

A broad consideration of the Agreement

Introduction

- 3.1 The Committee's inquiry into the Agreement attracted strong interest from a relatively limited range of organisations, individuals and academics. This chapter considers the key issues raised in submissions and public hearings which can be broadly described as concerning the scope and content of the Agreement as a whole, such as the impact of the Agreement on the bilateral relationship and the absence of human rights provisions. The following chapter provides the Committee's discussion of issues concerning specific provisions of the Agreement such as the defence, intelligence and nuclear cooperation provisions as well as the third principle of the Agreement contained in Article 2(3).

The bilateral relationship

- 3.2 Australia and Indonesia's relationship has developed a great deal in recent years and is an important bilateral relationship. The Department of Foreign Affairs and Trade noted that:

Bilateral cooperation reflects a number of important shared interests, our geographical proximity, extensive and long

standing people-to-people links, and is underpinned by frequent two-way high-level visits.¹

- 3.3 Primary to the bilateral relationship is a shared concern for stability and security in the region. The Agreement recognises the value of cooperation and collaboration between Australia and Indonesia to enhance both countries' capabilities in combating traditional and non-traditional security threats.²
- 3.4 However, the extent to which the Agreement enhances the bilateral relationship was subject to some debate. Professor Hugh White from the Australian National University contends that the Agreement is not built on a solid bilateral relationship but rather on Indonesia's concerns about Australia's policy towards Papua.³ This, he considers, is largely a result of Australia's involvement in East Timor. Professor White argues that the Agreement might ultimately be damaging to the relationship between Australia and Indonesia as Article 2(3) – the commitment not to participate or support activities which constitute a threat to the stability, sovereignty or territorial integrity – may create unrealistic expectations of Australia's actions, for instance, the next time asylum seekers from Papua arrive in Australia.

So it seems to me that on both sides the clause appears to create obligations on the other which neither of them can meet within their present political cultures and legal frameworks. My concern about that situation is that it would be bad for bilateral relations with Indonesia. The history of bilateral relations with Indonesia has been that it has been punctuated by periodic crises in which one side or the other has been disappointed at the other's inability to manage our domestic affairs in ways that suit the expectations of the other. A clause in a treaty like this which raises expectations of the way in which either side can manage these issues which cannot be met, which go beyond the kinds of

1 Department of Foreign Affairs and Trade, *Political Brief on Indonesia*, available from the DFAT website, accessed 16 May 2007
<www.dfat.gov.au/geo/indonesia/indonesia_brief.html>

2 National Interest Analysis (NIA), para. 9.

3 Professor Hugh White, *Exhibit 1*, p. 1; see also Hugh White, 'Security: The Lombok Pact's Empty Promise', *Far Eastern Economic Review*, December 2006 (subscription required). This article is reproduced on the Graduate Studies in Strategy & Defence, Australian National University website, accessed 16 May 2007:
<http://rspas.anu.edu.au/gssd/analysis/White_FEERAusIndonSecAgmtNov06.pdf>

approaches that either government can take, are in a crisis likely to amplify bitterness rather than reduce it.⁴

3.5 Professor White concludes that 'without deeper work on the fundamentals of the relationship from both sides, agreements like [this one] are worse than useless'.⁵

3.6 Other submissions expressed concern about the divergent expectations of the Agreement as a result of Australia's and Indonesia's different motives for its negotiation. Civil Liberties Australia suggested that:

While both Indonesia and Australia obviously used the Papuan refugee incident recently to achieve the treaty they wanted, there is a potential danger in the fact that the motives of the two parties for entering into this treaty appear to be quite different. Australia wants Indonesia to cooperate closely on a range of police and security measures. Indonesia wants a guarantee that there will not be a repeat of the recent refugee debate.⁶

3.7 Other submissions consider the Agreement a positive development but simultaneously emphasise the vulnerability of the bilateral relationship. Dr Malcolm Cook, from the Lowy Institute, welcomes the Agreement as a means to 'focus the bilateral relationship on our permanent shared interests' and points out that the scope of the Agreement indicates how Australia and Indonesia's shared interests have grown and diversified in recent years.⁷ However Dr Cook also cautions that the Agreement, similar to the 1995 security agreement with Indonesia, is likely to be more vulnerable to the bilateral relationship than be able to moderate it.⁸

This problem is the vulnerability of the relationship to policy difference and conflict between the two states and the negative popular and political reactions these cause on both sides of the Arafura Sea. On the Australian side, the inability of the relationship to remain on an even keel during these inevitable points of disagreement is partially explained by the airplay critics of the Indonesian state and of the bilateral

