

UNITED STATES OF AMERICA

v.

DAVID M. HICKS

**DEFENSE MOTION TO  
DISMISS CHARGE 3 FOR  
FAILURE TO STATE AN  
OFFENSE**

**4 October 2004**

The defense in the case of the *United States v. David M. Hicks* moves for dismissal of Charge 3 against Mr. Hicks, and states in support of this motion:

1. **Synopsis:** Charge 3 alleges that Mr. Hicks aided the enemy. However, the charge fails to state an offense by Mr. Hicks because Mr. Hicks owed no duty of allegiance to the United States or any other nation that would make him criminally liable for his actions while in Afghanistan.

2. **Facts:**
- A. Mr. Hicks is an Australian citizen.
  - B. Mr. Hicks has never been a member of the United States Armed Forces, and the site of the alleged misconduct by Mr. Hicks is not within the territory under the control of the United States or United States Armed Forces.
  - C. Mr. Hicks' conduct in Afghanistan did not violate Australian law.

3. **Discussion:**

**A. Allegiance to the United States**

The critical element of the offense of aiding the enemy is breach of the duty of allegiance to the United States.<sup>1</sup> Absent any duty of allegiance to the United States, it is not a criminal act for a person to perform acts that would constitute aiding the enemy if committed by a United States citizen (*e.g.*, providing advantage to an enemy of the United States). Allegiance to the United States is established either by U.S. citizenship at the time of the alleged conduct,<sup>2</sup> by membership in the United States Armed Forces,<sup>3</sup> or by presence within the territorial limits of

<sup>1</sup> The American offense of "aiding the enemy" has its origins in Articles 27 and 28 of the Articles of War of 1775, predating the American crime of treason. These offenses of "aiding the enemy" and "treason" were enacted by the first Congress of the United States on 30 April 1790. This Act, 1 Stat. 112, provided that "if any person or person, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, ... such person or persons shall be adjudged guilty of treason ..." See *Chandler v. U.S.*, 171 F.2d 921, 931 (1<sup>st</sup> Cir. 1948). The requirement that there be a breach of allegiance to the United States for the offense of "aiding the enemy" was carried over into the Articles of War and, ultimately the Uniform Code of Military Justice. See *United States v. Olsen*, 7 U.S.C.M.A. (1957).

<sup>2</sup> *Gillars v. U.S.*, 87 U.S. App. DC. 16, 45, (1950).

<sup>3</sup> As of March 2003, "Immigrants make up nearly 5 percent of all enlisted personnel on active duty in the U.S. Armed Forces." See The American Immigration Law Foundation, "U.S. Soldiers from Around the World:

the United States<sup>4</sup> (a “citizen in enemy country owes temporary allegiance to the alien government, must obey its laws and may not plot or act against it”).<sup>5</sup>

Charge 3 fails to allege these essential elements of the offense of “aiding the enemy,” and therefore fails to state an offense. Nor could the offense be properly alleged against Mr. Hicks, since neither precedent nor authority exist for alleging “aiding the enemy” with respect to any allegiance owed an ally or “coalition partner.”

### **B. Mr. Hicks Did Not Owe Any Allegiance to the United States**

At the time of the alleged conduct, Mr. Hicks did not owe any duty of allegiance to the United States. He is an Australian citizen, and not a United States citizen. Nor is he a member of the U.S. Armed Forces. He had never set foot within the territorial jurisdiction of the United States. None of the alleged conduct occurred in the United States or its territories; all conduct allegedly occurred in foreign countries.<sup>6</sup> There is absolutely no connection between Mr. Hicks and the United States that would give rise to a duty of allegiance to the United States. Consequently, since Mr. Hicks had no duty of allegiance to the U.S., it cannot constitute “aiding and abetting” for him to act in such a way that might provide aid to an enemy of the United States.

