

Enhanced Cooperation Agreement with Papua New Guinea

- 4.1 The *Joint Agreement on Enhanced Cooperation between Australia and Papua New Guinea* was signed at Port Moresby on 30 June 2004 (the Agreement). The Agreement will enable Australia to deploy police and other personnel to Papua New Guinea. The Agreement will allow the deployed Australians to work in partnership with the Government of Papua New Guinea to address core challenges in the areas of: governance; law and order and justice; financial management; economic and social progress; and public administration.

Background

- 4.2 Australia has had a close history of cooperation with Papua New Guinea since the latter's independence in 1975, and the two countries have entered into several bilateral treaties and other formal arrangements over the past 30 years.¹ The umbrella agreement is the *Joint Declaration of Principles Guiding Relations Between Papua New Guinea and Australia*, signed in 1987 and revised in 1992.²

1 National Interest Analysis (NIA), Annex 4, 'List of other treaties with Papua New Guinea', p. 1.

2 NIA, Annex 2, 'Papua New Guinea Political Brief', p. 1.

- 4.3 In recent years, Papua New Guinea has faced a number of serious challenges to its development, including law and order, justice, corruption, poor financial management, and governance. Papua New Guinean politics is highly competitive and fluid, with no Prime Minister ever serving a full five-year term.³ There are fundamental economic problems, including weak domestic demand, and the 2% economic growth experienced in 2003 is not likely to improve.⁴ The country also faces challenges in managing its borders and ensuring transport safety and security.⁵
- 4.4 Bilateral relations between Australia and Papua New Guinea entered a new era of cooperation in December 2003 when Ministers from both countries agreed to the Enhanced Cooperation Program (ECP) to help address Papua New Guinea's economic and development challenges.⁶ The ECP contains an outline of humanitarian and development assistance to be provided to Papua New Guinea by Australia. This includes a proposal to deploy a number of Australian police and officials to Papua New Guinea.⁷
- 4.5 Accordingly, the Agreement provides the necessary legal framework at international law for Australia to implement the ECP.⁸ The Agreement enables the deployment of Australian police and officials and provides them with appropriate legal protections and powers to perform their duties. The Agreement does this by establishing obligations, rights, and duties for each Party. The ECP will involve up to 210 members of the Australian Federal Police and 64 officials. These personnel will work in line positions with the Papua New Guinean police force, public service and judiciary.⁹

3 NIA, Annex 2, 'Papua New Guinea Political Brief', p. 1.

4 NIA, Annex 2, 'Papua New Guinea Political Brief', p. 1.

5 NIA, para. 4.

6 NIA, Annex 2, 'Papua New Guinea Political Brief', p. 1.

7 NIA, para. 9.

8 NIA, paras 4-5.

9 Mr Gerald Thomson, *Transcript of Evidence*, 7 March 2005, p. 35.

Features of the Agreement

- 4.6 The Department of Foreign Affairs and Trade (DFAT) advised the Committee that the Agreement is similar in nature to two other agreements:¹⁰ the *Agreement between Australia and Nauru concerning additional police and other assistance to Nauru*¹¹ and the multilateral agreement concerning the Regional Assistance Mission to the Solomon Islands (RAMSI).¹²
- 4.7 The Agreement establishes a number of obligations, rights and duties on both Parties in respect of the deployed officials, including:
- provisions enabling the deployment of Australian police and other personnel to work in partnership with the Government of Papua New Guinea to address core issues in the areas of governance, law and order and justice, financial management, economic and social progress, and public administration (Article 2)
 - provisions concerning the status of the Assisting Australian Police (Article 3) and other personnel (Article 5)
 - provisions concerning uniforms, and the carriage of weapons, by Assisting Australian Police (Article 4)
 - provisions decreeing that Australian personnel and their families must observe and respect the laws and regulations of Papua New Guinea (Article 7)
 - criminal jurisdiction over deployed Australians (Article 8)
 - establishment of a Joint Steering Committee, comprising members nominated by Australia and Papua New Guinea, to ensure continuing consultation on implementation of the ECP (Article 9)
 - compliance with obligations under international law (Article 10)

10 Mr Gerald Thomson, *Transcript of Evidence*, 7 March 2005, p. 35.

11 *Agreement between Australia and Nauru concerning additional police and other assistance (Melbourne, 10 May 2004)*. See Joint Standing Committee on Treaties Report 63.

12 *Agreement between Solomon Islands, Australia, New Zealand, Fiji, Papua New Guinea, Samoa and Tonga concerning the operations and status of the police and armed forces and other personnel deployed to Solomon Islands to assist in the restoration of law and order and security (Townsville, 24 July 2004)*. See Joint Standing Committee on Treaties Report 55.

- establishment of a system for dealing with civil claims brought against Australian personnel (Article 11)
- provisions for entry into and departure from Papua New Guinea of deployed Australians (Article 13)
- provisions for transport and financial arrangements for deployed Australians (Article 14)
- provisions for accommodation and facilities for deployed Australians (Article 15)
- provisions for communications and postal services for deployed Australians (Article 16)
- provisions for the health and safety of deployed Australians (Article 17).

