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The Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House
Canberra ACT 2600

Dear Secretary

Inquiry into Provisions of the Anti-Terrorism Bill 2004

Thank you for the opportunity to make a submission to this inquiry.

Proposed Amendments to Crimes Act 1914

Disregarded Time

Section 23CA(8), in specifying 'dead time' to be to be disregarded in ascertaining compliance with the time limits under ss 23CA(4) or (6), ought to be amended to impose an absolute limit upon the detention. Otherwise, the detention could be extended for undue periods. For example, while the time that can be disregarded while waiting for a reply from international agencies must not 'exceed the amount of the time zone difference', this alone could add up to an extra 23 hours to the detention period. This and the other potentially lengthy periods of disregarded time mean that there should be a cap on the absolute amount of time a suspect can be kept in custody without charge.

While selecting a time limit is difficult, 36 or at most 48 hours would appear appropriate. This time period would be within the equivalent detention regimes in the United Kingdom and Canada. In the United Kingdom, the police may detain suspected terrorists for 48 hours extendable for a further 5 days (*Terrorism Act 2000* (UK) s 41), and in Canada police may detain suspected terrorists for 24 hours extendable for a further 48 hours (*Anti-Terrorism Act*, SC 2001, c 41 s 4, inserting ss 83.3(6) and (7) into *Criminal Code*, RS 1985, c C-46).

The extended length of time for which a terrorism suspect may be held means that new issues arise that were not necessary to deal with under the existing detention without charge regime for criminal suspects. Protocols and other protections should be considered like those inserted into the *Australian Security Intelligence Organisation Act 1979* in regard to the detention of non-

suspects. Matters to be dealt with might include ensuring that suspects are not prevented from sleeping as necessary.

Proposed Amendments to the Proceeds of Crime Act 2002 (Cth)

Retrospective Operation

Section 4 of the Bill states that applications can be made for 'conduct that occurred before the commencement of this Act'. This would give the amendment a retrospective operation in that certain conduct that would not have been subject to this regime when the conduct occurred would now be so covered. Only a very strong argument could justify a departure from the normal rule that a law should not be given a retrospective operation (especially in this case given the free speech interests also involved). This change is inconsistent with the statement in the Explanatory Memorandum that 'None of these amendments are intended to operate retrospectively'. The Bill should be redrafted to remove its retrospective operation so as to reflect this statement.

Definition of 'foreign indictable offence'

The definition of 'foreign indictable offence' includes offences triable 'by a military commission established under a specified order of the President of the United States of America'. It is unusual to recognise these as offences when they are creations of the executive arm of government. Such recognition breaches basic understandings of the separation of powers in constitutional democracies like Australia.

Moreover, neither the Bill nor the Explanatory Memorandum provides a justification for singling out the United States in this respect. It is unusual that a sovereign nation like Australia would recognise in its own legislation the executive orders of a foreign power. It is even more unusual that only one nation is specified. The specific nature of this recognition means that the law would, in effect, single out David Hicks and Mamdouh Habib, now held by executive order in Guantanamo Bay. This gives the law some of the features of a Bill of Attainder. The amendment is in any event inappropriate given that these detainees have been denied access to natural justice and their rights under the rule of law, especially the right to be brought before a civilian court. This should not be impliedly endorsed by Australian law.

Whether the detention of David Hicks and Mamdouh Habib is lawful and whether the President of the United States has the power to deny them access to civilian courts is soon to be decided by the Supreme Court of the United States. Until this has been determined, it is inappropriate enact legislation that increases the impact of the military process referred to in the Bill. Otherwise, if Parliament enacts this definition of 'foreign indictable offence', Australia may find itself in the near future with a law that recognises an executive order of the United States that has been held to be unconstitutional.

Yours sincerely

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