### **C. Mr. Hicks’ Conduct Did Not Violate Australian Law**

At the time of the alleged conduct, Mr. Hicks was residing in Afghanistan. The only governments to which he owed a duty of allegiance to were the government of Afghanistan (*i.e.*, the Taliban) because he was within the territory of Afghanistan, and the government of Australia, by virtue of his Australian citizenship. The government of Australia has stated that it does not consider any of Mr. Hicks’s activities in Afghanistan to have violated Australian law, including the Australian domestic offense of “aiding the enemy.”<sup>7</sup> At the Australian Senate Estimate

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Immigrants Fight for an Adopted Homeland.” Available at  
<[http://www.aifl.org/ipc/policy\\_reports\\_2003\\_pr001\\_soldier.asp](http://www.aifl.org/ipc/policy_reports_2003_pr001_soldier.asp)>.

<sup>4</sup> *Ex parte Quirin*, 317 U.S. 1 (1942). The requirement that the accused owe a duty of allegiance to the United States is so central to the offense of “aiding the enemy” that it should be stated in the charges. For example, in the military commission trials that resulted in the case of *Ex parte Quirin*, the charges contained an allegation that the defendants had a duty of allegiance to the United States because they had entered United States territory.

<sup>5</sup> *Gillars v. U.S.*, 87 U.S. App. D.C. 16, 41-42 (1950).

<sup>6</sup> There is no reported case in which a non-United States citizen has been tried in either a court-martial or military commission for committing the offense of “aiding the enemy” outside the territorial jurisdiction of the United States or outside the geographical limits of an area occupied by United States forces. Military case law involving violations of Article 104, Uniform Code of Military Justice, primarily involves United States service members held as prisoners of war and their interactions with their captors. See *U.S. v. Olson*, 7 U.S.C.M.A. 460 (1957); *U.S. v. Batchelor*, 7 U.S.C.M.A. 354 (1956); and *U.S. v. Garwood*, 20 M.J. 148 (1985).

<sup>7</sup> The Australian equivalent of our “aiding the enemy” is embodied in its treason law, Section 24 of the Australian *Crimes Act 1914* (the treason law), and Sections 15 and 16 of the *Defence Force Discipline Act 1982* (Australian “aiding the enemy” law). None of these Sections applied to Mr. Hicks at the time of the charged offenses. The treason law criminalized only those acts by a person intended to assist a country at war (declared or undeclared) with Australia, which the Australian Government had proclaimed to be an enemy of Australia. At the time of the alleged

Hearing of 16 February 2004, the Assistant Secretary, Security Law and Justice Branch of the Australian Attorney Generals' Department explained, "[t]he government has consistently said that, on the basis of the evidence available to prosecuting authorities, there are no grounds to prosecute Mr. Hicks ... under any laws in Australia that were current at the time of [his] activities."<sup>8</sup> It is therefore inappropriate for the United States to claim that a person with no allegiance to the United States is guilty of the crime of "aiding the enemy" when that person's own country does not believe his actions were illegal.

#### **D: Conclusion**

Since Mr. Hicks is not, and has not ever been, a United States citizen, and/or has not had some other connection with the United States that would give rise to a duty of allegiance to the U.S., there cannot be grounds for a charge of "aiding the enemy" against him. The offense conduct alleged is without basis in the Uniform Code of Military Justice or any other United States law. Moreover, its application in this case would *ex post facto*, and/or constitute a Bill of Attainder. As a result, Charge 3 must be dismissed.

4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

#### **5. Evidence:**

**A:** The testimony of expert witnesses to be requested.

**B:** Attachments

1. Australian *Crimes Act 1914*, Section 24.
2. Australian *Defence Force Discipline Act 1982*, Sections 15 and 16.
3. Australian *Security Legislation Amendment (Terrorism) Act 2002*, Schedule 1.
4. See Senate Legal and Constitutional Legislation Committee, "Estimates," 16 February 2004, Canberra, Australia.
5. Australian *Crimes (Foreign Incursions and Recruitment) Act 1978*, Sections 6-7.

6. **Relief Requested:** The defense requests that Charge 3 be dismissed.

