PAPUA NEW GUINEA

Country Report: Anti-terrorism laws & policing

1. Country summary*

a. Government: Constitutional Monarchy
b. Population: 5 887 000
c. Size: 462 840 square km
d. Region: Pacific

e. General

Papua New Guinea (PNG) is the eastern side of the island of New Guinea and a number of smaller islands. It became an independent nation in 1975 under Prime Minister Michael Somare, before which it was under Australian administration. PNG continues to maintain strong ties with Australia.

The principle law enforcement body is the Royal Papua New Guinea Constabulary (RPNGC), under the control of the Commissioner of police. Under the constitution, the Head of State can order PNG's armed forces (PNGDF) to assist civilian police in the monitoring of internal security, however the defence force cannot exceed those powers which are conferred on the police.[1] The overall authority over both bodies rests in the National Executive Council (NEC) – PNG's Ministerial Cabinet.

A long period of civil unrest began in 1988 with secessionist conflict on PNG's island of Bougainville, claiming as many as 20,000 lives over nine years. The civil war ended in 1997 with the signing of a ceasefire. This resulted in the status of autonomous province for Bougainville. There is also an ongoing Papuan independence struggle on the western side of the mainland of New Guinea in the Indonesian province of Papua (formerly Irian Jaya).

2. Relevant Legislation

Criminal Code Act 1974

National Intelligence Organisation Act 1984

Internal Security Act 1993 – introduced in the context of the Bougainville conflict. This legislation is seldom, if ever, used and has also been partially annulled by the Supreme Court.

There are also a number of pieces of emergency powers legislation in force relating to the Southern Highlands. These have largely been introduced to deal with a general deterioration of law and order in the region. They are not specific anti-terrorism laws.

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3. Law summary

PNG does not have specific anti-terrorism legislation. However, as a result of internal security problems due to increasing inter-tribal conflict, rising crime rates and the violent separatist conflict in Bougainville, the *Internal Security Act* 1993 (ISA) was rushed through PNG parliament in May 1993 and contains a definition of terrorism. One commentator remarked that '[e]ssentially, the Act allows the cabinet to declare any organisation as a terrorist and to identify members, supporters and sympathizers for summary, draconian penalties, including up to K100,000 (US$100,000) fine and/or a 14-year prison sentence'.[2] The ISA was introduced without debate in an attempt to control situations like the secessionist rebellion in Bougainville.[3]

Legislation passed in 2005 pertains more to preventing transnational criminal acts, such as money laundering, than tackling terrorism itself. However, some general examples of how recent legislation and international trends and agreements have impacted policing and the public can be cited. For example, there is better control of the securities industry, airport security has improved (under existing civil aviation provisions), stricter international shipping requirements exist with respect to maritime security[4] and tax and customs authorities may now share information.

Part X of the PNG Constitution allows the Governor General, acting on the advice of the cabinet in situations of national emergency, to make laws that can impose severe restrictions on basic human rights. Part X circumscribes parliament's law-making power so that parliament only has the legislative power to make emergency legislation if it has first made a declaration of emergency in response to a threat to the authority of the state.

In 1994, the Ombudsman Commission of PNG challenged the constitutional validity of the ISA in the PNG Supreme Court, which held that certain sections of the ISA violated constitutional protections against arbitrary arrest and detention.[5] The court found that Sections 22 and 25 of the ISA, providing government examination officers with broad powers of arrest and detention without judicial review, were unconstitutional and therefore invalid.[6] However, the court concluded that invalidating the entire Act on the basis of isolated sections was not justified (despite the fact that these sections were of central importance to the Act), and that it could not rule the entire Act to be constitutionally invalid. The court stated: "The Act is invalid and ineffective only to the extent that the following provisions have been found in breach of the Constitution. These are [Sections] 4(4), 8(1)(b), 21, 22, 25(1)(b) and 25(2). The rest of the parts and sections are valid."

