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Government Accepts Military Commissions for Guantanamo Bay Detainees

The Government has reached an understanding with the US concerning procedures which would apply to possible military commission trials of the two Australians detained at Guantanamo Bay, David Hicks and Mamdouh Habib.

Mr Hicks was included in the list signed by President Bush on 3 July 2003 of the six detainees who have been declared eligible for trial at this stage. The US is expediting consideration of Mr Habib's case.

As part of the Government's extensive discussions with the US concerning military commission processes, the Minister for Justice and Customs, Senator the Hon Chris Ellison, visited Washington from 21 to 23 July 2003. As a result of the visit, the US made significant commitments on key issues, including that:

- Based upon the specific facts of his case, the US assured Australia it will not seek the death penalty in Mr Hicks' case.

- Australia and the US agreed to work towards putting arrangements in place to transfer Mr Hicks to Australia, if convicted, to serve any penal sentence in Australia in accordance with Australian and US law.

- Based upon his circumstances, conversations between Mr Hicks and his lawyers will not be monitored by the US.

- The prosecution in Mr Hicks' case does not intend to rely on evidence in its case-in-chief requiring closed proceedings from which the accused could be excluded.

- Subject to any necessary security restrictions, Mr Hicks' trial will be open, the media will be present, and Australian officials may observe proceedings.

The Government has since continued its high-level dialogue with the US. As a result, the US has made further important commitments, including that:

- The US has assured Australia that key commitments relating to Mr Hicks would also apply to Mr Habib, should he be listed as eligible for trial, including that he would not be subject to the death penalty given the circumstances of his case.

- The Government may make submissions to the Review Panel which would review either man's military commission trial.

- Should Mr Hicks or Mr Habib choose to retain an Australian lawyer with appropriate security clearances as a consultant to their legal teams following approval of military commission charges, that person may have direct face-to-face communications with their client.

- Mr Hicks and, if listed as eligible for trial, Mr Habib may talk to their families via telephone, and two family members would be able to attend their trials.

- An independent legal expert sanctioned by the Australian Government may observe a trial of Mr Hicks or Mr Habib.

The US Department of Defence is in the process of drafting clarifications and additional military commission rules that will incorporate the assurances given to

Australia where appropriate. All people attending military commission trials would require appropriate background checks.

The US commitments are in addition to rights which would be afforded to Mr Hicks and Mr Habib under military commission rules, including a presumption of innocence, a standard of proof beyond a reasonable doubt, the right to defence counsel free of charge, and the right to remain silent, including a guarantee that no adverse inference will be drawn from the exercise of such a right.

The Government has been advised that Mr Hicks or Mr Habib could not be prosecuted successfully in Australia in relation to their activities in Afghanistan or Pakistan under Australian laws that applied at the time. The Government has also been advised that both men trained with Al Qaeda.

In these circumstances, we accept Mr Hicks and Mr Habib could be tried by the US, provided that their trials are fair and transparent while protecting security interests. The Government believes that military commission processes will fulfil these criteria.

The US has assured the Government that Mr Hicks and Mr Habib will receive no less favourable treatment than other non-US detainees. We will remain in close contact with the US to ensure both men are treated fairly and appropriately at all times.

Government Accepts Military Commissions for Guantanamo Bay Detainees

The Government has reached an understanding with the US concerning procedures which would apply to any military commission trials of the two Australians detained at Guantanamo Bay, David Hicks and Marndouh Habib.

Mr Hicks is included in the list of the six detainees who have been declared eligible for trial by military commission. That list was signed by President Bush on 3 July 2003. To date, charges have not been laid against Mr Hicks. The laying of charges is a matter for US authorities.

The US is expediting consideration of Mr Habib's case. As the Government has said in the past, we would like to bring some certainty to Mr Habib's situation.

The Government does not want either man to remain in detention without trial any longer than necessary.

The Government has been advised that Mr Hicks or Mr Habib could not be prosecuted in Australia in relation to their activities in Afghanistan or Pakistan under Australian laws that applied at the time. The Government has also been advised that Mr Hicks and Mr Habib both trained with Al Qaeda. That organisation has committed and sponsored terrorist acts around the world. These are serious matters that must be addressed.

In these circumstances, the Government accepts that Mr Hicks or Mr Habib could be tried by the US, provided that their trials are fair and transparent while protecting security interests.