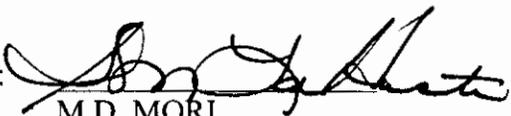
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offenses here, the Australian Government had not declared that any nation or entity with which Australia was at war or in conflict was an enemy. Accordingly, there was no "enemy" of Australia for Mr. Hicks to "aid." Also, the Australian "aiding the enemy" law applies only to members of the Australian Defence Force and Defence civilian employees who agree in writing to be subject to that law (*see* Section 3). Since Mr. Hicks was not a member or employee of the Australian Defence Force, the "aiding the enemy" law did not apply to him. On 5 July 2002, Australia modified its treason law, broadening it to encompass acts by persons in support of a country or organization that is engaged in armed hostilities against the Australian Defence Force. *See Australian Security Legislation Amendment (Terrorism) Act 2002*.

<sup>8</sup> See Senate Legal and Constitutional Legislation Committee, "Estimates," 16 February 2004, Canberra, Australia. Ironically, had Mr. Hicks assisted the Northern Alliance forces in their bid to overthrow the established government of Afghanistan, namely the Taliban, he would have potentially violated Australian law. *See Australian Crimes (Foreign Incursions and Recruitment) Act 1978*, Sections 6 and 7.

7. The defense requests oral argument on this motion.

By:

  
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# Crimes Act 1914

Act No. 12 of 1914 as amended

Volume 2

## Part 1D—Forensic procedures

*Crimes14Vo02.doc 15/11/2002 2:00 pm*

Attachment 1 to RE \_\_\_\_\_  
Page 1 of 3

## **Part II—Offences against the Government**

### **24AA Treachery**

- (1) A person shall not:
- (a) do any act or thing with intent:
    - (i) to overthrow the Constitution of the Commonwealth by revolution or sabotage; or
    - (ii) to overthrow by force or violence the established government of the Commonwealth, of a State or of a proclaimed country; or
  - (b) within the Commonwealth or a Territory not forming part of the Commonwealth:
    - (i) levy war, or do any act preparatory to levying war, against a proclaimed country;
    - (ii) assist by any means whatever, with intent to assist, a proclaimed enemy of a proclaimed country; or
    - (iii) instigate a person to make an armed invasion of a proclaimed country.
- (2) Where a part of the Defence Force is on, or is proceeding to, service outside the Commonwealth and the Territories not forming part of the Commonwealth, a person shall not assist by any means whatever, with intent to assist, any persons:
- (a) against whom that part of the Defence Force, or a force that includes that part of the Defence Force is or is likely to be opposed; and
  - (b) who are specified, or included in a class of persons specified, by proclamation to be persons in respect of whom, or a class of persons in respect of which, this subsection applies.
- (3) A person who contravenes a provision of this section shall be guilty of an indictable offence, called treachery.

Penalty: Imprisonment for life.

- (4) In this section:

Section 24AB

*proclaimed country* means a country specified by proclamation made for the purpose of this definition to be a proclaimed country, and includes any colony, overseas territory or protectorate of that country, or any territory for the international relations of which that country is responsible, which is a colony, overseas territory, protectorate or territory to which the proclamation is expressed to extend.

*proclaimed enemy*, in relation to a proclaimed country, means an enemy:

- (a) of and at war with a proclaimed country, whether or not the existence of a state of war has been declared; and
  - (b) specified by proclamation made for the purpose of this definition to be an enemy of and at war with that country.
- (5) A proclamation shall not be made for the purpose of the definition of *proclaimed country*, or for the purpose of the definition of *proclaimed enemy*, in subsection (4) except in pursuance of a resolution of each House of the Parliament passed within the preceding period of 21 days.



## Defence Force Discipline Act 1982

**Act No. 152 of 1982 as amended**

This compilation was prepared on 31 July 2002  
taking into account amendments up to Act No. 63 of 2002

The text of any of those amendments not in force  
on that date is appended in the Notes section

Prepared by the Office of Legislative Drafting,  
Attorney-General's Department, Canberra

## Part III—Offences

### Division 1—Offences relating to operations against the enemy

#### 15 Abandoning or surrendering a post etc.

- (1) A person who is a defence member or a defence civilian is guilty of an offence if:
- (a) the person has a duty to defend or destroy a place, post, service ship, service aircraft or service armoured vehicle; and
  - (b) the person knows of that duty; and
  - (c) the person abandons or surrenders to the enemy the place or thing mentioned in paragraph (a).

