such force is not to be used unless the Defence member 'believes on reasonable grounds that [the action likely to cause death or grievous bodily harm] is necessary to protect the life of, or to prevent serious injury to another person, including the member'.

That protection is, however, lost if an obligation imposed under specified divisions of the Statute, for example wearing a uniform together with an identifying name tag and number,[21] is not complied with.

Finally, there are provisions in the Act for independent review of the operation of the amendments within three years from the time the amendments came into force: s51XA.

There are a number of legal questions thrown up by the Act:

1 Is the formation of an opinion by the three authorising Commonwealth Ministers likely to be judiciable in the judicial review context?

2 Is the exercise of powers by the Defence Force under a call out order justiciable in the judicial review context and if so who has standing to make a challenge, for example:

- a State or Territory which is dissatisfied with the terms of a call out order;
- protesters who assert their protests are lawful and peaceful and thus within s51G of the Act.

3 Will the Courts give an expensive or a restrictive interpretation to the s51T immunity?

Overall, in the view of the author, the call out powers themselves cannot be regarded as an expansion of existing powers. What is new is the limited but necessary protection given to defence members in carrying out a role under the amendments to the Act. While close scrutiny by Parliament and commentators of the Bill was understandable, the capabilities confirmed by the Act and the protection conferred by it, are necessary and appropriate

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1 See *The Soldier's Dilemma – When to Use Force in Australia*, G J Cartledge, Department of Defence 1990, p.144.
2 While troops were, for example, used in the 1949 coal strike and the 1953 maritime strike these were not examples of military aid to the civil power in the sense now being discussed.
3 AGPS, Canberra, 1979. These are discussed in the standard work on this topic, namely, HP Lee, *Emergency Powers*, LBC, 1984, Ch VI.
4 This Act amends the *Defence Act 1903* (Cth) ('the Act').
5 See, eg, *Report of the Senate Foreign Affairs, Defence and Trade Legislation Committee on the Defence Legislation Amendment (Aid to Civil Authorities) Bill 2000,* Parliament of Australia, August, 2000.
6 Re *Residential Tenancies Tribunal of New South Wales & Henderson*, (1997) 190 CLR 410, 435;Constitution, s69.
7 Furthermore, this article provides a guarantee by the United States of a form of republican government in each State of the Union.
8 See 'Riot Control and the Use of Federal Troops', (1967) 81 *Harvard Law Review* 637.
9 *Official Record of the Debates of the Australasian Convention*, Third Session, Melbourne 1898, Legal Books, pp.691-2.
10 Lee, above n3 at 201-202
11 Of course s119 itself is the key to the matter and contains all that is necessary for a request to be made.
12 There are similar provisions for the self-governing territories.
13 Lee, above n3 at 202.
14 The actual as opposed to the titular command.
15 Cf s17A of the *Australian Security Intelligence Organisation Act 1979* (Cth) which states: 'This Act shall not limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security, and the functions of the Organisation shall be construed accordingly'.
16 Senate Report, above n5
17 Cf Quick & Garren, *The Annotated Constitution of the Australian Commonwealth*, pp.964-5.
18 *Cf Crimes (Internationally Protected Persons)* Act 1976 (Cth), Lee, above n3 at 210-211.
19 ss51H-V.
20 Ibid.
21 s51W