

# David Hicks and Retrospective Criminal Laws

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## Executive Summary

The rationale behind the prohibition of retrospective criminal laws is that people should not be convicted and sentenced for actions that were not illegal when they were taken without fair warning that the conduct was criminal. A retrospective law is unjust because it deprives people of the knowledge of what behavior will or will not be punished and makes breaches of the criminal law a lottery at the whim of those in power.

Except in Victoria, there is no constitutional protection against retrospective legislation in Australia.

The Constitution of the United States prohibits retrospective legislation.

Australia, however, is a party to an international treaty which prohibits retrospective criminal laws (the ICCPR – Article 15). Australia has also incorporated the war crimes defined by the Rome Statute into Division 268 of the *Criminal Code*. It is a war crime to deny a protected person a fair trial, including prosecuting a trial for a retrospective offence. To ‘counsel’ or ‘urge’ an illegal trial of this kind is also an offence.

The charge of ‘material support for terrorism’ is founded on a classic retrospective offence. The Military Commissions Act was signed into law in the United States by President Bush in October 2006. It adapted an earlier US Federal offence to apply to a foreign national like David Hicks in Afghanistan, it has critical differences in its basic elements and increases the penalty from 10 years to life imprisonment. Hicks, however, is alleged to have committed his offence in Afghanistan in 2001. The argument that the new offence is not retrospective but is merely a ‘codification’ of a pre-existing US Federal offence, is untenable.

There has now been a significant reversal of policy by the Federal government based on its previous resistance to charging Hicks with a retrospective offence in Australia. It now supports and is pressing the US to do what it was not prepared to do locally – prosecute Hicks for a retrospective offence.

In so doing, the Australian government and its responsible Ministers have:

- Exposed themselves to breaching the Australian *Criminal Code*; and
- Exposed Hicks to further and unacceptable delay in his trial by an inevitable constitutional challenge to the retrospective offence in US courts – a course which is invited by charging him with this offence.

## Rationale for Prohibiting Retrospective Laws

The rationale behind the prohibition of retrospective criminal laws is that people should not be convicted and sentenced for actions that were not illegal when they were taken without fair warning that the conduct was criminal. A retrospective law is unjust because it deprives people of the knowledge of what behavior will or will not be punished and makes breaches of the criminal law a lottery at the whim of those in power.

## Constitutional Position in Australia

Retrospective laws, at least at the Federal level, are not prohibited in Australia. While the courts will, as a matter of statutory construction, normally interpret laws not to have a retrospective effect, if retrospectivity is clearly intended by the legislature, the courts are bound to enforce it.

The High Court confirmed in the course of argument in the case of *Baker v The Queen*<sup>1</sup> that Federal Parliament does in fact have the power to pass retrospective criminal laws without trespassing on the judicial power referred to in chapter III of the Commonwealth Constitution.

The position in Australia is that, at least at the Federal level and in all States other than Victoria, there is no constitutional protection against retrospective legislation, whether criminal or otherwise.

This may be contrasted with the position in a number of other countries. In Indonesia, for example, the Indonesian Constitutional Court recently ruled to strike down anti-terrorism laws introduced shortly after the Bali bombings of 12 October 2002. This resulted in the conviction of one terror suspect being overturned and a further decision to withdraw charges against another alleged terrorist. In spite of these outcomes being greeted with dismay and even outrage in some quarters in Australia, there is little doubt that the outcome was consistent with the proper application of the Indonesian constitution and the rule of law. Under the amended Indonesian anti-terrorism legislation, committing or assisting terrorist acts was punishable by death and section 46 of the law authorized its retrospective application. Article 28I of the Indonesian constitution, however, prohibited prosecution for a retrospective offence. The constitution describes this as a "basic human right that may not be diminished under any circumstances at all". In Indonesia the constitution is the supreme law and a law that conflicts with it is not valid. Retrospective laws are therefore constitutionally invalid under Article 28I and the Indonesian Constitutional Court ruled accordingly.

