

DECLASSIFIED

SECRET AUSTEO

Page 1 of 3

A 2680

56714



Australian Defence Headquarters
Chief of the Defence Force
MINUTE

04 OCT 2002

CDF 1063/02
ADHQ 2001/31884

Minister for Defence

For Action: By 6 Oct 02 or earlier if possible

OPERATION SLIPPER – TREATMENT OF CAPTURED TALIBAN AND AL
QA'EDA PERSONNEL

RECOMMENDATION

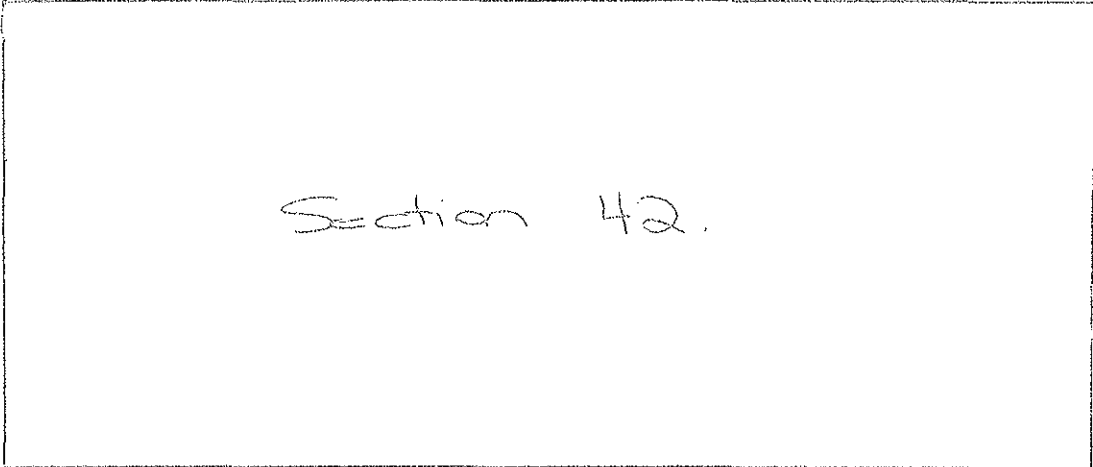
- That you approve:
 - the draft SCNS/NSC submission (Flag A) dealing with detainee issues in Afghanistan attached to this brief.
 - the addition of this matter to the SCNS agenda for the meeting of 10 Oct 02 as a late item.

OVERVIEW

- You previously directed that a brief on treatment of personnel captured during ADF operations in Afghanistan be prepared for consideration at SCNS/NSC. The last brief to you on this subject, dated 30 Aug 02 (Flag B), indicated that this briefing package would be prepared once further advice from the Attorney General's Department (AGD) was obtained on certain issues. That advice, dated 27 Sep 02, has now been obtained and is attached (Flag C). The AGD took longer to settle their advice than anticipated.
- The most important aspect of the AGD advice is that the legal basis for the detention of civilians has now been formally addressed. Consequently, it is now possible to advise

Section 42.

DECLASSIFIED
SECRET AUSTEO



Section 42.

- The most relevant parts of the legal advice from the AGD and AGS have been incorporated into the attached draft SCNS/NSC submission. The AGD's latest advice of 27 Sep 02, has not been attached to the draft SCNS/NSC brief because of its length and complexity. However, AGD have been closely involved in the preparation of those parts of SCNS/NSC submission that draw upon their advice. AGD's earlier written advice is attached because it addresses the central issue of PW status. DFAT have not yet been consulted during the drafting of this specific submission. However, DFAT lawyers have been involved in previous discussions on this issue.
- Agenda items for the SCNS meeting on 10 Oct 02 were due to be settled by 20 Sep 02, and the cleared-by-the-Minister version of the draft brief provided to DMPLS by 3 Oct 02. You may consider this matter to be of sufficient importance to add as a late item.

