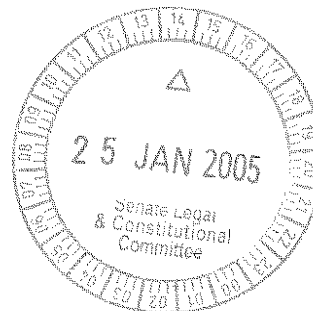


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THE CABINET OFFICE
NEW SOUTH WALES



TCO/16185

Senator Marise Payne
Chair
Senate Legal and Constitutional Legislation Committee
Parliament House
Canberra ACT 2600

24 JAN 2006

Dear Senator Payne

I refer to your letter to the Premier of 15 December 2005, inviting the NSW Government to make a submission in relation to the Committee's inquiry into the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005.

The Premier has asked me to provide you with the following comments on the Bill on behalf of the NSW Government.

Constitutional issues

As a preliminary point, I note an earlier submission of the NSW Government regarding constitutional issues associated with defence call out in relation to the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000. NSW considers that the Commonwealth Government should ensure that there is a sound constitutional basis for the exercise of these important powers.

Use of the Defence Forces in connection with an industrial dispute

The call-out orders currently available under s51A, s51B and s51C of the *Defence Act 1903* are subject to a prohibition on the use of Emergency Forces or Reserve Forces in connection with an industrial dispute. The Bill creates two new types of call-out orders. The provisions regarding a call out to deal with a threat in the offshore area prohibit the use of the Reserves in connection with an industrial dispute. The provisions relating to call outs where "specified circumstances" arise contain no restriction on the use of the Defence Forces in connection with an industrial dispute. NSW considers that the prohibitions applying to existing call-out orders should also apply to the new orders created by the Bill.

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Use of the Reserve Forces

The Bill removes the current requirement under s51G that the Reserves only be used in a call out if sufficient Permanent Forces are not available. NSW Police advise that the use of Reserves in tactical assault situations is not appropriate. Consideration should therefore be given to excluding the use of Reserves in exercising the powers under Division 2, Part IIIAAA of the Defence Act (which relate to such situations).

Designated Critical Infrastructure

The Bill provides Commonwealth Ministers with the power to declare infrastructure to be designated critical infrastructure. The Explanatory Memorandum to the Bill indicates that the definition provided in the Bill is intended to extend beyond definitions of critical infrastructure employed by all jurisdictions in implementing the *National Guidelines for Protecting Critical Infrastructure from Terrorism*. NSW considers that the use of the term 'designated critical infrastructure' creates the potential for confusion and that it would be preferable for the Bill to use the term 'designated infrastructure' instead.

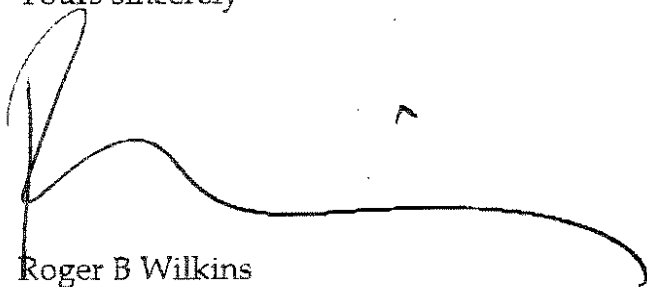
The Bill contains no requirement for Commonwealth Ministers to consult with a State or Territory Government before making such a declaration. NSW considers that consultation should be required (subject to urgency) in order to ensure the effective deployment of military and civil assets in times of increased threat.

Exclusion of State and Territory criminal law

The Bill provides that the substantive criminal law of the Jervis Bay Territory applies in relation to an alleged criminal act of an Australian Defence Force member that is done, or purported to be done, under the call-out provisions. This effectively applies the criminal law of the Australian Capital Territory in such situations. This raises a number of questions in regard to practical matters. For example, if a soldier were to commit a criminal offence in Western Australia, but was liable under ACT law, who would investigate the offence? Under what powers could the person be arrested and questioned outside the ACT? How would the person be granted his or her bail rights? The transfer of the trial to the ACT Supreme Court may also cause logistical problems for victims and witnesses. These matters require clarification.

It would be appreciated if the above issues could be taken into account by the Committee in considering the Bill.

Yours sincerely



Roger B Wilkins
Director-General