4 Professor Hugh White, *Transcript of Evidence*, 26 March 2007, p. 41.

5 Professor Hugh White, see note 3 above.

6 Dr Kristine Klugman, *Transcript of Evidence*, 26 February 2007, p. 15.

7 Dr Malcolm Cook, *Submission 3*, p. 1.

8 Dr Malcolm Cook, *Submission 3*, p. 1.

relationship in general gain during these incidents. On the Indonesian side, there is also a small but growing number of "Australia" critics playing a similar role in the Indonesian media, the security forces and even in parliament.⁹

3.8 The result, Dr Cook suggests, is pressure for a politically expedient response rather than one which focuses on the long term interests of a cooperative bilateral relationship.¹⁰

3.9 Similarly, Professor Vickers from the University of Sydney, describes Australia and Indonesia's relationship as 'fluctuating' and sees the current period as a low point.¹¹ He attributes this largely to the negative portrayal of Indonesia by the media and resulting tendency among Australians to view Indonesia narrowly within a context of terrorism.

Broadly speaking, sections of the media focus on negative portrayals of Islam and present Indonesia as a source of jihad directly threatening Australia. Positive aspects of Indonesia are downplayed or ignored, and the country is not treated in the comprehensive manner that the UK or the USA (both also sites of major terrorist acts), or even China and India, for example, are portrayed.¹²

3.10 This view is supported by the Lowy Institute's 2006 survey, 'Australia, Indonesia and the World: Public Opinion and Foreign Policy', which indicates a belief among Australian respondents that Indonesia was a dangerous source of Islamic terrorism and that Australia was right to worry about Indonesia as a military threat.¹³

3.11 However, the Committee notes that the survey also found that:

More than three quarters (77%) [of Australians surveyed] said that 'it is very important that Australia and Indonesia work to develop a close relationship', firmly rejecting the idea that 'Australia and Indonesia are too different to develop a close relationship'¹⁴

9 Dr Malcolm Cook, *Submission 3*, p. 1.

10 Dr Malcolm Cook, *Submission 3*, p. 1.

11 Professor Adrian Vickers, *Submission 9*, p. 1.

12 Professor Adrian Vickers, *Submission 9*, p. 1.

13 Ivan Cook, *The Lowy Institute Poll 2006: Australia, Indonesia and the World: Public Opinion and Foreign Policy*, The Lowy Institute, 2006, p. 2.

14 Ivan Cook, see note 12 above, p. 14.

- 3.12 Australia's bilateral relationship with Indonesia is strategically, politically, economically and culturally important. However the Committee also recognises that there are some elements of the bilateral relationship that are not as strong as others. A number of submissions made the point that some of the more fundamental issues, such as trust and expectation, must be resolved before a more resilient bilateral relationship can develop. To this end, the Agreement makes clear Australian government policy on Indonesian territorial integrity, reassuring Indonesia on this point, and provides a framework for cooperation between Australia and Indonesia on a broad range of traditional and non-traditional security threats, ranging from defence cooperation to people-to-people cooperation. This would seem to provide an opportunity to forge a closer relationship and as such, the Committee welcomes and supports the Agreement as a positive development in the bilateral relationship.
- 3.13 The Committee notes as a positive development the increased cooperation between Australia and Indonesia, including combating illegal fishing, people trafficking, transnational crime and terrorism.

Human rights

- 3.14 Many submissions were concerned that the Agreement does not contain any reference to human rights. The New South Wales (NSW) Council for Civil Liberties expressed this most directly, commenting that 'the most disturbing flaw in the Lombok Treaty is that it contains no recognition of individual rights or express human rights safeguards.'¹⁵

In our view, human rights values are framework values that should be included in the treaty. It is essential that the other aspects of the treaty are understood in that context.¹⁶

- 3.15 The Human Rights Law Resources Centre recommended including a recognition that the Agreement will be interpreted to promote universal respect for, and observance of, human rights and freedoms.¹⁷ The NSW Council for Civil Liberties also recommended that any cooperation under the Agreement should be subject to a

15 NSW Council for Civil Liberties, *Submission 22*, p. 2.

16 Mr Cameron Murphy, *Transcript of Evidence*, 30 April 2007, p. 1.

17 Human Rights Law Resources Centre, *Submission 17*, p. 3.

guarantee that such cooperation will not result in the violation of anyone's human rights.¹⁸

- 3.16 In response to this issue the Department of Foreign Affairs and Trade pointed out that Article 2(6) of the Agreement, which states that 'nothing in this Agreement shall affect in any way the existing rights and obligations of either Party under international law', ensures the maintenance of Australia's and Indonesia's human rights obligations alongside the Agreement.¹⁹ The Human Rights Law Resources Centre considers that a specific reference to human rights may not be *necessary* but it is not without value and put the same argument with regard to the inclusion of the principles of sovereignty and territorial integrity:

... the same could be said for the issues of sovereignty and territorial integrity. We have seen the need to specifically and expressly include those provisions in the agreement, so to balance those provisions, why wouldn't we include human rights safeguards?²⁰