Sensitivity. Yes. Australia's position regarding the treatment of captives remains of considerable interest to its coalition partners (particularly the US), the United Nations, International Committee of the Red Cross, NGOs concerned with human rights, political and legal commentators and to the media.

Consultation. AGD involved in the provision of advice on which CABSUB is based, and in settling draft text of CABSUB.

AUTHORISED:

APPROVED / NOT APPROVED

~~APPROVED / NOT APPROVED~~

*Ray to P-6 h
R 10/10*

Too late for 10/10.

P. J. COSGROVE
GEN
CDE

Robert Hill

3
Oct 02

CONTACT: WGCDR S41 Strategic Command. S41
Copies: Secretary, VCDF, DEPSEC SP, CN, CAF, CA, HSO, DEPSEC I-S, FASSIP, HPGA,
COMAST, HPACC, DGTDLs.

CABINET - IN - CONFIDENCE
~~SECRET AUSTEO~~
DRAFT

Copy No.

CABINET SUBMISSION

JH0x/0xxx

TREATMENT AND STATUS OF PERSONNEL CAPTURED BY THE AUSTRALIAN DEFENCE FORCE DURING MILITARY OPERATIONS IN AFGHANISTAN

MINISTER: DEFENCE

MINISTER'S EXECUTIVE SUMMARY

PURPOSE: To seek Cabinet approval to continue with the current Australian Defence Force (ADF) procedures regarding the handling of captives taken during combined Australian/US operations in Afghanistan, and to advise Cabinet that in the event captives are taken during solely Australian operations, the subsequent handling of those captives will require Government-level decisions.

KEY ISSUES:

Section 33 (1)(a) (ii)
§

Section 42.

CONSULTATION:

FINANCIAL IMPLICATIONS:

In the event that the ADF activates its contingency plan Defence will seek supplementation of estimated net additional costs of \$860,000.

	Fiscal Balance (\$m)	Underlying cash balance (\$m)	Operating balance/Net assets (\$m)
2002/03			
2003/04			
2004/05			
2005/06			

This document is the property of the Australian Government and is not to be copied or reproduced

CABINET - IN - CONFIDENCE
~~SECRET AUSTEO~~

RECOMMENDATIONS

1. I recommend that the Cabinet approve a continuation of the current ADF procedure during combined operations with the US forces in Afghanistan of the US taking control over all captured personnel
2. I recommend that Cabinet note that in the event that the ADF retains custody of captives taken during solely Australian operations in Afghanistan (in accordance with the procedures set out in paragraphs 8-12 of the submission), then depending upon the circumstances of each individual and the then existing status of the conflict, the following issues may arise:
 - (a) the possible convening of a tribunal under Geneva Convention III for the purpose of determining whether the captive is a prisoner of war.
 - (b) whether it is possible to transfer the captive to the custody of a third party, including geographically to another country; and
 - (c) the release or repatriation of the captive, including as a result of a cessation of hostilities.
3. I recommend that the Cabinet note that in the event that the ADF activates its contingency plan Section 33 (1) a (ii)

the approximate additional cost is up to \$860,000.

CABINET - IN - CONFIDENCE
~~SECRET~~
DRAFT
BACKGROUND

Introduction

1. Australia's international legal obligations relevant to any captives taken by the ADF in Afghanistan involve a combination of the laws of armed conflict and human rights law. These obligations are found principally in:
 - a. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva Convention III);
 - b. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (Geneva Convention IV);
 - c. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Armed Conflicts (Additional Protocol I);
 - d. International Covenant on Civil and Political Rights (ICCPR); and
 - e. Second Optional Protocol to the ICCPR (OPII).
2. During the opening months of military operations in Afghanistan, in the absence of definitive US government statements to the contrary, Australia assumed that the US would take a similar view to Australia with respect to its legal obligations towards any captives under the laws of armed conflict. Australia also assumed that the US forces operating in Afghanistan would be in a position to handle any captives taken by the ADF. Consequently, the ADF did not deploy resources for the processing and retention of captives.