Maximum punishment: Imprisonment for 15 years.

- (2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the *Criminal Code*.

#### 15A Causing the capture or destruction of a service ship, aircraft or vehicle

- (1) A person who is a defence member or a defence civilian is guilty of an offence if:
- (a) the person engages in conduct; and
  - (b) the conduct causes the capture or destruction by the enemy of a service ship, service aircraft or service armoured vehicle; and
  - (c) by engaging in the conduct, the person intends to bring about that result.

Maximum punishment: Imprisonment for 15 years.

- (2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Section 15B

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Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the *Criminal Code*.

**15B Aiding the enemy while captured**

- (1) A person who is a defence member or a defence civilian is guilty of an offence if:
- (a) the person is captured by the enemy; and
  - (b) the person serves with the enemy, aids the enemy in prosecuting hostilities or measures likely to influence morale or aids the enemy in any other manner that is not authorised by international law.

Maximum punishment: Imprisonment for life.

- (2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the *Criminal Code*.

**15C Providing the enemy with material assistance**

- (1) A person who is a defence member or a defence civilian is guilty of an offence if the person provides the enemy with, or permits or enables the enemy to have access to, arms, ammunition, vehicles, supplies of any description or any other thing likely to assist the enemy.

Maximum punishment: Imprisonment for life.

- (2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the *Criminal Code*.

**15D Harbouring enemies**

- (1) A person who is a defence member or a defence civilian is guilty of an offence if:
- (a) the person harbours or protects another person; and
  - (b) that other person is an enemy person; and
  - (c) that other person is not a prisoner of war; and

Section 15E

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- (d) the first-mentioned person knows that the other person is an enemy person.

Maximum punishment: Imprisonment for 15 years.

- (2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the *Criminal Code*.

**15E Offences relating to signals and messages**

- (1) A person who is a defence member or a defence civilian is guilty of an offence if:

- (a) the person is engaged on service in connection with operations against the enemy; and  
(b) the person:  
(i) gives a signal, message or other communication that the person knows to be false; or  
(ii) alters or interferes with a signal, message or other communication; or  
(iii) alters or interferes with apparatus for giving or receiving a signal, message or other communication.

Maximum punishment: Imprisonment for 15 years.

- (2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the *Criminal Code*.

**15F Failing to carry out orders**

- (1) A person who is a defence member or a defence civilian is guilty of an offence if:

- (a) the person:  
(i) is ordered by his or her superior officer to prepare for, or to carry out, operations against the enemy; or  
(ii) is otherwise under orders to prepare for, or to carry out, operations against the enemy; and

**Section 15G**

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- (b) the person does not use his or her utmost exertions to carry those orders into effect.

Maximum punishment: Imprisonment for 15 years.

- (2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the *Criminal Code*.

**15G Imperilling the success of operations**

- (1) A person who is a defence member or a defence civilian is guilty of an offence if:

- (a) the person engages in any conduct; and  
(b) the conduct imperils the success of operations against the enemy.

Maximum punishment: Imprisonment for 15 years.

- (2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the *Criminal Code*.

**16 Communicating with the enemy**

- (1) A person who is a defence member or a defence civilian is guilty of an offence if the person communicates with, or gives intelligence to, the enemy.

Maximum punishment: Imprisonment for 15 years.

- (2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (2). See section 13.4 of the *Criminal Code*.

**16A Failing to report information received from the enemy**

- (1) A person who is a defence member or a defence civilian is guilty of an offence if:

Section 16B

- (a) the person receives information from the enemy; and
- (b) the person does not make the information known to proper authority; and
- (c) the information is likely to be directly or indirectly useful in operations against the enemy; and
- (d) the person knows or could reasonably be expected to know that the information is likely to be directly or indirectly useful in operations against the enemy.

Maximum punishment: Imprisonment for 15 years.

- (2) It is a defence if the person proves that he or she had a reasonable excuse for the relevant conduct.

Note: The defendant bears a legal burden in relation to the matter in subsection (3). See section 13.4 of the *Criminal Code*.

