



Australian Government
Attorney-General's Department

Secretary

6/21854

20 March 2007

The Secretary
Senate Standing Committee on Foreign
Affairs, Defence and Trade
Suite G.57
Parliament House
CANBERRA ACT 2600

Dear Secretary

Inquiry into Australia's involvement in peacekeeping operations

The Attorney-General's Department welcomes the opportunity to contribute to the Senate Standing Committee on Foreign Affairs, Defence and Trade's inquiry into the changing nature of Australia's involvement in peacekeeping operations.

While the term 'peacekeeping operation' traditionally referred to the deployment of military forces to maintain cease-fires, the term has evolved to apply to a broad range of operations in relation to a conflict or post-conflict environment, including weapons disarmament, provision of humanitarian assistance, election monitoring and restoration of law and order—this evolution is recognised by the Committee. The restoration and maintenance of law and order have been the particular objectives of recent deployments of Australian personnel to countries in our region, such as the Solomon Islands, East Timor and, most recently, Tonga.

The implementation of the Australian Government's decision to deploy Australian personnel for these operations has involved consideration of many legal issues. The Attorney-General's Department (the Department) has a key role in providing legal and legal policy advice to Government on these issues.

This submission will discuss the nature and extent of advice that the Department provides before and during a deployment of Australian personnel and the interaction of the Department with other Government agencies in providing this advice. The submission will conclude with some observations about the particular pressures and challenges associated with the Department's role in advising on these matters.

Legal advice provided on a broad range of issues

The decision to deploy personnel to peacekeeping operations and the conduct of those operations typically raise issues under three bodies of law: international law; Australian domestic law; and the law of the State in which the operation is taking place. The Department provides legal advice across these three bodies of law, in close collaboration with legal advisers, policy officers and operational personnel in the Department of Foreign Affairs and Trade (DFAT), the Department of Defence (Defence), the Department of the Prime Minister and Cabinet (PM&C), the Australian Federal Police (AFP), AusAID and other agencies involved in a peacekeeping deployment.

The matters on which the Department provides legal advice and assistance generally fall within the following three categories: the legal basis for the deployment; the rules governing the conduct of the deployment; and the liabilities and immunities of deployed Australian personnel.

The legal basis for deployments

As mentioned above, the term 'peacekeeping operation' has evolved to encompass a broad range of activities undertaken by a deployment of foreign military—and often police and civilian—personnel in another State, including efforts to restore law and order in that State. The majority of peacekeeping operations are effected through the United Nations (UN). In these cases, the deployments are authorised by resolutions of the UN Security Council. The Department and DFAT provide legal advice about the interpretation and implementation of these resolutions.

Recent Australian deployments have arisen as a result of States' specific requests for assistance with their particular law and order problems, as was the case with the Solomon Islands in 2003 and East Timor and Tonga in 2006. In the absence of authorisation by the United Nations Security Council, the consent or request of a State provides the basis under international law for another State to deploy its personnel in the territory of the requesting State.

Where a State requests Australia's assistance through the deployment of personnel, two fundamental legal questions must be addressed. Firstly, does the entity making the request have the legal authority to do so? Secondly, what international instruments are required to document the requesting State's authorisation for the deployment of Australian personnel in its territory?

In relation to the first question, close consideration is given to the requesting State's legal framework to ensure that the requesting authority has the power to request and consent to a deployment by another State. Such authority will usually stem from the State's Constitution.

In relation to the second question, the type of international instrument which documents the State's authorisation for a foreign deployment in its territory may be influenced by factors such as the urgency of the request for assistance and the number of States involved in the operation. In some circumstances, the instruments will be of less than treaty status. For example, in May 2006, East Timor requested that Australia provide forces to assist in the restoration of security, confidence and peace in East Timor following a violent outburst of civil unrest. The authorisation for this deployment was effected through an exchange between Australia and East Timor of Third Party Notes. (The term 'Third Party Note' refers to written communications between States.) Similarly, in November 2006, Tonga authorised, through an exchange of Third Party Notes, the deployment of Australian military and police personnel to assist in bringing under control violence directed against the Government which had resulted in a number of fatalities and extensive property damage.

In the case of the Solomon Islands, the authorisation of the Solomon Islands for the deployment of Pacific Island Forum countries, including Australia, to stabilise the security environment and restore

law and order was documented in a treaty signed in 2003, the *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*.

The Department, in collaboration with DFAT and Defence, provides legal advice in relation to the matters discussed above, as well as drafting assistance for the international instruments documenting the authorisation of the deployments. Where the instrument is a treaty, as was the case for the deployment to the Solomon Islands, the treaty will be subject to the Australian Parliamentary treaty process which involves the treaty being tabled in Parliament with an accompanying National Interest Analysis and scrutiny by the Joint Standing Committee on Treaties. The Department, in conjunction with DFAT, is responsible for clearing National Interest Analyses and routinely appears before the Committee to provide advice concerning the interpretation of treaties and domestic implementation of international obligations.

The rules governing the conduct of deployments

Legal advice provided by the Department, in conjunction with Defence and DFAT, informs many of the policy and operational decisions which direct the conduct of a deployment.