This legislation is seldom, if ever, used.

The regional context

Since 2001, the Pacific Islands have been under pressure to comply with international anti-terrorism conventions. The demands come principally from Australia, which views the Pacific Islands to be at risk of being used by terrorists as transit points to other countries including Australia. Prior to the September 11 2001 attacks, Australia had already been involved in policy and legislative decisions in the Pacific Islands. The Australian Attorney General's Department and the Pacific Islands Forum (PIF) had agreed on the 1992 Honiara Declaration on Law Enforcement Cooperation, which requires the Pacific Islands "to have in place policy and legislation to combat transnational organised crime."[7] The Nasonini Declaration on Regional Security followed the Honiara Declaration in 2002, with an emphasis on counter-terrorism and the need to conform to the United Nations Transnational Organised Crime

Convention and Protocols. Australia already has Memoranda of Understanding with the Fiji Islands and Papua New Guinea although neither country has anti-terrorism legislation in place. The PIF has also adopted a Pacific Plan, called the "Kaliboro Roadmap".[8] The Pacific Plan has four pillars aimed at improving economic growth, sustainable development, good governance, and security for the Pacific through regionalism. The fourth pillar on increased security covers anti-terrorism and counter-terrorism.

Most of the Pacific Islands do not have any specific anti-terrorism legislation. However, new legislation has been drafted to secure borders, particularly around maritime and aviation points. Therefore the impact of anti-terrorism is clearest on the policing of border control, customs, immigration, money laundering, port control and airport security. Additionally, there has been a crackdown on transnational crime, an issue that was already prevalent before the 2001 attacks on the USA. Although security has visibly increased, finding examples of the impact of relevant legislation on policing in the general public is difficult due to the infrequent use of the term terrorism in that context. Imrana Jalal of Pacific Regional Rights Resource Team (RRRT) points out, the Pacific does "not wish to be drawn into America's war on terrorism".[9]

Critics of the Pacific Plan have voiced distrust with regard to alleged "disproportionate concern about national security, particularly Australian national security. Since [Pacific Island Countries] are not yet to be overly concerned with external threats, there is an argument that security in this context ought to be more about human security…rather than focused only on national security".[10] The Pacific Islands have existing internal issues to attend to such as economic, environmental, social and political matters. These issues are regarded as more important in the region than issues of terrorism.

4. Provisions

a. Definition

The definition of terrorism provided in Section 2 of the ISA reads:

> "Terrorism" means the use of violence for political ends or any use of violence for the purpose of putting the public or any section of the public in fear.

This definition is complemented by Section 3. When considering whether this definition was too broad in 1994, the Supreme Court insisted that these two sections be read together. Section 3 reads:

> A person who—
> (a) manufactures, imports, stockpiles, buys, sells, leases, gives or uses arms or equipment for the purposes of; or
> (b) practices, encourages, supports or advocates; or
> (c) is knowingly concerned in the arrangements for securing the entry into the country, or into any part of the country, of a person whom he knows or has reasonable grounds for believing is likely to engage in; or
> (d) knowingly harbours a person whom he knows or has reasonable grounds for believing is or has been engaged in, terrorism, is guilty of an offence.

Penalty: A fine not exceeding K100,000 or imprisonment for a term not exceeding 14 years, or both.

The definition remains vague and thus enables it to cover a range of potentially legitimate activities, such as political protests or peaceful demonstrations.

b. Arrest

Section 25 of the ISA provides the following regarding powers of arrest and detention:

(1) A—
- (a) police officer; or
- (b) in the case of an offence against Part VII [see section "use of force"], an examination officer, may arrest, without warrant, a person whom he reasonably suspects of having committed an offence against this Act.

(2) A person arrested under this Act shall be brought before a court within 120 hours of the time of his arrest, save that in exceptional circumstances, the period of 120 hours may be extended by a further period of 120 hours.