The Government has held extensive discussions with the US concerning military commission processes. As a result, the US has made significant commitments on key issues of concern to the Government

As part of the Government's extensive discussions with the US concerning military commission processes, the Minister for Justice and Customs, Senator the Hon Chris Ellison, visited Washington from 21 to 23 July 2003. As a result of the visit, the US made important commitments on issues related to Mr Hicks' possible trial, including that:

- Based upon the specific facts of his case, the US assured Australia it will not seek the death penalty in Mr Hicks' case.
- Australia and the US agreed to work towards putting arrangements in place to transfer Mr Hicks to Australia, if convicted, to serve any penal sentence in Australia in accordance with Australian and US law.
- Based upon his circumstances, conversations between Mr Hicks and his lawyers will not be monitored by the US.
- The prosecution in Mr Hicks' case does not intend to rely on evidence in its case-in-chief requiring closed proceedings from which the accused could be excluded.
- Subject to any necessary security restrictions, Mr Hicks' trial will be open, the media will be present, and Australian officials may observe proceedings.

The Government has since continued its high-level dialogue with the US. As a result, the US has made further important commitments. These further commitments are now being finalised. They include:

- The US has assured Australia that key commitments made in relation to Mr Hicks would also apply to Mr Habib, should he be listed as eligible for trial, including that he would not be subject to the death penalty given the circumstances of his case.
- The Government may make submissions to the Review Panel which would review either man's military commission trial.
- Should Mr Hicks or Mr Habib choose to retain an Australian lawyer as a consultant to their legal teams following approval of military commission charges, subject to security requirements, that person may have direct face-to-face communications with their client.

- Mr Hicks and, if listed as eligible for trial, Mr Habib may talk to their families via telephone, and two family members would be able to attend their trials.
- An independent legal expert sanctioned by the Australian Government, may observe a trial of Mr Hicks or Mr Habib.

The US Department of Defence is in the process of drafting clarifications and additional military commission rules that will incorporate the assurances given to Australia where appropriate. All people attending military commission trials would require appropriate background checks.

I would remind the honourable members that the rules governing the military commission trials provide fundamental guarantees for the accused. These guarantees are similar to those found in our own criminal procedures and in fact they are the basis upon which our criminal justice system is founded. The guarantees include: the right to representation by defence counsel, a presumption of innocence, a standard of proof beyond a reasonable doubt, the right to obtain witnesses and documents to be used in their defence, the right to cross examine prosecution witnesses and the right to remain silent with no adverse inference being drawn from the exercise of that right.

The accused will be represented at all times by military defence counsel who have considerable expertise in military law and will provide a full and expert defence. An accused may also retain civilian defence counsel. To assume that military defence counsel will act other than in the best interests of their client has no basis in fact.

The rules of evidence applicable in Australian criminal proceedings do not apply to trial before US military commission. Those rules of evidence also do not apply before international tribunals. For example, the rule against hearsay does not apply in trials before the International Criminal Tribunal for the Former Yugoslavia (ICTY). Similarly, the rule against hearsay does not apply in many States with highly developed legal systems which are based on the civil law tradition.

Although certain rules of evidence do not apply to a military commission trial, provision is made to ensure that the accused can examine and refute the evidence presented against him. Under the rules of the military commissions, the defence shall

be provided with access to evidence the prosecution intends to introduce at trial and evidence known by the prosecution that tends to exculpate the accused. In addition, the defence shall be able to present evidence in the accused's defence and cross-examine each witness presented by the prosecution.

Government officials will attend any military commission trial of Australian citizens. In this way, we will monitor the military commission proceedings.

Military commissions are a recognised way of trying persons who may have committed offences against the laws of war. In the United States, military commissions have a long history of use. They were used extensively during the Mexican American War and the American Civil War. They were also used more recently during World War II. In fact, the United States Uniform Code of Military Justice recognises the jurisdiction of military commissions in certain cases.

Immediately after World War II, Australia established military tribunals to try Japanese prisoners of war charged with committing war crimes. Like the military commissions, those tribunals did not apply the usual procedures, including the normal appeal rights and rules of evidence, applicable in criminal trials at the time. However, those trials were still fair and transparent.

Far from the sustained indifference which some commentators have claimed the Government has shown towards Mr Hicks and Mr Habib, the Government has always been concerned for the welfare of Australian detainees held in United States custody at Guantanamo Bay. But Australians who breach the laws of foreign countries while overseas have no automatic right to be repatriated to Australia for trial. So long as their trial is fair and transparent, those who breach foreign laws while overseas are liable for their offences.

The US has assured the Government that Mr Hicks and Mr Habib will receive no less favourable treatment before a military commission than other non-US detainees. We will remain in close contact with the US to ensure both men are treated fairly and appropriately at all times.

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