4.8 One of the features of the Agreement is that Australian police and other officials will work alongside their Papua New Guinean colleagues in line positions within the Papua New Guinean Government. They will exercise the powers and duties of their Papua New Guinean counterparts, with this Agreement affording them the powers and protections necessary to operate in line positions.¹³ The Australian Federal Police (AFP) are working closely with the Royal Papua New Guinea Constabulary, enabling:

A sharing of skills across a range of activities within the law enforcement sector, from criminal investigations through to general policing duties through to anticorruption investigations and a range of other activities.¹⁴

4.9 The Committee discussed at length the ability of the AFP to sustain overseas deployments such as this. Mr John Lawler from the AFP informed the Committee that the AFP is represented extensively internationally.¹⁵ Management of such a large number of personnel deployed overseas is made possible by financial support from the government, involvement of state and territory police officers in overseas deployments, as well as:

A quite highly developed and sophisticated prioritisation model, which enables [the AFP] to deploy key resources to the highest priority tasks and to monitor and adjust staffing

13 NIA, para. 12 and Mr Gerald Thomson, *Transcript of Evidence*, 7 March 2005, p. 35.

14 Mr John Lawler, *Transcript of Evidence*, 7 March 2005, p. 37.

15 Mr John Lawler, *Transcript of Evidence*, 7 March 2005, p. 38.

in particular functional streams or crime types, as and when required.¹⁶

- 4.10 It was stated quite conclusively that the number of police personnel deployed overseas does *not* stretch the AFP's resources in terms of having people on the ground to fulfil their duties in Australia. Pressure from overseas deployments is ameliorated by the AFP's prioritisation model, which enables the organisation to move resources to meet high priority tasks.¹⁷ As stated by Mr Lawler:

The reality is that the nature of transnational law enforcement, the nature of the world in which we live, means that we need to prioritise and to respond efficiently to the taskings that we have from time to time. There will be peaks and troughs in the response that is required, and it is an issue of making sure that the organisation is able to receive, analyse and adjust its resourcing models to meet what might be the highest priorities at a given point in time.¹⁸

Jurisdictions and protections

- 4.11 As reported previously, the Agreement will provide the deployed Australians with appropriate legal protections and appropriate powers. Mr Thomson stated that:

The agreement contains provisions on jurisdiction designed to protect Australian police and officials serving within the PNG bureaucracy and to particularly guard them from vexatious claims. Australians working in PNG under the ECP will be engaged in potentially sensitive work, and in order to protect them from vexatious claims it was desirable to agree to these jurisdiction provisions. Australia has not and did not seek blanket immunities for ECP personnel.¹⁹

- 4.12 Under Article 7 of the Agreement, deployed Australians are at all times obliged to observe and respect the laws and regulations of Papua New Guinea. However, under Article 11, the deployed Australians are not subject to the civil jurisdiction of the courts and tribunals of Papua New Guinea for acts or omissions done within the course of, or incidental to, official duties.

16 Mr John Lawler, *Transcript of Evidence*, 7 March 2005, p. 38.

17 Mr John Lawler, *Transcript of Evidence*, 7 March 2005, p. 39.

18 Mr John Lawler, *Transcript of Evidence*, 7 March 2005, p. 39.

19 Mr Gerald Thomson, *Transcript of Evidence*, 7 March 2005, p. 35.

- 4.13 With respect to criminal or disciplinary matters, Article 8 of the Agreement establishes a system of concurrent jurisdiction to deal with alleged breaches of Papua New Guinean law. Under this system and in accordance with the *Crimes (Overseas) Act 1964* (Cth) ('the Crimes Act'), Australia will have the primary right of jurisdiction for actions or omissions by deployed persons which are in the course of, or incidental to, official duties and for offences involving Australian personnel or property.²⁰
- 4.14 Alleged offences, either civil or criminal, committed outside official duties will be investigated to determine if there is a case to answer and, if so, which country will exercise jurisdiction.²¹ The exercise of jurisdiction will require agreement by both Australia and Papua New Guinea through a Joint Steering Committee, established under Article 9.
- 4.15 The Committee is aware that on 13 May 2005 the Supreme Court in Papua New Guinea overturned the legal immunity of Australian police working in Papua New Guinea. In a unanimous verdict, five judges agreed that the legal immunity given to Australian police was unconstitutional.
- 4.16 The Australian Government has halted the work of Australian police in Papua New Guinea and most of the Australians working under the Agreement have left Papua New Guinea.
- 4.17 The Governments of Australia and Papua New Guinea have indicated their intent to re-negotiate the terms of the Agreement.