**16B Offence committed with intent to assist the enemy**

- (1) A person who is a defence member or a defence civilian is guilty of an offence if:
  - (a) the person engages in conduct that constitutes an offence against any of sections 15 to 16A (other than section 15B or 15C); and
  - (b) the person engages in that conduct with intent to assist the enemy.

Maximum punishment: Imprisonment for life.

- (2) In paragraph (1)(a), strict liability applies to the physical element of circumstance, that the conduct constitutes an offence against the section concerned.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.



## **Security Legislation Amendment (Terrorism) Act 2002**

No. 65, 2002

**An Act to enhance the Commonwealth's ability to  
combat terrorism and treason, and for related  
purposes**

Note: An electronic version of this Act is available in SCALEplus  
(<http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm>)

Attachment 3 to RE \_\_\_\_\_  
Page 1 of 4

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## Schedule 1—Amendments relating to treason and terrorism

### *Criminal Code Act 1995*

#### 1 The Schedule (after Chapter 4 of the *Criminal Code*)

Insert:

### Chapter 5—The security of the Commonwealth

Note: If either the *Criminal Code Amendment (Espionage and Related Offences) Act 2002* or the *Suppression of the Financing of Terrorism Act 2002* receives the Royal Assent on or before the day on which this Act receives the Royal Assent, this item does not commence at all. See subsection 2(3) of this Act.

#### 2 The Schedule (Chapter 5 of the *Criminal Code*)

Insert in the appropriate numerical position:

### Part 5.1—Treason

#### Division 80—Treason

##### 80.1 Treason

- (1) A person commits an offence, called treason, if the person:
  - (a) causes the death of the Sovereign, the heir apparent of the Sovereign, the consort of the Sovereign, the Governor-General or the Prime Minister; or
  - (b) causes harm to the Sovereign, the Governor-General or the Prime Minister resulting in the death of the Sovereign, the Governor-General or the Prime Minister; or
  - (c) causes harm to the Sovereign, the Governor-General or the Prime Minister, or imprisons or restrains the Sovereign, the Governor-General or the Prime Minister; or
  - (d) levies war, or does any act preparatory to levying war, against the Commonwealth; or

- (e) engages in conduct that assists by any means whatever, with intent to assist, an enemy:
  - (i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and
  - (ii) specified by Proclamation made for the purpose of this paragraph to be an enemy at war with the Commonwealth; or
- (f) engages in conduct that assists by any means whatever, with intent to assist:
  - (i) another country; or
  - (ii) an organisation;  
that is engaged in armed hostilities against the Australian Defence Force; or
- (g) instigates a person who is not an Australian citizen to make an armed invasion of the Commonwealth or a Territory of the Commonwealth; or
- (h) forms an intention to do any act referred to in a preceding paragraph and manifests that intention by an overt act.

Penalty: Imprisonment for life.

- (1A) Paragraphs (1)(e) and (f) do not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1A). See subsection 13.3(3).

- (1B) Paragraph (1)(h) does not apply to formation of an intention to engage in conduct that:
- (a) is referred to in paragraph (1)(e) or (f); and
  - (b) is by way of, or for the purposes of, the provision of aid of a humanitarian nature.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1B). See subsection 13.3(3).

- (2) A person commits an offence if the person:
- (a) receives or assists another person who, to his or her knowledge, has committed treason with the intention of allowing him or her to escape punishment or apprehension;  
or

- (b) knowing that another person intends to commit treason, does not inform a constable of it within a reasonable time or use other reasonable endeavours to prevent the commission of the offence.

Penalty: Imprisonment for life.

- (3) Proceedings for an offence against this section must not be commenced without the Attorney-General's written consent.
- (4) Despite subsection (3):
- (a) a person may be arrested for an offence against this section; or
  - (b) a warrant for the arrest of a person for such an offence may be issued and executed;
- and the person may be charged, and may be remanded in custody or on bail, but:
- (c) no further proceedings may be taken until that consent has been obtained; and
  - (d) the person must be discharged if proceedings are not continued within a reasonable time.
- (5) On the trial of a person charged with treason on the ground that he or she formed an intention to do an act referred to in paragraph (1)(a), (b), (c), (d), (e), (f) or (g) and manifested that intention by an overt act, evidence of the overt act is not to be admitted unless the overt act is alleged in the indictment.
- (6) Section 24F of the *Crimes Act 1914* applies to this section in the same way it would if this section were a provision of Part II of that Act.
- (7) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this section.

