
Second Annual public Interest Address
David Hicks and Guantanamo Bay
by Lex Lasry QC

Thank you indeed for inviting me to speak at this lunch – I am honoured to be here in the presence of so many distinguished guests.

I was invited by Mr Woodyatt to make copies of a paper available but I have taken the easy way out and have provided a copy of the report that I prepared for the Law Council of Australia in August of 2004.

There is no doubt that the case of the *United States v David Matthew Hicks*, the similar case of Mamdouh Habib and the military commission process at Guantanamo generally is becoming a disgraceful chapter in the life of the United States military justice process. It gives substance to the view held by Groucho Marx that military justice is to justice what military music is to music.

Worse, from the Australian point of view is that our government refuses to acknowledge the faults and looks us in the eye and says it is OK. It is not OK and never will be.

The fact is though that there is genuine military justice in the United States just as there is in Australia and the only question really is why David Hicks and Mamdouh Habib can't be part of that process. Or if not that, then the civilian criminal justice system.

David Hicks was captured by the Northern Alliance in Afghanistan in December 2001 and transferred to Camp X Ray at Guantanamo Bay Cuba in January 2002. He waited another 18 months to be designated for trial and until December of 2003 for a military lawyer to be assigned to him. He was not actually charged until June 2004 – two and a half years after his capture.

Even more concerning in many ways is that there are many people in Guantanamo nowhere near as fortunate as David Hicks in that they will spend many years in detention without trial without a country willing to take an interest in their welfare. There is no evidence that there are genuine terrorists at Guantanamo – many have been or are about to be released after years because the US military acknowledge they have done nothing wrong.

It has taken far too long for the general community in this country to come to realise that there is something very unjust about what is going on at Guantanamo. In my view that has happened due to the efforts of one person in particular – Terry Hicks. There is no question that Dan Mori, Stephen Kenney, Michael Ratner and Clive Stafford-Smith have done great work. But people are used to whingeing, bleeding heart lawyers, as they are called.

Terry Hicks is an ordinary Australian bloke who has gone in to bat for his son in a most heroic way and I think he has turned the tide.

It must be acknowledged that some progress has also been made, in a sense, by the US Government being willing to expose their process to international scrutiny. This flawed process is now going to be examined by human rights groups from all over the world and it won't pass.

The other area of progress is of course the judgment of the US Supreme Court in the case of *Rasul v Bush* on 28 June 2004, when the Court ruled that the detainees have access to US Courts to

challenge their detention. Then the problem arose that other detainees had that fact kept from them so they had no idea they could challenge.

In addition Neil Sonnet from the American Bar Association is applying his very considerable talent and the significant resources of that organisation to scrutiny of the military commission process and there is no way it can pass the test.

It would of course help if the Australian Government was prepared to recognise the staggering injustice of it all.

Through me the Law Council of Australia has observed one day of military commission hearing and looked at the rules that will apply but the process is off to a bad start.

My report was not an analysis of the case against David Hicks because the detail of that case is not available to me or publicly. What my report looks at is the risk of unfairness to David Hicks in his trial and the point of reference for that is the nature or structure of the process of military commissions that will apply.

In this process there are some fundamental problems which others had already seen and which were obvious to me. I do not see how they can be fixed by any form of tinkering with a flawed process. Such has been recently demonstrated and I will come back to that.

Some of the problems can be summarised.

Firstly, this purports to be a system of criminal justice. David Hicks is charged with what are effectively criminal offences – conspiracy, attempted murder and the military offence of aiding the enemy.

But the system is missing some of the requirements of criminal justice and the first of those is **independence**.

This military commission is not independent in any manner. It is a creation of the executive of the US Government and controlled by it. It is not set up under legislation like courts are. It has no independence from the US Department of Defence.

Those in control of this process are the President of the United States, the Secretary of Defence and others at the Pentagon. The President has already said that the detainees at Guantanamo are "killers". This structure was set up despite the existence of a separate independent system of military justice and, of course, the civilian criminal justice process in the US itself. Both of those have a degree of impartiality and independence which seem to be lacking in the military commission process.