3.

Section 33 1 (b)

§

Section 42.

342?

CABINET IN CONFIDENCE
~~DECLASSIFIED~~
SECRET AUSTEO
DRAFT

Section 33 1(b)
&
Section 42

Consultation with the United States

4.

Section 33 (1)(a) iii & (b)

Section 33 (1)(a)iii
& (b)

Legal Advice from the Attorney General's Department

6.

Section 42.

CABINET ~~IN CONFIDENCE~~
~~DECLASSIFIED~~
SECRET AUSTEO
DRAFT

Section
42.

This document is the property of the Australian Government and is not to be copied or reproduced

CABINET ~~IN CONFIDENCE~~
~~DECLASSIFIED~~
SECRET AUSTEO

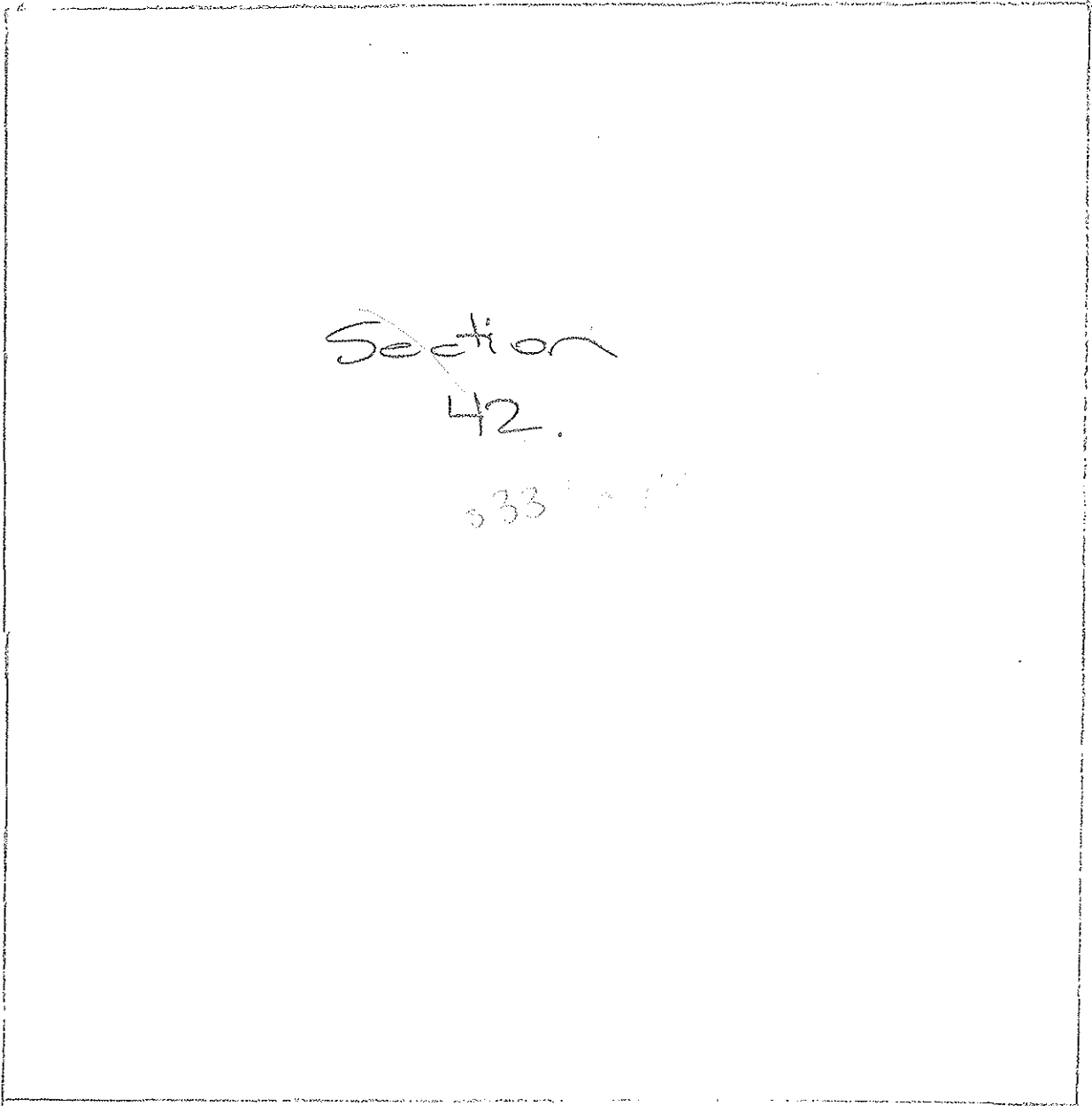
Section 42.