Implementation and costs

- 4.18 No legislation is required to implement Australia's obligations. The Crimes Act has been extended to include Papua New Guinea and ensures that Australia is able to exercise criminal jurisdiction over its officials who are deployed to Papua New Guinea under the Agreement.²²

20 Mr Gerald Thomson, *Transcript of Evidence*, 7 March 2005, p. 36.

21 Mr Gerald Thomson, *Transcript of Evidence*, 7 March 2005, p. 36.

22 NIA, para. 27.

- 4.19 The Australian Government is responsible for salary, allowances, medical and dental expenses, removal expenses, and accommodation and transport costs for Australian officials deployed to Papua New Guinea. Australia will fund its participation following regular budgetary processes.²³
- 4.20 At the time the ECP was first agreed to, Australian Ministers agreed to fund Papua New Guinea with an amount of approximately \$1.1 billion over five years until 30 June 2008. This includes \$805 million of new funding to the Australian Federal Police, as well as \$330 million of existing funding from the bilateral aid program with Papua New Guinea.²⁴

Consultation

- 4.21 The Committee understands that the Government of Papua New Guinea was consulted in the preparation of the text of the Agreement.²⁵ The National Interest Analysis states that relevant Commonwealth agencies were also heavily involved in the preparation of the text of the Agreement, including DFAT, AusAID, the AFP, and the Attorney-General's Department.²⁶ The State and Territory Governments were also notified.²⁷

Entry into force

- 4.22 The Agreement was signed on 30 June 2004 and entered into force on 13 August 2004 following the exchange of first person notes between the two Parties in accordance with the provisions of Article 22.2.²⁸
- 4.23 As at 24 February 2005, 136 police, including 111 officers of the AFP and 25 state and territory officers, and 37 officials had been deployed to Papua New Guinea and commenced their work.²⁹

23 NIA, para. 28.

24 Mr Gerald Thomson, *Transcript of Evidence*, 7 March 2005, p. 37.

25 NIA, Annex 1, p. 1.

26 NIA, para. 29 and NIA, Annex 1, p. 1.

27 NIA, para. 30 and NIA, Annex 1, p. 1.

28 <http://www.info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/F1B48DDEECEC6FA6CA256ECC001C075C> accessed 20/4/2005 at 3.30pm.

29 Mr John Lawler, *Transcript of Evidence*, 7 March 2005, p. 38.

Future treaty action

- 4.24 In accordance with Article 21, the Agreement may be varied by agreement between the Parties. Amendments to the Agreement would be subject to the usual Australian treaty making process.
- 4.25 As there is no set expiration date, the Agreement will expire on the complete withdrawal of all Designated Persons from Papua New Guinea (Article 22.3). However, the Agreement may be suspended, in whole or in part, by agreement between the parties (Article 21).

National interest exemption provision

- 4.26 Generally, after treaties have been signed for Australia they are tabled in both Houses of Parliament for at least 15 sitting days prior to binding treaty action being taken. During this period the Committee reviews the proposed treaty action and presents its conclusions and recommendations to the Parliament.
- 4.27 However, where it is in Australia's national interest to proceed with an urgent treaty action, the 15 or 20 sitting day tabling requirement may be varied or waived. The national interest exemption provision was invoked in relation to the Agreement to ensure the deployment of police and officials as soon as possible. As explained by Mr Thomson:

It took the governments of Australia and Papua New Guinea quite a bit longer to reach agreement on the treaty than we had anticipated. This caused considerable delay in the implementation of the ECP. When agreement was finally reached on the treaty, the situation was such that the Australian government wanted to move quickly to bring the agreement into force so that we could proceed as quickly as possible with the deployment of Australian police and officials under the ECP.³⁰

- 4.28 On 23 June 2004, the Minister for Foreign Affairs and Trade, the Hon Alexander Downer MP, wrote to the Committee advising of the urgent need for the Agreement to be in force to enable the Australian police and officials to be deployed to Papua New Guinea as soon as possible.³¹ The Agreement was signed on 30 June 2004. The

30 Mr Gerald Thomson, *Transcript of Evidence*, 7 March 2005, pp. 34 - 35.

31 NIA, para. 3.

Papua New Guinean Parliament passed enabling legislation on 27 July 2004, and the Agreement came into force on 13 August 2005, when Mr Downer and the Papua New Guinean Minister for Foreign Affairs and Immigration, Sir Robbie Namaliu, exchanged first person notes. The Agreement and associated NIA were tabled in both houses of the Australian Parliament on 4 August 2004. The Agreement was scheduled to be considered by the Committee until the Federal election was called in late August. The Agreement was subsequently re-tabled in Parliament on 7 December 2004.

Conclusion

- 4.29 The Committee supported the Agreement enabling the deployment of Australian Police and other officials to deliver assistance to Papua New Guinea. The Committee also acknowledged the urgent need for the Agreement to be in force prior to the treaty action being tabled in Parliament and parliamentary consideration of the Agreement.
- 4.30 There have been a number of treaties relating to the stability of Pacific Island Countries which have invoked the national interest exemption and entered into force before being tabled in Parliament. For this reason, the Committee believes it would be preferable to receive an urgent briefing on the treaty in cases where the national interest exemption is used.
- 4.31 Following the decision of the Supreme Court in Papua New Guinea, the Government of Australia and the Government of Papua New Guinea have committed to renegotiate the terms of the Agreement. The Committee awaits the outcome of these negotiations.

Recommendation 3

In circumstances where the national interest exemption is invoked the Committee recommends that an urgent briefing by the Minister for Foreign Affairs be provided in addition to the notification it currently receives.