- (8) In this section:

**constable** means a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory.

**organisation** means:

- (a) a body corporate; or
- (b) an unincorporated body;

whether or not the body is based outside Australia, consists of persons who are not Australian citizens, or is part of a larger organisation.



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

ESTIMATES

(Additional Estimates)

MONDAY, 16 FEBRUARY 2004

CANBERRA

BY AUTHORITY OF THE SENATE

Attachment 4 to RE \_\_\_\_\_  
Page 1 of 3

**SENATE**

**LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE**

**Monday, 16 February 2004**

**Members:** Senator Payne (*Chair*), Senator Bolkus (*Deputy Chair*), Senators Greig, Ludwig, Mason and Scullion

**Senators in attendance:** Senator Payne (*Chair*), Senator Bolkus (*Deputy Chair*), Senators Bishop, Greig, Kirk, Ludwig, O'Brien and Scullion

**Committee met at 9.04 a.m.**

**ATTORNEY-GENERAL'S PORTFOLIO**

**In Attendance**

Senator Ellison, Minister for Justice and Customs  
Mr Robert Cornall, Secretary  
Mr Ian Carnell, Deputy Secretary, Criminal Justice & Security  
Mr Ian Govey, Deputy Secretary, Civil Justice & Legal Services  
Mr Richard Oliver, General Manager, Corporate Services  
Mr Trevor Kennedy, Chief Finance Officer  
Mr Graham Fry, Acting General Manager, Information and Knowledge Services  
Ms Kathy Leigh, First Assistant Secretary, Civil Justice Division  
Mr Iain Anderson, First Assistant Secretary, Legal Services and Native Title Division  
Mr James Faulkner, Assistant Secretary, Constitutional Policy Unit  
Ms Karen Moore, Acting Assistant Secretary, Office of Legal Services Coordination  
Ms Kathryn Shugg, Assistant Secretary, Native Title Unit  
Mr Steven Marshall, Assistant Secretary, Native Title Unit  
Ms Philippa Lynch, First Assistant Secretary, Family Law and Legal Assistance  
Ms Sue Pidgeon, Assistant Secretary, Family Pathways  
Mr Kym Duggan, Assistant Secretary, Family Law Branch  
Mr Paul Griffiths, Assistant Secretary, Legal Assistance Branch  
Ms Renée Leon, First Assistant Secretary, Office of International Law  
Ms Youda Younan, Senior Legal Officer, Office of International Law  
Mr James Graham, Principal Legislative Counsel  
Ms Joanne Blackburn, First Assistant Secretary, Criminal Justice Division  
Mr Geoff McDonald, Assistant Secretary, Criminal Law Branch  
Ms Robyn Warner, Assistant Secretary, International Crime Branch  
Dr Dianne Heriot, Assistant Secretary, Crime Prevention Branch  
Ms Robyn Frost, Director, International Crime Branch  
Mr Peter Ford, First Assistant Secretary, Information and Security Law Division  
Mr Keith Holland, Assistant Secretary, Security Law and Justice Branch  
Mr David Templeman, Director General, Emergency Management Australia  
Mr Ed Tyrie, Executive Director, Protective Security Coordination Centre  
Ms Helaine Hallahan, Director, Counter-Terrorism Policy Section  
**Australian Federal Police**  
Mr Mick Keelty, Commissioner

LEGAL AND CONSTITUTIONAL

**Senator BOLKUS**—So we have come to our own independent conclusion that there is no charge which can be made against Hicks here but, in coming to that conclusion, we are of a view that the evidence is sufficient for him to be charged in Guantanamo Bay on US offences?

**Mr Holland**—Putting it another way—

**Senator BOLKUS**—I actually put it that way for a reason, Mr Holland.

**Mr Holland**—I know, but I have to answer it in the most helpful way I can. The government has consistently said that, on the basis of the evidence available to prosecuting authorities, there are no grounds to prosecute Mr Hicks or Mr Habib under any laws in Australia that were current at the time of their activities. If, however, the evidence was there to support any charges the United States authorities had, then the United States could go ahead and do that. It is not saying that the charges that the United States might have had are exactly the same as ours. Certainly, if the terrorism laws that came into effect last year were in place at the time that these activities were engaged in, it is possible that a different outcome would have been reached.