An example of the operation of the 'supremacy' of Federal Parliament in relation to retrospective laws in Australia is provided by the Commonwealth's "bottom of the harbour" tax legislation of the 1980's.<sup>2</sup> In 1982 the Commonwealth Parliament passed a number of related Acts, including the *Taxation (Unpaid Company Tax) Assessment Act* which aimed to

<sup>1</sup> [2004] HCA 45 (1 October 2004)

<sup>2</sup> See: A. Freiberg, "Ripples from the Bottom of the Harbour: Some Social Ramifications of Taxation Fraud" (1988) 12 Crim.L.J. 136 at 159

recover tax evaded under the “bottom of the harbour schemes” which had been declared illegal. This Act expressly provided for retrospective operation enabling the recovery of tax previously avoided at a time when the schemes had not been declared illegal. In his second reading speech on the 1982 Bill, the then Federal Treasurer, John Howard, acknowledged the retrospective nature of the new legislation but justified this aspect as follows:

“Our normal and general reluctance to introduce legislation having any retrospective element has, on this occasion, been tempered by the competing consideration of overall perceptions as to the equity and fairness of our taxation system and the distribution of the tax burden.”<sup>3</sup>

In Victoria the Charter of The Charter of Human Rights and Responsibilities Act 2006 came into operation on 1 January 2007. The Charter is a set of human rights which receives recognition and defined protection by law. Government departments and public bodies are required to observe these rights when they create laws, set policies and provide services.

New laws in Victoria are now required to be checked against the Charter. All new laws in Victoria require a Statement of Compatibility to advise Parliament whether the laws meet the standards set, and in the circumstance that a law does not meet human rights standards, the Government is expected to explain how and why. In exceptional circumstances Parliament may strike down a law that does not uphold human rights. From 1 January 2008, the Supreme Court will be empowered to issue a Declaration of Incompatibility requiring the Government to reconsider legislation but it does not have the power to strike down legislation. Thus Parliament retains the final authority as to the passing of legislation in Victoria.

Section 27 of the Victorian Charter of The Charter of Human Rights and Responsibilities Act 2006 contains a prohibition against retrospective criminal laws in the following sub-sections:

(1) A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.

(2) A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

(3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.

(4) Nothing in this section affects the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.

## **Historical Roots**

*Nullum crimen, nulla poena sine praevia lege poenali* (Latin: *No crime (can be committed), no punishment (can be imposed) without a previous penal law*) is a basic maxim in continental European legal thinking. The principle that people should be free from

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<sup>3</sup> House of Representatives, *Debates* 1982, Vol. HR129, p. 1866

retroactive law has its roots in this principle: that there is no crime or punishment except in accordance with law.

As early as 1651, Hobbes wrote:

No law, made after a fact done, can make it a crime ... For before the law, there is no transgression of the law.<sup>4</sup>

According to Glanville Williams,<sup>5</sup> the principle was first formulated in a constitution of importance in Article 8 of the French Declaration of the Rights of Man of 1789, which reappeared in the French Constitution of 1791, and remains in the French Code Pénal. It became part of the Bavarian Code in 1813, when Feuerbach formulated the Latin maxim and included it in the Code. It was recognized in the German Penal Code of 1871 and was guaranteed by the Weimar Constitution. It is clear that the principle had wide acceptance in Europe by the end of the nineteenth century.<sup>6</sup>

From the nullum crimen maxim, jurists have deduced the principle of prohibition of retrospective penal laws.

### **Constitution of the United States**

Since 1789 in the United States, the passing of retrospective (or in US “ex post facto” or “retroactive”) laws are prohibited by Article I section 9 (applying to federal law) and section 10 (applying to state law) of the U.S. Constitution.