(3) The powers of arrest under this Act are in addition to the powers of arrest and detention under any other law.

Section 25 was challenged at the Supreme Court under Sections 42 and 244 of the Constitution. It was held that Section 25(1)(a) was no more than ordinary law. However, the court objected to Section 25(1)(b), which gives police powers to individuals who are not members of state services. In relation to Section 25(2), the court did not see the necessity of providing such a long period of detention before bringing the detained individual to court, and found the section unconstitutional.

c. Use of force

Section 8(1) of the ISA addresses exclusion orders:

Where—
- (a) a person has been convicted of an offence against this Act; or
- (b) the National Executive Council is of the opinion that a person is likely to commit an offence against this Act, the National Executive Council may make an exclusion order against that person—
- (c) excluding him from any specified part of the country; or
- (d) where he is a non-citizen—excluding him from the country or from any specified part of the country.

A certain number of elements must be listed in the order (for example the region for which the order is valid) and if possible the order should be delivered personally.

It is possible to appeal to the Minister, within 48 hours and by written notice, who will forward the appeal to the National Executive Council.

The Supreme Court, who was asked to consider the matter, made it clear that the exclusion order was of such magnitude that it had to follow a finding of guilt by a court. If 8(1)(a) is constitutional because the person has been convicted of an

offence, Section 8(1)(b) is unconstitutional because it relates only to a person that is likely to commit such an act.

Where the appeal is concerned, the court noted that it was not an appeal against a judicial act (conviction) but against an administrative act. It stated that, "with the exclusion of s 8(1)(b), the exclusion orders may be of less concern, as they will only now apply to persons who have been convicted by a court of an offence against the Act. It is legitimate to have consequential orders of this nature, analogous to restriction orders as part of penalties under the Criminal Code."

The legality of the whole of Part IV relating to exclusion orders was also challenged under the Constitution on the basis that it denied the full protection of the law guaranteed to persons charged with offences and that it conferred judicial powers on the National Executive Council and therefore breached the separation of powers requirement. The court found the Part to be constitutional because its scope was clearly limited by the infractions listed in the Act.

Part V and VI of the ISA deals with prohibited areas and restricted areas.

Prohibited areas are declared by the head of state, acting on advice, if it is likely that there may be terrorism in that area, and shall be broadly publicised. They enter into force 24 hours after publication. The period may not exceed 3 months, but can be renewed. As soon as possible, parliament is to confirm the prohibition. Section 17 provides exceptions and allows for the entry of the head of state, on-duty police, on-duty uniformed members of the armed forces, emergency medical practitioners or people who have been given a special permit under Section 18. People normally residing in the area may be exempted. Entering a prohibited area is punishable by up to 3 years imprisonment and/or a K1000 fine. The Supreme Court considered that the Act was not infringing Section 52 of the Constitution because: exceptions were possible; the areas were limited in duration; there was control by parliament; and the Act was not attempting to oust the jurisdiction of the court.

Restricted areas are declared by the head of state acting on advice, if it is likely that there may be terrorist activity in the area but enforcing a prohibited area is not justified. They shall be broadly publicised. They enter into force 24 hours after publication, and the period may not exceed 3 months, but can be renewed. As soon as possible, the parliament must confirm the restriction. Infraction of this section is punishable by imprisonment for five years and/or a K10,000 fine. With regard to Section 52, the court considered that Section 21 (establishing the offence of not respecting the conditions of the order) was contrary to the Constitution for it could lead to unjust exclusion from homes and land since there were no exceptions for people who may have valid reasons to enter the area. The unconstitutionality of Section 21 makes Section 20 meaningless, and as a result the whole section on restricted areas is of no effect.