**Senator BOLKUS**—Taking you two steps back, are we of a view that there is sufficient evidence for Hicks to be charged with an offence under US law?

**Mr Holland**—That is not a decision for me or the Australian government to make. To be perfectly honest, at this stage, charges have not yet been laid. Without knowing what those charges are, it is not possible to say whether or not the evidence would support those charges.

**Senator BOLKUS**—There is only one thing wrong with that: he is an Australian national and he has been held for over a couple of years. We take an interest in Australian nationals who may be held unfairly overseas and we raise complaints about such incarceration world wide. I would have thought that, in these circumstances, it would have been a requirement to look at the evidence about and to make an assessment with a view to—for instance, if you thought that there was insufficient evidence—raising consular requests on his behalf. You are telling me that you have not made that assessment?

**Mr Holland**—I certainly have not, no.

**Senator BOLKUS**—Don't you think someone should? You have the evidence before you. In order to work out whether we should be acting more strenuously with respect to Hicks, shouldn't we make an assessment as to whether we think he has been held fairly or unfairly?

**Mr Cornall**—We do not have the evidence before us. We have had access to Mr Hicks and Mr Habib through the AFP and through ASIO, and they have conducted extensive inquiries in relation to any possible offences in Australia.

**Senator BOLKUS**—But to have come to that conclusion, Mr Cornall, you must have had some evidence before you.

**CHAIR**—Senator Bolkus, perhaps we could let Mr Cornall conclude.

**Mr Cornall**—Yes, we had. We had all of the evidence that the AFP was able to generate in its investigation and in its interviews. But, in terms of the evidence that the Americans have, we have not been party to their interviews, we have not seen the transcripts of their interviews

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LEGAL AND CONSTITUTIONAL

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## Crimes (Foreign Incursions and Recruitment) Act 1978

**Act No. 13 of 1978 as amended**

This compilation was prepared on 6 July 2004  
taking into account amendments up to Act No. 104 of 2004

The text of any of those amendments not in force  
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be  
affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting,  
Attorney-General's Department, Canberra

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### 3A Application of the *Criminal Code*

Chapter 2 of the *Criminal Code* applies to all offences against this Act.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

### 4 Extension of Act to Territories

This Act extends to every Territory.

### 5 Act not to apply to acts done for defence of Australia

Nothing in this Act applies to any act done by a person acting in the course of the person's duty to the Commonwealth in relation to the defence of Australia.

### 6 Incursions into foreign States with intention of engaging in hostile activities

- (1) A person shall not:
- (a) enter a foreign State with intent to engage in a hostile activity in that foreign State; or
  - (b) engage in a hostile activity in a foreign State.
- Penalty: Imprisonment for 20 years.
- (2) A person shall not be taken to have committed an offence against this section unless:
- (a) at the time of the doing of the act that is alleged to constitute the offence, the person:
    - (i) was an Australian citizen; or
    - (ii) not being an Australian citizen, was ordinarily resident in Australia; or
  - (b) the person was present in Australia at any time before the doing of that act and, at any time when the person was so present, his or her presence was for a purpose connected with that act, or for purposes that included such a purpose.
- (3) For the purposes of subsection (1), engaging in a hostile activity in a foreign State consists of doing an act with the intention of

achieving any one or more of the following objectives (whether or not such an objective is achieved):