When deciding *ex post facto* cases, the United States Supreme Court has referred repeatedly to its ruling in the *Calder v. Bull* case of 1798, in which Justice Chase established four categories of unconstitutional *ex post facto* laws. In this seminal case the Calders claimed that a Connecticut law relating to testamentary dispositions of property under a will was void. The sole issue in the case was whether the law of Connecticut was an ex post facto law and therefore void within the prohibition of the Federal Constitution because it violated Article I, section 10.

Justice Chase said in his 1798 judgment:

“The Legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.”

And further in defining the categories of ex post facto legislation that are prohibited by the US Constitution:

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<sup>4</sup> Hobbes, *Leviathan* (1651), Chapters 27-28, quoted in Williams, op. cit., p. 580

<sup>5</sup> G. Williams, *Criminal Law, The General Part* (2nd ed., 1961), p. 576

<sup>6</sup> James Popple, *The right to protection from retroactive criminal law*, *Criminal Law Journal*, vol. 13, no. 4, August 1989, pp. 251-62

"I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. 1st. Every law that makes an action , done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive."

### **International Law, the Rome Statute and the Australian Criminal Code**

The legal principle directed against retrospective criminal laws has been incorporated into international law and international criminal law.

Emphasizing its importance among the community of nations, the principle is found in Article 11 of the United Nations Universal Declaration of Human Rights.<sup>7</sup>

Central to the modern international law framework of human rights is the International Covenant on Civil and Political Rights 1966 (the "ICCPR").<sup>8</sup> This treaty embodies the fundamental civil and political rights contained in the Universal Declaration of Human Rights. With over 150 States Parties, the Civil and Political Covenant is the most widely accepted human rights treaty in existence. The United States ratified the ICCPR in 1992 and is therefore bound by its terms.<sup>9</sup> Australia is also bound by the Covenant, having ratified the treaty in 1980.<sup>10</sup>

The principle against retrospective criminal offences is re-stated in Article 15 of the International Covenant on Civil and Political Rights 1966 (ICCPR), where the following is provided:

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby."

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<sup>7</sup> 10 Dec, 1948, G.A. Res.217A, 3 U.N. GAOR, U.N. Doc. A/810 ("Universal Declaration"), agreed at the United Nations General Assembly on 10 December 1948.

<sup>8</sup> 16 Dec., 1966, 999 U.N.T.S. 171.

<sup>9</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 with entry into force 23 March 1976. The ICCPR was ratified by the United State on 8 September 1992.

<sup>10</sup> The ICCPR was ratified by Australia on 13 August 1980 (Australian Treaty Series [1980] ATS 23).

The principle is also enshrined in several national constitutions, and a number of international instruments. See for example the European Convention on Human Rights 1950.<sup>11</sup>

The Rome Statute of the International Criminal Court (“the Rome Statute”) entered into force on 1 July 2002. It established the International Criminal Court (ICC) and defined war crimes within the jurisdiction of the ICC. Australia signed the treaty in 1998 and ratified it on 1 July 2002 and the treaty entered into force for Australia on 1 September 2002. There are now 104 countries that are bound by the Rome Statute and subject to the jurisdiction of the ICC.

Following ratification, the Australian Parliament then introduced Division 268 into the Australian *Criminal Code* thereby incorporating the war crime provisions of the Rome Statute into Australian law. In describing the importance of the introduction of the Rome Statute into Australian law the former Attorney-General Daryl Williams said in July 2002 “*The establishment of the International Criminal Court on 1 July 2002 and Australia's ratification of the Rome Statute establishing the court is one of the most significant recent developments in international humanitarian law. It was clear after Australia's signature of the Rome Statute in 1998 that ratifying the International Criminal Court Statute was an issue of importance to many members of the community. This is why the Government took such a considered approach to ratification of the ICC Statute and to the development of the domestic legislation implementing Australia's obligations under the Statute in Australian law.*”

Division 268 of the *Criminal Code* creates offences of denying a fair trial to persons protected by the Geneva Conventions. The offences are found in section 268.31 (a trial of a protected person arising out of an international armed conflict) and section 268.76 (a trial of a protected person arising out of a conflict which is not of an international character). Hicks is clearly a protected person, whether his precise status is that of a presumed prisoner of war under Article 5 of the Third Geneva Convention (GC3) or, consistently with the findings of the US Supreme Court in *Hamdan v Rumsfeld*, he is otherwise a protected person under Common Article 3 of the Four Geneva Conventions (GC 1-4).