Examination officers are addressed in Part VII of the ISA. The officers are appointed by the head of state, acting on advice, and their duties and obligations are listed below:

(2) An examination officer may—
(a) within a prohibited area or a restricted area or in relation to a person who is about to travel to or who has travelled from a prohibited area or restricted area, outside a prohibited area or a restricted area—
(i) examine a person in order to ascertain whether that person—

(A) is or was authorized to be present in, enter or leave that prohibited area or restricted area; or

(B) is subject to an exclusion order in relation to the country or to that part of the country in which the prohibited area or restricted area is situated; or

(C) is concerned with or involved with a proscribed organization, or involved with the commission, preparation or instigation of terrorism; and

(ii) arrest and detain a person pending examination under Subparagraph (i); and

(iii) arrest and detain a person pending a decision on an exclusion order; and

(b) within a prohibited area or a restricted area, or in relation to a conveyance which is about to travel to or has travelled from a prohibited area or restricted area, outside a prohibited area or a restricted area—

(i) board and search a conveyance or premises; and

(ii) detain a conveyance or any article suspected of being—

(A) used or likely to be used for terrorism; or

(B) used or likely to be used by or in connection with a proscribed organization; or

(C) necessary in connection with a decision to make an exclusion order against a person; or

(D) likely to be required as evidence in any court proceeding.

(3) Where an examination officer detains a conveyance or article under Subsection (2)(b)(ii), he shall—

(a) at the time of detaining the conveyance or article issue a receipt to the person, if any, in charge of it; and

(b) as soon as practicable thereafter, issue a receipt to the owner, if known, of it.

This section was found to be unlawful since the power to arrest, examine, and detain did not contain the necessary checks and balances required by Section 42 of the Constitution.

Forfeiture Under Part VII of the ISA, if a person is convicted of an offence under Section 3 (prevention of terrorism) or Section 6 (membership of a terrorist organisation), the court may order, in addition to the penalty, the forfeiture of any money or property that it considers has been or was intended to be used for the purpose of terrorism or for the benefit or on behalf of the prescribed organisation. Forfeited goods become the property of the state.

d. Immunity

There are no specific immunity provisions in the ISA.

e. General

The first section in Part 1 of the ISA indicates that public safety may require there to be restrictions on basic human rights:

This Act, to the extent that it regulates or restricts a right or freedom referred to in Subdivision III.3.C of the Constitution, namely—

(a) freedom from arbitrary search and entry conferred by Section 44 of the *Constitution*; and
(b) freedom of conscience, thought and religion conferred by Section 45 of the *Constitution*; and
(c) freedom of expression conferred by Section 46 of the *Constitution*; and
(d) freedom of assembly and association conferred by Section 47 of the *Constitution*; and
(e) freedom of employment conferred by Section 48 of the *Constitution*; and
(f) right to privacy conferred by Section 49 of the *Constitution*; and
(g) right to freedom of information conferred by Section 51 of the *Constitution*; and
(h) right to freedom of movement conferred by Section 52 of the *Constitution*,

is a law that is made for the purpose of giving effect to the public interest in public safety and public order and public welfare.

Proscribed Organisations – Sections 4, 5 and 6 of the ISA relate to proscribed organisations. Section 4 affirms that the head of state, acting on advice, can declare an organisation to be proscribed if the organisation 'is engaged in, or is likely or about to be engaged [in terrorism]; or (b) is promoting or encouraging, or is likely to promote or encourage terrorism'.

This is a wide definition that has the potential to undermine the rule of law, particularly because it is a political decision and not a judicial one. Once made, the decision must be widely publicised by different means, and the declaration will take effect seven days after this publication. The parliament can revoke this decision. When asked whether this section and the broad definition of terrorism was too vast, the Supreme Court held the provisions to be constitutional and considered that they did not unduly limit the freedom of expression and assembly. The court considered that risk of abuse was removed due to the parliamentary review of the order and due to the available appeal process. The organisation has a right to appeal to the Minister, within 28 days of the publication, who will forward it to the National Executive Council and the head of state who, acting on advice, will make the final decision. The independence of the appeals process is thus seriously jeopardized since it is ultimately the same authority that makes both decisions. In 1993, the Supreme Court found that this was constitutional:

> "It is suggested that this is a function that should not be put into the ambit of the body that made the original declaration. However, firstly, there is a distinction between the action of declaring a proscribed organisation and then considering the appeal, because the appeal is supported with reasons which, therefore, means the National Executive Council is taking a wider view of the organisation so proscribed. And then the National Court and Supreme Court would still have the wider power of review under Constitution s 155."

