A response from the Commonwealth Attorney-General, the Hon Philip Ruddock MP

Far from the 'sustained indifference' which Mr Barker asserts the government has shown towards Mr Hicks and Mr Habib, the government has always been concerned that Australian detainees held in United States custody at Guantanamo Bay receive humane treatment and, if tried, receive a fair and transparent trial.

We continue to discuss the military commission process with US authorities and this matter has been raised at the highest political levels. The Prime Minister discussed the military commission process with President Bush during the President's October visit to Australia. The Prime Minister told the President that he would like to see the process of consultation between our two countries brought forward and accelerated.

The military commission rules have not been changed for Mr Hicks. Rather, the government has clarified, and continues to clarify, with the United States how the military commission process will be applied to the case of Mr Hicks. This has included seeking an assurance from the United States, which the US has granted, that he will receive no less-favourable treatment than any other non-US citizens who may be tried by military commission. If Mr Habib is nominated as eligible for trial, the government will do the same in his case.

'The United States has said that detainees will be released when they are no longer of law enforcement, intelligence or security interest. Several detainees have already been released on those grounds.'

The rules governing the military commissions provide fundamental protections and legal guarantees for accused persons. Contrary to Mr Barker's assertions, these 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.

In addition to the fundamental procedural guarantees included in the military commission process, and as a result of the government's detailed discussions with the US, Mr Hicks will benefit from the following:

- The US will not seek the death penalty in his case.
- An Australian lawyer with appropriate security clearances may be retained as a consultant to Mr Hicks's legal team at his request, following approval of military commission charges. His direct contact with such a lawyer will be further discussed with US authorities.
- Conversations between Mr Hicks and his lawyers will not be monitored by the US, despite this being allowed in some circumstances by military commission rules.
- The prosecution in Mr Hicks's case does not intend to rely on evidence requiring closed proceedings from which the accused could be excluded.
- Subject to any necessary security restrictions, the trial will be open, the media will be present and Australian officials may observe proceedings.

Should Mr Hicks be tried and convicted, Australia and the US have agreed to work towards putting arrangements in place to transfer him to Australia to serve any penal sentence in Australia in accordance with Australian and US law.

Legal status

Australia and the US have different international legal obligations under the law of armed conflict. While both States are parties to the Geneva Conventions of 1949, Australia is a party to the 1977 Protocol I Additional to the Geneva Conventions, and the US is not. US compliance with its obligations under international law is primarily a matter for the United States.

The position of the United States is that the detainees are unlawful enemy combatants. The law of armed conflict recognises that only certain classes of people are permitted to take part in hostilities as lawful combatants.[1] The US has noted that persons not included in the recognised classes, and who take part in the hostilities, do so unlawfully. They are therefore regarded by the US as unlawful enemy combatants who are not entitled to prisoner of war status as set out in Article 4 of the third Geneva Convention 1949.

The detainees are within US custody. It is for the US to determine under applicable international law whether or not the detainees fall within the categories of persons entitled to prisoner of war status. In cases of doubt persons who have committed belligerent acts are to be treated as prisoners of war until an assessment can be made by a competent tribunal. In the case of the detainees, the United States, as the detaining power, has decided that there is no doubt. While Mr Barker may not agree with this assessment, it does not necessarily follow that a violation of the law of armed conflict is 'immediately apparent'.

Mr Barker says that the United States' war on terror is incapable of definition. He claims this means that detainees will be held indefinitely. The United States Congress has authorised the President to use 'force against those nations, organisations, or persons' that were involved in the terrorist attacks of 11 September 2001 in order 'to prevent future actions of international terrorism against the United States.' The United States has said that detainees will be released when they are no longer of law enforcement, intelligence or security

interest. Several detainees have already been released on those grounds. There is no reason to assume that the United States will hold detainees indefinitely.

Military commissions

Although the use of military commissions is rare, it is not unprecedented. 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 jurisdiction of military commissions continues to be saved by a provision in the United States Uniform Code of Military Justice.[2]

The rules and procedures governing the military commission process are not the same as those that apply in civil criminal trials. However, fundamental guarantees are included in those rules and procedures. Contrary to Mr Barker's claims, cases must be proved beyond a reasonable doubt. The accused is presumed to be innocent until proven guilty.[3]

The accused will be represented at all times by military defence counsel who have been ordered to provide a 'zealous' defence and who have expertise in military law.[4] 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.[5] 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.

Mr Barker refers to the written agreement that defence counsel will be required to sign before acting for an accused in military commission proceedings. Yes, military commission instructions provide that communications between a lawyer and his or her client may be monitored. However, Mr Barker fails to point out that those same instructions provide that information derived from such communications will not be used in proceedings against the accused who made or received the communication.[6] Further, the US has already told the Australian Government that in Mr Hicks's particular case, conversations between Mr Hicks and his lawyers will not be monitored.

The written agreement requires a lawyer to reveal to authorities information relating to the representation of the accused where the lawyer reasonably believes it necessary to 'prevent the commission of a future criminal act' that they believe is 'likely to result in death or substantial bodily harm or significant impairment of national security.'[7] Mr Barker objects to this rule. However, the Professional Conduct and Practice Rules of the Law Society of NSW state that a lawyer may disclose information received from a client for the purpose of avoiding the probable commission or concealment of a felony.[8] The potential saving of lives justifies placing a duty on legal professionals in these extraordinary circumstances.

Mr Barker claims that the agreement requires counsel to waive the client's 'ability to test the constitutionality of the proceedings.' There is no such requirement in the agreement. Yes, President Bush's military order of 13 November 2001 states that an accused shall 'not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought' on his or her behalf.[9] That does not mean that a lawyer cannot seek to bring a proceeding in a court on behalf of a detainee. Whether or not the court will find it has jurisdiction over the proceeding is a matter to be decided by the courts.

Yes, there are restrictions on a lawyer's travel and his communications. Given the security issues related to these cases, such restrictions are not unreasonable. Let us not forget that we are living in a world where the security implications of these matters are real and not imaginary.

Before emotive criticisms are levelled at the military commission process, I would urge careful consideration of the facts. The alleged violations of international and domestic law are not as readily apparent or obvious as Mr Barker has asserted.

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1 See for example Article 4, Third Geneva Convention 1949

2 10 USC sec 821

3 Military Commission Order No. 1, Article 5

4 Military Commission Order No. 1, Article 4(C)(2)

5 Military Commission Order No. 1, Article 5

6 Military Commission Instruction No. 5, Annex A, Article II(I)

7 Military Commission Instruction No. 5, Annex A, Article II(J)

8 Law Society of New South Wales, *Professional Conduct and Practice Rules*, Rule 2.1.3

9 Military Order of 13 November 2001, Section 7(b)(2)