- 3.17 The extent of both Australia's and Indonesia's human rights obligations outside of the Agreement is considerable. Both Australia and Indonesia have ratified a number of significant human rights treaties²¹, including the International Covenant on Civil and Political Rights²², the International Covenant on Economic, Social and Cultural Rights²³, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment²⁴, the International Convention on the Elimination of All Forms of Racial Discrimination²⁵, the Convention on the Elimination of All Forms of

18 NSW Council for Civil Liberties, *Submission 22*, p. 7.

19 Ms Gillian Bird, *Transcript of Evidence*, 26 March 2007, p. 42.

20 Mr Mathew Tinkler, *Transcript of Evidence*, 26 March 2007, p. 34.

21 See generally Office of the United Nations Commissioner for Human Rights website, accessed 16 May 2007. <www.ohchr.org/english/countries/ratification/>

22 Opened for signature 19 December 1966, entered into force generally 23 March 1976, ratified by Australia 13 August 1980, acceded to by Indonesia 23 February 2006.

23 Opened for signature 19 December 1966, entered into force generally 3 January 1976, ratified by Australia 10 December 1975, acceded to by Indonesia 23 February 2006.

24 Opened for signature 10 December 1984, entered into force generally 26 June 1987, ratified by Australia 8 August 1989, by Indonesia on 28 October 1998.

25 Opened for signature 19 December 1966, entered into force generally 3 January 1976, ratified by Australia 30 September 1975, acceded to by Indonesia on 25 June 1999.

Discrimination against Women²⁶ and the Convention on the Rights of the Child.²⁷

- 3.18 The Committee acknowledges that a reference to human rights would be of symbolic value to the Agreement. However, it is not convinced that the Agreement should be rejected unless human rights provisions are added. Both Indonesia and Australia have extensive human rights obligations under international law and the absence of a reference to human rights in the Agreement does not imply that these obligations cease to apply. Rather, these obligations continue to exist alongside the obligations and principles provided for in the Agreement.
- 3.19 There is nothing in the Agreement which is inconsistent with Australia's human rights obligations nor does the Agreement attempt to exclude the operation of any recognised human rights. On the contrary, such obligations are indirectly referenced through Article 2(6), which states that 'nothing in this Agreement shall affect in any way the existing rights and obligations of either Party under international law', and in effect, maintains Australia's and Indonesia's human rights obligations in addition to the obligations acquired under the Agreement.
- 3.20 The Department of Foreign Affairs and Trade informed the Committee that a commitment to human rights and an open dialogue with Indonesia would continue to be a part of the bilateral relationship.

The Australian government's strong commitment to human rights is reflected fully in our international cooperation activities, including with Indonesia. Activities pursued under the agreement will be no exception ... We continue to register with the Indonesian government at the highest levels the importance of upholding its commitment to an open, tolerant and pluralist society and ensuring that the human rights of all Indonesians are respected.²⁸

- 3.21 As human rights are already part of Australia's and Indonesia's obligations and the Agreement does not attempt to exclude their operation, the Committee considers it unnecessary to specifically require a reference to them. The Committee expects human rights
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26 Opened for signature 1 March 1980, entered into force generally 3 September 1981, ratified by Australia 28 July 1983, by Indonesia 13 September 1984.

27 Opened for signature 20 November 1989, entered into force generally 2 September 1990, ratified by Australia 17 December 1990, by Indonesia 5 September 1990.

28 Ms Gillian Bird, *Transcript of Evidence*, 26 March 2007, p. 42.

concerns in relation to Indonesia to be raised at high levels with the Indonesia government.

Human rights and the principle of non-interference

3.22 A number of submissions questioned whether the principle of 'non-interference in the internal affairs of one another' in Article 2(2) of the Agreement would affect Australia's commitment to raise human rights concerns with Indonesia.²⁹

3.23 Dr Ben Saul from the University of Sydney pointed out that human rights violations 'no longer fall within the exclusive domain of domestic jurisdiction' and as a result, 'expressions of concern by one government about the human rights situation in another country can no longer be seen as interference in internal affairs.'³⁰ This is consistent with the Australian government's approach to human rights:

Pursuing these standards is a responsibility of all countries and a legitimate subject for international scrutiny. Australia does not accept the argument that the treatment of human rights constitutes an 'internal affair' for any country. Equally, in our bilateral dealings, we do not presume to hold other nations to standards that we do not apply to ourselves.³¹

Recommendation 1

The Committee recommends that the Australia Government continue to address widely expressed concerns about human rights in Indonesia with the Indonesian Government and in appropriate international fora.

29 See for instance Indonesian Solidarity, *Submission 13*, p. 1.

30 Dr Ben Saul, *Submission 43*, p. 2.

31 Department of Foreign Affairs and Trade, Human Rights Manual, Chapter 1 'Australia and Human Rights - An Overview', accessed 21 May 2007: <www.dfat.gov.au/hr/hr_manual_2004/chp1.html>