

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS  
ATTORNEY-GENERAL'S DEPARTMENT

**Output 2.1**

**Question No. 44**

**Senator Stott-Despoja asked the following question at the hearing on 23 May 2007:**

David Hicks

- (a) The language in the Hicks regulation is couched in terms of 'understandings' about how the two countries will cooperate on relevant matters. How do understandings create binding legal relations?
- (b) Why are there no dispute resolution mechanisms in the Agreement?
- (c) Why is there not a signature from either country on the Agreement?
- (d)
  - (i) Because there was no mirror offence in Australian law at the time Mr Hicks was charged how will paragraph 10 of the Regulations work?
  - (ii) How can his sentence be 'adapted' by an administrative order? Does that mean a control order?
  - (iii) Why is it that at the time of David Hicks capture and detainment there could be no prosecution of Hicks for such an offence in either Australia or the United States?
- (e) Is it not the case that the Australian Government can not by any legislation or executive action oust the original jurisdiction of the High Court or the ability of the Court to strike down ultra vires legislation on constitutional grounds?
- (f) It is a condition of the transfer that a prisoner will be treated humanly and in accordance with the laws and international obligations of Australia. In light of David Hicks undertaking that he will not communicate with the media in any way about his time at Guantanamo Bay for a period of 3 months after his release from Yatala, how is this consistent with Australia's international obligations? In the New Year David Hicks will be a free man, how can he be gagged for a further 3 months? Does this not disregard Australia's obligations under the International Covenant on Civil and Political Rights which protects freedom of speech and association?
- (g) Does the Attorney-General have any plans to amend the *Proceeds of Crime Act* to prevent Mr Hicks, or his family, profiting from his crime?

**The answer to the honourable senator's question is as follows:**

- (a) The Arrangement between the Governments of the United States of America and Australia on the Transfer of Persons Sentenced by a US Military Commission is an instrument of less-than-treaty status. It is not binding upon Australia under international law. The Arrangement is given effect under Australian law in the *International Transfer of Prisoners (Military Commission of the United States of America) Regulations 2007*.
- (b) Many bilateral agreements and arrangements do not contain dispute settlement clauses and the expectation is that any disagreement over the interpretation and application of the document is settled through consultation and negotiation.

- (c) The Arrangement was signed by representatives of both governments on 23 March 2007. In accordance with standard practice for bilateral treaties, the original, signed version of the Arrangement is held by the Treaties Secretariat within the Department of Foreign Affairs and Trade.
- (d) (i) Paragraph 10 of the Arrangement provides that the punishment imposed by the US is able to be adapted to the punishment or measure prescribed by Australian law for a similar offence if the sentence is by its nature or duration incompatible with the law of Australia. For the purposes of the International Transfer of Prisoners scheme, the existence of a similar offence under Australian law is assessed at the time that the prisoner applies for transfer. At the time of Mr Hicks' application, if he had committed the acts in Australia, they would have constituted terrorist organisation offences, contrary to division 102 of the *Criminal Code Act 1995* (Cth). The maximum penalty under this section is 25 years imprisonment.
- (ii) If any adaptation to a prisoner's sentence is necessary, it forms part of the terms of transfer, which must be consented to by the prisoner and the governments of Australia, the foreign country and the receiving State or Territory. The terms of transfer are given effect by issuing directions under section 44 of the *International Transfer of Prisoners Act 1997* (Cth). An application for a control order is completely separate from the International Transfer of Prisoner process.
- (iii) Mr Hicks was captured in Afghanistan on approximately 9 December 2001.

The Government has stated on numerous occasions that at that time there was no offence available to prosecute Mr Hicks in Australia, based on advice given by the Commonwealth Director of Public Prosecutions.

However, the United States was of the view that it could prosecute Mr Hicks and charged him on 10 June 2004 with conspiracy to commit war crimes, attempted murder by an unprivileged belligerent, and aiding the enemy under a Presidential order made 13 November 2001. Mr Hicks was subsequently served with charges, on 1 March 2007, of providing material support for terrorism, an offence under section 950v(b)(25) of the United States Military Commissions Act of 2006.

- (e) The *International Transfer of Prisoners (Military Commission of the United States of America) Regulations 2007* does not seek to oust the jurisdiction of the High Court.
- (f) The suspension of Mr Hicks' sentence is subject to certain conditions, including that he will not speak to the media for a period of one year. However, under the terms of the transfer arrangement, the Australian Government is only bound to enforce the sentence imposed by the US to the extent that it is compatible with the Australian Constitution.
- (g) The intention of the Proceeds of Crime Act is to prevent criminals from being able to enjoy the fruits of their crimes, by depriving them of the proceeds and benefits gained from criminal conduct and to prevent the re-investment of those proceeds and benefits in further criminal activities. The Government has advice that the offence Mr Hicks has been convicted of would be covered by the *Proceeds of Crime Act 2002*. It would not be appropriate to speculate further about this matter.