War crimes in the *Criminal Code* include offences which strike at conducting unfair and irregular trials arising out of an armed conflict. The offences include prohibitions against prosecuting charges in criminal trials against protected persons based on retrospective offences.

Section 268.31 of the *Criminal Code* provides:

**268.31 War crime—denying a fair trial**

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- (1) A person (the **perpetrator**) commits an offence if:
  - (a) the perpetrator deprives one or more persons of a fair and regular trial by denying to the person any of the judicial guarantees referred to in paragraph (b); and
  - (b) the judicial guarantees are those defined in articles 84, **99** and 105 of the Third Geneva Convention and articles 66 and 71 of the Fourth Geneva Convention; and

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<sup>11</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (ECHR), was adopted under the auspices of the Council of Europe in 1950. The Convention also established the European Court of Human Rights, which has its seat in Strasbourg.

- (c) the person or persons are protected under one or more of the Geneva Conventions or under Protocol I to the Geneva Conventions; and
- (d) the perpetrator knows of, or is reckless as to, the factual circumstances that establish that the person or persons are so protected; and
- (e) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for 10 years.

Article 99 of GC3 provides:

"No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed"

Therefore, the Section 268.31 war crime may be committed by prosecuting a GC3 POW for a retrospective criminal offence.

Section 268.76 of the *Criminal Code* provides:

**268.76 War crime—sentencing or execution without due process**

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- (1) A person (the **perpetrator**) commits an offence if:
  - (a) the perpetrator passes a sentence on one or more persons; and
  - (b) the person or persons are not taking an active part in the hostilities; and
  - (c) the perpetrator knows of, or is reckless as to, the factual circumstances establishing that the person or persons are not taking an active part in the hostilities; and
  - (d) either of the following applies:
    - (i) there was no previous judgment pronounced by a court;
    - (ii) the court that rendered judgment did not afford the essential guarantees of independence and impartiality or other judicial guarantees; and
  - (e) if the court did not afford other judicial guarantees—those guarantees are guarantees set out in articles 14, **15** and 16 of the Covenant [the ICCPR]; and
  - (f) the perpetrator knows of:
    - (i) if subparagraph (d)(i) applies—the absence of a previous judgment; or
    - (ii) if subparagraph (d)(ii) applies—the failure to afford the relevant guarantees and the fact that they are indispensable to a fair trial; and
  - (g) the perpetrator's conduct takes place in the context of, and is associated with, an armed conflict that is not an international armed conflict.

Penalty: Imprisonment for 10 years.

Article 15 of the ICCPR provides:

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed"

Therefore, the Section 268.76 war crime may be committed by prosecuting a Common Article 3 protected person for a retrospective criminal offence.

The *Code* has extra-territorial effect so that offences comprising the war crimes apply whether or not the relevant conduct or its result occurs in Australia or elsewhere.<sup>12</sup> Thus the *Code* has application to the conduct of a trial of David Hicks before a Military Commission held in Guantanamo Bay or anywhere else. Further, and importantly, under the *Code*, to “counsel”<sup>13</sup> or “urge”<sup>14</sup> another party to conduct a trial that does not meet the mandated standards, including conducting a trial for a retrospective criminal offence, can constitute a war crime.

