

Crimes And Misconduct (Overseas Operations) Bill 2003

25 July 2003

Attorney-General

Legal Advice

Crimes And Misconduct (Overseas Operations) Bill 2003 Consistency With The New Zealand Bill Of Rights Act 1990

1. We have considered whether the Crimes and Misconduct (Overseas Operations) Bill 2003 (PCO 5344/4) is consistent with the New Zealand Bill of Rights Act 1990. We understand that this Bill is to be considered by Cabinet on Monday, 28 July 2003. The Cabinet version of the Bill was only provided to the Ministry of Justice on Thursday, 24 July 2003. We understand that the Bill needs to proceed urgently to ensure that New Zealand can assume jurisdiction over the non-armed forces personnel of the New Zealand contingent that will be deployed to the Solomon Islands on or about 24 July 2003.
2. The Bill notes that members of the New Zealand police and other civilian personnel may be deployed overseas as part of in operations involving peacekeeping, the maintenance or restoration of law and order or functioning governmental institutions, or similar activities. However, under current New Zealand law, criminal jurisdiction can only be exercised for offences committed overseas as part of deployments where the offences are committed by New Zealand Defence Force personnel or by police personnel serving in a United Nations force.
3. The Bill seeks to ensure that these persons are subject to the jurisdiction of New Zealand Courts for offences against New Zealand law committed overseas, unless there are good reason why they should not be subject to that jurisdiction. The Bill also provides that members of the police engaged in such operations are subject to the disciplinary processes that apply to members of the police in New Zealand.
4. The Bill notes that there is a need for New Zealand to possess such jurisdiction in order to cover non-armed service personnel participating in the deployment in the Solomon Islands to help restore law and order and functioning government institutions in that country. However, the Bill also covers any deployments for similar purposes that might at some time in the future be necessary.

Section 26(1): Retroactive offences

5. Clause 2 of the Bill provides that the extension of New Zealand's criminal law to the non-armed forces personnel of an overseas operations force shall commence on 24 July 2003. Since this date will be prior to the date on which

the Bill is enacted, this clause raises a *prima facie* issue of inconsistency with section 26(1) of the Bill of Rights Act. This section provides:

No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.

Is this a justified limitation under section 5?

6. Where a provision is found to be *prima facie* inconsistent with a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of section 5 of the Bill of Rights Act. The section 5 inquiry is essentially two-fold: whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and the objective.

A significant and important objective?

7. The explanatory note to the Bill states that purpose of the legislation is to ensure that the non-armed forces personnel of an overseas operations force "are subject to the jurisdiction of the New Zealand Courts for offences against New Zealand law committed overseas". The objective is one of ensuring that such persons do not have impunity with respect to offences committed either in the course of the official operations of the overseas operating force (but subject to the usual protections in this situation) or outside of their official duties. Equally, it is preferable that New Zealand possesses jurisdiction for New Zealand personnel deployed overseas so as to avoid exposure to a judicial or penal system that may be incongruent with the standards applicable in New Zealand. In our view, these are significant and important objectives and, accordingly, clause 2 of the Bill meets the first limb of the inquiry under section 5 of the Bill of Rights Act.

A rational and proportional connection?

8. We also consider that the clause is rationally and proportionally connected to its objective. In reaching this view, we note that the date selected for the commencement of the Bill, namely 24 July 2003, coincides with the date of deployment of the New Zealand contingent to the Solomon Islands. Moreover, the Bill only applies to the non-armed forces personnel of an overseas operations force. It does not extend the jurisdiction of New Zealand law to other New Zealanders who commit offences while travelling or working overseas. We also note that the number of persons affected by the legislation will be small and that these persons will be put on clear notice prior to deployment of the forthcoming change to the law.

Conclusion

9. We have concluded that the Bill does not appear to be inconsistent with the rights and freedoms contained in the Bill of Rights Act.

10. In accordance with your instructions, we attach a copy of this opinion for referral to the Minister of Justice.

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cc
Minister of Justice

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