

**Mr. Laurie Chan,  
Chairman, Foreign Relations Committee,  
National Parliament of Solomon Islands,  
P. O. Box 19,  
Honiara.**

Dear Mr. Chan,

## **INQUIRY INTO THE FACILITATION OF INTERNATIONAL ASSISTANCE NOTICE**

I refer to your letter of 4<sup>th</sup> August, 2008/NP/05/2/181.

In my view, the Facilitation of International Assistance Act, 2003 is constitutionally defective in sections 3, 20, 21 and 22. I have been a potential challenger to the validity of the Act but I have decided against mounting a challenge for the sake of public interest. I think we all needed RAMSI in 2003. My personal grievance therefore has to give way to the public benefit that RAMSI has brought to us in Solomon Islands. I am a gun owner whose registered gun was surrendered to RAMSI under the authority of the Facilitation of International Assistance Act, 2003. I understand that the Facilitation of International Assistance Act, 2003 had been drafted in Canberra and rushed through our Parliament without being adequately scrutinized by the then Attorney-General and the Legal Draftsman. There might have been some discussion but our men did not take ownership of the Bill in its draft form.

The opportunity has however now come for the alleged defects to be rectified and thus my humble submission to your Committee.

1. Is the Facilitation of International Assistance Act, 2003 constitutional in that it has a valid constitutional basis?

This is a very interesting question and an important one indeed. What are the functions of the Governor-General under the Constitution? Under section 30 of the Constitution, the Governor-General is the repository of the executive authority of the people. The Governor-General does however exercise his functions either directly or indirectly through officers below him. Such functions by the Governor-General can be delegated by legislation to other persons or authorities.

Section 31 says that the functions of the Governor-General under the Constitution or any other law must be exercised on the advice of Cabinet or the advice of a Minister authorized by Cabinet except where the Governor-General is required to act on the advice of or in consultation with any other person or authority, apart from the authority of Cabinet or in his or her deliberate judgment.

Where the Governor-General under the Constitution is required to exercise any function after consultation with any person or authority, he or she is not obliged to act on the advice of that person or authority. Any question as to whether or not the Governor-General has acted on the advice given is not a matter for any court to decide

The Prime Minister under section 32 is obliged to inform the Governor-General concerning the general conduct of the government and must supply such information the Governor-General requests on any matter relating to the government.

The Governor-General appoints Ministers under section 33 other than the Prime Minister. The Governor-General assigns responsibility portfolios to Ministers under section 37 and appoints acting Prime Ministers under section 38 on the advice of the Prime Minister. The Governor-General may appoint in his or her deliberate judgment an acting Prime Minister where for some reason, it is impractical to obtain the advice of the Prime Minister for that purpose.

The Governor-General acts on the advice of the Prime Minister in the following cases-

1. Section 33(2)(3)- the number of Ministers and the appointment of other Ministers;
2. Section 34(1)- removal of Prime Minister following a successful motion of no confidence;
3. Section 34(5)- if the Prime Minister dies;
4. Section 34(6)- revoking of appointment of any Minister;
5. Section 37-assignment of responsibilities to Ministers;
6. Section 38(1)- appointment of acting Prime Minister;
7. Section 39-taking of oaths;
8. Section 43- appointment of Commissioner of Police;
9. Section 44- constituting offices and termination ;
10. Section 45-Prerogative of Mercy;
11. Section 50-appointment of Speaker;
12. Section 115(7)-appointment of members of the PSC.
13. Section 127- appointment to particular offices.

The Governor-General acts on the advice of others in the following cases-

1. Section 45(5)- granting of pardons;
2. Section 53- appointment of members of Constituency Boundaries Commission;
3. Section 57-appointment of members of the Electoral Commission;
4. Section 58-report ;
5. Section 66-appointment and removal of Leaders of Independent and Opposition Groups in Parliament;
6. Section 78,79, 80,86 and 87- appointment and removal of judges;
7. Section 91-appointment of DPP;
8. Section 92- appointment of the Public Solicitor;
9. Section 96-appointment of the Ombudsman;
10. Section 108-appointment of the Auditor-General;
11. Section 126-removal from office of members of Commissions.

Governor-General acts in his own deliberate judgment in the following cases-

1. Section 31(1)-can act in his own deliberate judgment;
2. Section 38 (2)- can act in his own deliberate judgment;
3. Section 45(2) (a)- ca act in his own deliberate judgment;
4. Section 45 (4 )(b)- can act in his own deliberate judgment;
5. Section 87(8)- can act in his own deliberate judgment;
6. Section 115 (2) and (4)(c)-can act in his own deliberate judgment;
7. Section 129 (7)(c)-can act in his own deliberate judgment.

Other cases where the Governor-General also acts according to the wish of the Constitution-

1. Section 59- assents to Bills;
2. Section 72- appoints of commencement date for Parliament;
3. Section 73- appointment date for election;
4. Section 74- date of general election;
5. Section 129- appointment beyond retirement age;
6. Section 132- power to grant and withhold pension.