- (a) the overthrow by force or violence of the government of the foreign State or of a part of the foreign State;
  - (aa) engaging in armed hostilities in the foreign State;
  - (b) causing by force or violence the public in the foreign State to be in fear of suffering death or personal injury;
  - (c) causing the death of, or bodily injury to, a person who:
    - (i) is the head of state of the foreign State; or
    - (ii) holds, or performs any of the duties of, a public office of the foreign State or of a part of the foreign State; or
  - (d) unlawfully destroying or damaging any real or personal property belonging to the government of the foreign State or of a part of the foreign State.
- (4) Nothing in this section applies to an act done by a person in the course of, and as part of, the person's service in any capacity in or with:
- (a) the armed forces of the government of a foreign State; or
  - (b) any other armed force in respect of which a declaration by the Minister under subsection 9(2) is in force.
- (5) Paragraph (4)(a) does not apply if:
- (a) a person enters a foreign State with intent to engage in a hostile activity in that foreign State while in or with an organisation; and
  - (b) the organisation is a prescribed organisation at the time of entry.
- (6) Paragraph (4)(a) does not apply if:
- (a) a person engages in a hostile activity in a foreign State while in or with an organisation; and
  - (b) the organisation is a prescribed organisation at the time when the person engages in that hostile activity.
- (7) For the purposes of subsections (5) and (6), **prescribed organisation** means:
- (a) an organisation that is prescribed by the regulations for the purposes of this paragraph; or

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- (b) an organisation referred to in paragraph (b), (c), (d) or (e) of the definition of *terrorist organisation* in subsection 102.1(1) of the *Criminal Code*.
- (8) Before the Governor-General makes a regulation prescribing an organisation for the purposes of paragraph (7)(a), the Minister must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering:
  - (a) a serious violation of human rights; or
  - (b) armed hostilities against the Commonwealth or a foreign State allied or associated with the Commonwealth; or
  - (c) a terrorist act (as defined in section 100.1 of the *Criminal Code*); or
  - (d) an act prejudicial to the security, defence or international relations of the Commonwealth.

**7 Preparations for incursions into foreign States for purpose of engaging in hostile activities**

- (1) A person shall not, whether within or outside Australia:
  - (a) do any act preparatory to the commission of an offence against section 6, whether by that person or by another person;
  - (b) accumulate, stockpile or otherwise keep arms, explosives, munitions, poisons or weapons with the intention of committing an offence against section 6, whether by that person or by another person;
  - (c) train or drill or participate in training or drilling, or be present at a meeting or assembly of persons with intent to train or drill or to participate in training or drilling, any other person in the use of arms or explosives, or the practice of military exercises, movements or evolutions, with the intention of preparing that other person to commit an offence against section 6;
  - (d) allow himself or herself to be trained or drilled, or be present at a meeting or assembly of persons with intent to allow himself or herself to be trained or drilled, in the use of arms or explosives, or the practice of military exercises,

- movements or evolutions, with the intention of committing an offence against section 6;
- (e) give money or goods to, or perform services for, any other person or any body or association of persons with the intention of supporting or promoting the commission of an offence against section 6;
  - (f) receive or solicit money or goods, or the performance of services, with the intention of supporting or promoting the commission of an offence against section 6;
  - (g) being the owner, lessee, occupier, agent or superintendent of any building, room, premises or place, intentionally permit a meeting or assembly of persons to be held in the building, room, premises or place with the intention of committing, or supporting or promoting the commission of, an offence against paragraph (a), (b), (c), (d), (e) or (f); or
  - (h) being the owner, charterer, lessee, operator, agent or master of a vessel or the owner, charterer, lessee, operator or pilot in charge of an aircraft, intentionally permit the vessel or aircraft to be used with the intention of committing, or supporting or promoting the commission of, an offence against paragraph (a), (b), (c), (d), (e) or (f).
- (1A) A reference in subsection (1) to the commission of an offence against section 6 is a reference to the doing of an act that would constitute, or would but for subsection 6(2) constitute, an offence against section 6.
- (1B) A person shall not be taken to have committed an offence against this section merely because of doing an act by way of, or for the purposes of, the provision of aid of a humanitarian nature.
- (2) A person shall not be taken to have committed an offence against this section in respect of the doing of an act outside Australia unless:
- (a) at the time of the doing of that act, the person:
    - (i) was an Australian citizen; or
    - (ii) not being an Australian citizen, was ordinarily resident in Australia; or
  - (b) the person was present in Australia at any time before the doing of that act and, at any time when the person was so present, his or her presence was for a purpose connected with that act, or for purposes that included such a purpose.

Penalty: Imprisonment for 10 years.