The use of armed force by Australian personnel is one such issue. Rules of Engagement (ROE) are prepared by Defence to prescribe the types of force which may be used by a deployment in different circumstances. The Department and DFAT are consulted in the preparation of the ROE—and subsequent amendments made during the course of an operation—to ensure that the ROE are consistent with the terms of the deployment's authorisation by the receiving State, as well as with Australia's obligations under international humanitarian law. International humanitarian law—sometimes referred to as the law of armed conflict—is the body of international law governing the conduct of hostilities, the methods and means of warfare, and rules designed to protect the victims of international and internal armed conflicts. While many peacekeeping operations may not, as a matter of law, concern armed conflicts, it is Australian policy to act consistently with international humanitarian law principles in all peacekeeping operations.

Another important issue is the procedure for dealing with people detained by Australian personnel. The Department and DFAT provide legal advice to Defence and the AFP in relation to detainee management in light of Australia's obligations under relevant international humanitarian law and international human rights law.

Legal and drafting advice is also provided in relation to arrangements made between Australia and other countries participating in the operation and/or the UN. For example, the initial deployment of Australian forces to East Timor in May 2006 was subsequently followed by the establishment of the United Nations Integrated Mission in Timor-Leste (UNMIT). Australia, which leads the International Stabilisation Force (ISF) in East Timor, has concluded a Technical Arrangement with the UN to set out the support to be provided by the ISF to UNMIT. Australia has also entered into a Memorandum of Understanding with East Timor and the UN which establishes a forum for coordination between the three parties for discussion of security matters.

Liabilities and immunities of Australian deployed personnel

A significant issue for the deployment of Australian personnel to another State will be the extent to which Australian personnel are subject to the jurisdiction of the receiving State.

The privileges and immunities of deployed personnel are typically provided in a separate international arrangement made between the deploying State and receiving State (known as Status of Forces Arrangements), though in some cases such as the Solomon Islands they are incorporated in a broader agreement or arrangement dealing with the deployment as a whole. Consideration is also given to the extent to which immunities made at an international level have effect in the domestic law of the receiving State. The legal framework of some States provide for the automatic incorporation of international obligations into their domestic law.

Other States require that international obligations be implemented into domestic legislation in order to have effect in the domestic legal system. Similarly to Australia, the Solomon Islands falls into this second category. Accordingly, legislation was enacted in the Solomon Islands— the *Facilitation of International Assistance Act 2003*— to implement domestically the provisions of the Treaty which authorised the deployments of Pacific Island Forum countries in the Solomon Islands, including those provisions conferring immunity on the Regional Assistance Mission to Solomon Islands (RAMSI) personnel.

Where deployed personnel are granted privileges and immunities with respect to acts done in the course of the deployment, it is established practice to apply a body of Australian criminal law to those persons. There are two reasons for this. The first is that unless a body of criminal law is applied, then a deployed person might escape the consequences for a criminal act which they have committed altogether. Secondly, the immunity within the receiving State is in some cases conditional upon Australian criminal law coverage of deployed Australian personnel. For example, the immunity of Australian personnel in RAMSI in relation to acts not done in the course of duty is dependent on an assertion of Australian jurisdiction over such acts.

In this respect, the Attorney-General is responsible for the administration of the *Crimes (Overseas) Act 1964*. This Act provides for the application of Australian criminal law to acts committed overseas by Australian citizens and residents in specific circumstances, including where the Australians are working overseas under relevant arrangements between the Australian Government and the United Nations or a foreign country. Other legislation in the form of the *Defence Force Discipline Act 1982* applies Australian criminal law to Australian Defence Force personnel deployed overseas. Through both pieces of legislation, Australia ensures accountability for the actions of its deployees as well as ensuring appropriate protections for its deployees from the threat of spurious or vexatious legal proceedings in another State.

Concluding observations

The provision of legal advice in the context of deployments presents particular pressures and challenges. Chief amongst these is the pressure of time. The request for a deployment will often, by reason of the events occurring in the requesting State, demand immediate action, involving the urgent provision of legal advice and drafting of relevant legal instruments in coordination with Defence, DFAT and other agencies such as AFP, PM&C and AusAID.

During the course of the operation, policy and operational issues will arise which also demand urgent resolution, often on the basis of legal advice. Another challenge is ensuring that legal advice is provided with a sound appreciation of the operational constraints and problems facing deployed personnel. For this reason close coordination is required between policy and operational personnel and legal advisers.

This submission has sought draw attention to the major legal issues that arise in the course of Australia's involvement in deployments, without going into the specific advice given to the Government in each case. It is not an exhaustive description—these operations inevitably give rise to a broad variety of complex legal issues. The provision of sound and timely legal advice plays an important role in ensuring the integrity of Australia's role in peacekeeping operations, as well as minimising the risks associated with the role.

The Department trusts that the information provided is of assistance to the Committee's timely consideration of the changing nature of Australia's involvement in peacekeeping operations.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R. Cornall', with a horizontal line extending to the right and a small flourish at the end.

Robert Cornall AO
Secretary