Section 6 states that any person who belongs to or assists a proscribed organisation is guilty of an offence punishable by 7 years or K10,000. This offence is overly broad, in particular regarding the criteria and the procedure to proscribe an organisation. Yet, if anyone is charged under this section, it is a defense for him to prove that he was not aware that it was a terrorist organization, or that he became a member by force or under influence.

Subsection 6(4) makes the definitive statement that: "A certificate signed by the Commissioner of Police certifying that a person is, in the opinion of the

Commissioner of Police, a member of a proscribed organization, shall be *prima facie* evidence of that fact." The Supreme Court found this unconstitutional:

> "However, we must find that s 6(4), in providing that the Commissioner for Police having certified that a person is a member of a proscribed organisation shall be *prima facie* evidence of that fact is an affront to the presumption of innocence, as provided for in Constitution s 37(4), and is, therefore, also contrary to s 37(11)."

Section 7 also punishes displays of public support, such as carrying items or clothes that arouse reasonable suspicion that a person supports a prohibited organisation. This is punishable by up to three years imprisonment.

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[1] United Nations Economic and Social Council (1996) 'Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, With Particular Reference to Colonial and Other Dependent Countries and Territories' in *Commission on Human Rights 52nd Session Item 10 of the Provisional Agenda*, Doc No E/CN4/1996/4/Add2, para [17]: http://www1.umn.edu/humanrts/commission/country52/4-add2.htm as on 3 March 2007.
[2] Saffu, Y (1994) 'Papua New Guinea in 1993: Toward a More Controlled Society?' 34(2) *Asian Survey*, p. 133.
[3] Ibid.
[4] See AusAid (2004) *Strengthening Port Security in the Pacific*, 10 May: http://www.ausaid.gov.au/media/release.cfm?BC=Media&Id=8158_9412_7852_108_7057 as on 30 January 2007.
[5] *Re Internal Security Act: Reference by the Ombudsman Commission* (4 May 1994) [1994] PNGLR 341: http://www.worldlii.org/pg/cases/PNGLR/1994/341.html as on 25 January 2007.
[6] The court stated: 'Sections 22 and 25 are meant to enforce the aim of the Act, that is "to combat terrorism and terrorist activities". Initially, there does not seem to be anything offensive in the power to appoint examination officers and their powers to examine, arrest, and detain. However the power to arrest, examine, or detain does not contain the necessary checks and balances required by s 42 of the Constitution. The manner of the examination is left to an examiner and not, like in the ordinary law, to a policeman who is answerable to the courts. We consider, therefore, s 22 is inconsistent with s 42 of the Constitution.'
[7] Australian Government Attorney-General's Department (2006) *Australia's Aid Program in the Pacific*: *Submission by the Attorney-General's Department*, 30 June: http://www.aph.gov.au/house/committee/jfadt/pacificaid/subs/sub15.pdf as on 3 March 2007.
[8] See Australian Government: Department of Foreign Affairs and Trade (2005) *Thirty-Sixth Pacific Islands Forum*, 25-27 October, p. 2: http://www.dfat.gov.au/geo/spacific/regional_orgs/pif36_communique.html as on 20 January 2007.
[9] Jalal, I (2006) "Through Pacific Eyes: Australia and the Pacific Islands at the *National President's Forum*, 14 July, p. 3: http://www.aiia.asn.au/national/7_Jalal_Through_Pacific_Eyes.html as on 20 January 2007.
[10] Ibid