By pressing the United States to proceed with this charge, members of the Australian government are at serious risk of committing a war crime under the Australian *Criminal Code*. If that occurs, the Prosecutor of the International Criminal Court could initiate charges, or provided the Federal Attorney-General consents, charges could be laid before an Australian criminal court.

### **The Hicks’ Draft Charge of ‘Material support for terrorism’**

The US Prosecutor of the Military Commission has prepared and sworn two draft charges against David Hicks. He has done so purportedly pursuant to the Military Commissions Act of 2006 (US) (MCA). After its passage through Congress, the MCA was signed into law in the United States by President Bush on 17 October 2006. Before the charges can be formalized and served, the MCA and its regulations require the charges, and the evidence in support of the charges, to be independently reviewed and approved by a Convening Authority appointed under the Act.

The essence of draft Charge 1 against Hicks is as follows:

CHARGE I: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.  
SECTION 950v(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM

22. SPECIFICATION 1: In that the accused, David Matthew Hicks (a/k/a "David Michael Hicks," a/k/a "Abu Muslim Australia," a/k/a "Abu Muslim Austraili," a/k/a "Abu Muslim Philippine," a/k/a "Muhammad Dawood;" hereinafter "Hicks"), a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from in or about December 2000 through in or about December 2001, intentionally provide material support or resources to an international terrorist organization engaged in hostilities against the United States, namely al Qaeda, which the accused knew to be such an organization that engaged, or engages, in terrorism, and, that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

Section 950v(25) of the Military Commissions Act (MCA) is the source of the offence. It provides:

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<sup>12</sup> See Sections 15.4 and 268.117 Criminal Code

<sup>13</sup> See Section 11.2 Criminal Code

<sup>14</sup> See Section 11.4 Criminal Code

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(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM.—

(A) OFFENSE.—Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.

(B) MATERIAL SUPPORT OR RESOURCES DEFINED.—In this paragraph, the term ‘material support or resources’ has the meaning given that term in section 2339A(b) of title 18.

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### **Jurisdiction of the Military Commissions Act of 2006 (MCA)**

“Any person subject to this chapter” as provided in Section 950v(25) of the MCA is a reference to all those who are subject to trial by Military Commission under the Act.

Under Section 948c of the MCA “Any alien unlawful enemy combatant is subject to trial by military commission under this chapter”. Under Section 948d a finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is determinative for purposes of jurisdiction for trial by military commission.

Further, a military commission established under the MCA is granted jurisdiction by Section 948d to “try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.” Section 948d therefore opens the way for the creation of retrospective offences under the MCA.

The question then becomes, does Section 950v(25) of the MCA create a retrospective offence ?

### **Pre-existing US Law and Comparisons with Section 950v(25) MCA <sup>15</sup>**

There are two statutes in the US criminal code with the title of "Providing material support": One is 18 U.S.C. 2339A, "providing material support to terrorists", and the other is 8 U.S.C. 2339B, "providing material support to a designated terrorist organization."

If the MCA is not retrospective, then the MCA should be a mirror image of the US federal statute offences. But it is not. The differences between the MCA offence under section 950v(25) and sections 2339A/2339B are not superficial. The MCA offence removes elements, attempts to create a broader offence and increases punishment. The MCA offence also applies to foreign nationals like David Hicks and others operating outside the territory of the United States, which the US federal statute offences do not.

2339A prohibits support in preparation of or carrying out a violation of another specified U.S. criminal statute. There is a long list of US offenses which the support must

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<sup>15</sup> See generally for this section Maj. Dan Mori *Opinion* the Melbourne “Age” 7 February 2006

further. This is a significant element of 2339A. Yet, in the MCA this list of US federal offenses is removed and in their place the MCA creates the offense of "terrorism". The removal of a critical element of 2339A and the substitution of the newly created offense of terrorism is retrospective. This is a substantial modification of 2339A.

2339B prohibits support to a designated terrorist organization. The organization must be so designated by the US Secretary of State. This element of 2339B is eliminated within the MCA which does not require an official designation on the part of the Secretary of State.