Current ADF Policy

7. In June 2002, following consideration of the AGD advice, CDF issued the current ADF policy regarding the handling of captives taken in Afghanistan with a view to ensuring that the ADF's conduct was consistent with Australia's legal obligations. This policy is as follows:

- a. The US will assume responsibility for captives taken during combined Australia/
US operations
- b. The ADF will retain custody of those captives taken during separate ADF
operations, thereby allowing the Government to make decisions as to the future
handling of those captives.

Implementation of ADF Policy



11. CDF has also approved a plan for the conduct of tribunals under Article 5 of Geneva Convention III if required. These tribunals would be used to determine the status of captured

personnel where there is doubt as to whether the captive is a prisoner of war or not. The staff of these tribunals would include ADF Legal Officers. CDF will consult with Government prior to convening an Article 5 Tribunal. The US is not conducting Article 5 Tribunals as they have no doubts as to the lack of PW status of any persons captured in Afghanistan.

12. The ADF will not transfer any captives into the custody of a third party, nor out of Afghanistan, without Government direction and approval. The ADF can also be expected to seek Government approval for the release and/or repatriation of a captive unless in the circumstances there is clearly no controversy involved in the release (for instance if there has been a mistake as to identity).

13. The plans developed by CDF are not ends in themselves. However, the development of this detainee handling capability will provide time for the Government to consider how it wants to proceed should captives be taken for whom Australia attracts legal responsibility. This planning should also reduce the risk that if any captives are taken, that their treatment would inadvertently fall below international legal requirements.

Finance

14. The net additional costs of ADF retaining custody of captives taken during solely Australian operations in Afghanistan are estimated at \$750,000. In the event of deployment of a 10 person Competent Tribunal for a two week period to assess the POW status of captives, Defence's net additional costs are estimated as \$110,000.

15. The additional funding provided to Defence for War Against Terrorism in the context of the 2002-03 Budget did not include funding for the possible handling of captives by the ADF as covered in this submission. Given the existing pressures in Defence budget, it will not be possible for Defence to accommodate these costs within the existing funding baseline. Accordingly, in the event that the ADF activates its contingency plan as outlined in this submission, Defence will include the additional \$860,000 requirement in its Operation SLIPPER bid that will be considered by Cabinet for supplementation in the context of the 2002-03 Additional Estimates or the 2003-04 budget.

Legal Basis for Detention

Section 42.

CABINET - IN CONFIDENCE
~~SECRET~~ AUSTEO
DRAFT

Section 42.

This document is the property of the Australian Government and is not to be copied or reproduced

CABINET - IN CONFIDENCE
~~SECRET~~ AUSTEO

Section 42.

Criminal Responsibility for Unlawful Transfer/Confinement

Section 42.

Future Operations

22. These types of issues will arise in any operation where the range of potential captives includes combatants who are not clearly connected with the regular armed forces, or are civilians who are either political leaders or suspected terrorists. Relevant Australian Government departments and agencies must continue to discuss these issues, with a view to ensuring that Australia adheres to its international obligations.

COORDINATION COMMENTS

Prime Minister and Cabinet

Attorney General's

Foreign Affairs and Trade