The above powers are set out in the provisions of the Constitution. However, under section 31 (1) of the Constitution, the Governor-General may exercise further powers provided such powers are conferred upon him by law. An example is clearly the Facilitation of International Assistance Act, 2003. However, the condition is that whether the powers exercisable by the Governor-General under the Constitution or under any other law, that power must be so exercisable in accordance with the advice of the Cabinet or any other Minister authorized by the Cabinet. In other words, the Governor-General must not act alone either under the Constitution or under any other law but with the authority of the Cabinet or a Minister of the Crown. This is the substance of this argument under section 31(1) of the Constitution.

Section 3(1) of the Facilitation of International Assistance Act, 2003 does not seem to comply with the condition stipulated under section 31(1) of the Constitution. That is, the Governor-General cannot act alone but with the advice of the Cabinet or any Minister authorized to act on the general authority of the Cabinet. Section 3(1) of the Facilitation International Assistance Act, 2003 has omitted to state that the Governor-General acting upon the advice of the Cabinet or upon the advice of the relevant Minister may publish a notice that states (a), (b) and (c) in section 3 (1)above. This omission in section 3 of the Facilitation of International Assistance Act, 2003 would make the section inconsistent with section 31(1) of the Constitution and therefore would appear to be unconstitutional. If indeed this is the case, then obviously everything that has been done or is being done under the authority of the Facilitation of International Assistance Act, 2003 is unconstitutional and therefore null and void under section 2 of the Constitution.

If the notice is said to be unconstitutional, then subsection 2 of section 3 above would also be unconstitutional on the basis that the notice that facilitates the agreement is unconstitutional.

Sections 20, 21 and 22 of the Facilitation of International Assistance Act, 2003 are also in the same category as section 3 above. They are defective for the same reason.

This is serious to say the least. Section 3 of the Facilitation of International Assistance Act, 2003 is the king-pin to the validity of the whole operation of RAMSI in Solomon Islands. Once this king-pin is removed, the whole RAMSI operation would collapse with its consequences.

## 2. The way forward.

The way forward is to enact legislation to amend section 3 and then validate in retrospect the status and activities of RAMSI since its arrival in 2003. In this way, all that had been done in the past would be regarded as being valid in law.

There is however a problem. Because of the unconstitutionality of section 3 of the Facilitation of International Assistance, the right to challenge that in the High Court would have accrued long ago. This is a vested right. Great care must be given in addressing this vested right when drafting the validating legislation.

For example, I do have a vested right to sue for the confiscation of my licensed gun by RAMSI. Many others are in this category. I have not exercised my right to sue for damages because I do not wish to rock the boat because we need RAMSI and the benefit it has brought to us. However, this right continues to exist. One way forward is for compensation to be paid to those who have lost their guns so that these vested rights cease to exist and are not exercised in the future. At the time of payment of compensation, each gun owner should sign an agreement with the Attorney-General relinquishing his right to sue for compensation in the future.

There may be others who have right to sue for compensation such as some whose vehicles had been damaged by RAMSI drivers in road accidents who had been negligent in driving RAMSI vehicles. These rights have to be recognized by the government through compensation for damages in the same manner as in the case of gun owners.

Whilst members of RAMSI may be immune, that does not prevent the government being sued for damages on the basis of vicarious liability in that RAMSI had come at the invitation of the Government of Solomon Islands. In other words, any negligent act of the members of RAMSI on duty which resulted in damages such damages would have to be borne by the Government of Solomon Islands. This is the current sticking point with RAMSI. In this way, the citizens of Solomon Islands are not disadvantaged when they do have a valid cause of action against the members of RAMSI for negligent conduct.

One such case occurred on 28<sup>th</sup> September, 2003 where an Army truck collided with vehicle No. A7442, causing severe damage to the local vehicle. The driver of the Army vehicle claimed immunity against any criminal prosecution and any civil suit. The owner of the local vehicle has claimed \$125,000.00 but RAMSI has denied liability. The owner of the local owner may have a claim against Solomon Islands Government on the ground of vicarious liability. This has to be settled before any validating legislation is passed by Parliament otherwise the cause of action continues to subsist.

## 3. Suggestion.

The present Facilitation of International Assistance Act, 2003 may have to be repealed and then re-enacted correctly with a validating provision or provisions. There may have

to be a new provision to say that where any RAMSI personnel should be guilty of negligence in the course of duty and liability is admitted, the Solomon Islands Government will meet the cost of any damages as may be assessed. This is premised upon the ground that RAMSI has been invited in by the Solomon Islands Government for the benefit of the whole country and its people. Such a provision is necessary to appease those who may suffer damages through the negligent conduct of any RAMSI personnel operating in Solomon Islands and thus avert the criticism that there are two systems of laws operating in Solomon Islands-one for the RAMSI personnel and one for Solomon Islanders.

The present Agreement in the Notice may also have to be amended to reflect any changes of circumstances that have taken place since July, 2003.

This is not a submission by the Law Reform Commission. My address is of course of the Law Reform Commission.

Yours Sincerely,

Frank Ofagioro Kabui, C.S.I. C.M.G. O.B.E,

Chairman, Law Reform Commission,  
Honiara.

Dated 15/8/2008.

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