In 2004, 2339B was modified again to remove the requirement that the person committing the offense be "within the United States or subject to the jurisdiction of the United States." However, even on the extended extra-territorial operation of 2339B as and from the commencement of the 2004 amendment, none of the categories of extended operation would have covered David Hicks activities in Afghanistan in 2000 - 2001.

There is also a significant difference in the maximum punishment authorized under the MCA compared to these US federal offenses. The MCA maximum punishment is life imprisonment.

The maximum punishment for a violation of 2339A or 2339B was 10 years. On 26 October 2001, the maximum punishment for both was amended to 15 years. This change also permitted a maximum penalty of confinement for life if any death resulted.

No one is accusing Mr. Hicks of causing anyone's death, so if prosecuted for the US federal offense the maximum punishment he would face is 10 or 15 years depending on when the offense occurred. Under the commission system he is facing a lifetime of imprisonment.

Accordingly, and on a number of grounds, the offence created by section 950v(25) MCA, when applied to the activities of David Hicks in Afghanistan between December 2000 to December 2001, is a classic retrospective offence.

The Military Commissions Act of 2006 is a legal experiment which is vulnerable to, and indeed invites, legal challenges to the Supreme Court of the United States. In this context, section 950v(25) MCA stands out as being prone to legal challenge because it violates the prohibition against ex post facto Federal laws in Article 1 section 9 of the US Constitution. If a constitutional challenge on this basis (or indeed on any other of a number of bases) is mounted, further delays in a trial for David Hicks can be expected for a number of years, and this will be the case as long as a trial before a military commission is persisted with.

## Position of the Federal Government

In February 2004 the Prime Minister stated the position of his government on retrospective criminal laws in no uncertain terms. Mr Howard said on ABC television in relation to the Hicks matter: “It’s fundamentally wrong to make a criminal law retrospective.”

The Federal government has continued to make it clear that such a course of action is not appropriate because it raises the prospect of creating retrospectively an offence which in reality would be for the purposes of charging one person. For example, in April 2006 the Attorney-General Phillip Ruddock posted the Howard government’s answers to frequently asked questions about David Hicks on his website. The FAQ’s included the following question and answer: “Can the Australian Government enact a new offence or enact amendments to apply retrospectively to Mr Hicks? The Government has made it clear that such a course of action is not appropriate. It raises the prospect of creating retrospectively an offence which in reality would be for the purposes of charging one person. In addition, there is no certainty that the High Court would now uphold a retrospective criminal offence created for Mr Hicks.”

Indeed, this approach has underpinned the position of the Federal government on Hicks. Because he should not (or could not) be charged with any retrospective offence in Australia, this justified the United States charging Hicks under US law and continuing to detain him in Guantanamo Bay in the meantime (the implication being that the US had applicable, valid non-retrospective laws in place with which to charge Hicks). However, it now appears that one of the two charges intended to be pressed against Hicks is not founded upon a valid non-retrospective US law.

Furthermore, there has now been significant reversal. On the announcement of the draft charges against Hicks by US prosecutors, which included the draft section 950v(25) MCA retrospective offence, there was positive encouragement from the Prime Minister of Australia, declaring that he was “glad that the charges are being laid and that the deadline I set has been met.” Public statements made since, regularly and consistently point to the Federal government continuing to press the United States administration to proceed with the trial of the draft charges, including the retrospective offence, without delay.

No qualification has been made raising any objection or concern about the retrospective nature of the section 950v(25) MCA offence. On the contrary, the position of the Federal government has been that the 950v(25) MCA offence is not a retrospective law, but rather is merely the codification of an existing US Federal Law. This position is legally untenable.

Further and importantly, this conduct raises a serious prospect of offences having been committed and continuing to be committed by members of the Federal government contrary to Division 268 and sections 11.2 and 11.4 of the Australian *Criminal Code*.

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