As is well known international instruments set out the basic requirements for a fair trial such as Article 14 of the International Covenant on Civil and Political Rights require competent, impartial and independent tribunals.

The military commission that will hear the Hicks case also raises a number of what might be described as structural issues.

Apart from the presiding officer, the remaining members have no real experience in such a task and no legal training yet they will be expected to make findings of both fact and law without any direction from any judge. Some of those issues will be complex.

Interestingly, the Presiding Officer appears to have his own legal adviser which role remains undefined but he is an officer of the Department of Homeland Security.

The Commission appears **not to have the power to regulate its own proceedings and to make preliminary rulings** – all of these matters seem to have to be referred back to the Appointing Authority at the Pentagon before whom the accused has no audience.

It was obvious at the outset that particular members of this commission appeared to be lacking in the **high level of independence and partiality required for the task**.

Some members of the commission had involvement in Afghanistan immediately after 11 September 2001 and one was actually involved with what was described as "detainee operations". Another was an intelligence operations and plans officer in Afghanistan in 2001 to 2002. Another member said he had strong emotions about September 11 and that he intended to look at the case objectively and put his emotions aside. He had also previously expressed the view that all the detainees at Guantanamo were terrorists – that is an opinion he now says he has resiled from.

On 8 September 2004, the Chief Prosecutor filed a motion in which they accepted the defence challenge to three of the members. They disagree on one other and as to the presiding officer Colonel Brownbank, they urge that the facts concerning him be carefully evaluated to see whether he should also be removed.

On 19 October 2004, the Appointing Authority at the Pentagon accepted the prosecution motion and removed those three members of the commission but they have not replaced them with new more independent members. And Colonel Brownbank survives despite concerns about his relationship with the Appointing Authority itself.

This one military commission will hear some 6 cases. Potentially, they will be heard consecutively with overlapping allegations and evidence before commissioners who have no legal experience and probably no concept of the dangers of the misuse of evidence in one case in another case. You would never impose such a task on a jury being guided by a judge let alone 4 people with no legal training and no judicial supervision.

There are no rules of evidence to speak of. Everything that might be probative to a reasonable person is in. That means:

- Hearsay with the maker of the original statement not available to give evidence;
- Coerced confessions;
- Identification evidence and all sorts of odd identifications;
- Evidence of people who might be accomplices and with a strong motive to give false evidence.

Hicks is charged with a very broad charge of conspiracy which may be argued under the civilian law to be a misuse of that charge.

There has been a **very long delay** – David Hicks was arrested on 8 December 2001 and held in custody. His lawyer, Major Dan Mori, was assigned 2 years later. They are now still trying to assemble evidence. The law has long recognised the adverse effect of delay.

After conviction, there is **no genuine right of appeal**. There is no independent appeal court – the post trial process simply involves a review process within the Department of Defence and ultimately by Donald Rumsfeld or President Bush.

If Hicks is sentenced after being convicted, the rules specifically make it clear that the **time spent in custody since December 2001** does not count toward that sentence.

This process is being carried out in a military commission hearing complex high on a hill overlooking the bay and as you walk in the door of the building surrounded by armed soldiers you cannot help but see the motto of the Guantanamo Joint Task Force – "**Honour bound to defend freedom**".

It remains my view the Australian Government should request that Hicks and Habib be removed from this process and be put before a proper system of criminal justice or sent back to Australia.

The Attorney-General has declined to comment on these issues specifically. The Prime Minister apparently said my suggestion that Hicks should be brought back to Australia was absurd.

I admit to being perplexed. I simply don't see why they can't see it – and the only explanation is that they do not wish to see it.

Now, with the re-election of the Howard Government it seems the only real chance of avoiding a dramatic injustice is the election of John Kerry as President of the United States.

As Martin Luther King said from prison in 1963: *Injustice anywhere is a threat to justice everywhere.*

International Covenant on Civil and Political Rights

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of his witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be

compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partially attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.