Law Council
OF AUSTRALIA

# David Hicks v the United States

# Summary of the Report of the Independent Observer for the Law Council of Australia

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# Introduction

This report is the third and final report on the David Hicks case produced by Mr Lex Lasry QC in his role as independent observer for the Law Council of Australia.

Mr Lasry travelled to Guantanamo Bay, Cuba on 26 March 2007 to observe the proceedings brought by the United States Government against David Hicks.

Over the course of the following week, Mr Lasry observed David Hicks' arraignment, his guilty plea and the examination and acceptance of that plea, his conviction and sentence.

The report contains Mr Lasry's observations and assessment of that process. His findings are informed not only by the events which unfolded during that week in Guantanamo Bay, but also by the events of the preceding five years of David Hicks' incarceration.

# Summary of Observations and Findings

## Delay

The delay in bringing and finalising proceedings against David Hicks was the responsibility of the US administration and was a direct consequence of its desire to maintain complete control over the fate of the detainees at Guantanamo.

The US Supreme Court found in *Rasul, Hamdi* and *Hamdan* that the US Executive had overestimated and thus incorrectly drawn the boundary of its unfettered authority. However, the response was not to accept the principles of the Court's decisions but rather to minimise and avoid their effect.

## The Charges against David Hicks

The charge of "providing material support for terrorism" is a recently invented and new war crime and was clearly retrospective in its application to Hicks.

Comments made by Chief Prosecutor Colonel Morris Davis on this issue demonstrated a fundamental misunderstanding about the policy against retrospective laws and were deplorable.

The Australian Government never sufficiently concerned itself with the legitimacy of the charges brought against Hicks by the United States. On the contrary, the Australian Government refused to address whether Hicks' alleged conduct, already judged by the Government as reprehensible and warranting punishment, might nonetheless not amount to an offence under US domestic or military law.

## The Shambolic Proceedings on 26 March 2007

The proceedings before the Military Commission on 26 March during which Hicks was arraigned and later entered a guilty plea, were best described as “shambolic”.

Many of the requisite rules and procedures were not in place and the there was a degree of improvisation by the Judge. This led to a situation where there appeared to be a preference for advancing the case and dealing with matters of substance by way of private conferences between the Judge and the parties.

These conferences occurred away from public scrutiny, where no rules were necessary. Issues were resolved and then the outcome was presented to the public as something of a *fait accompli*. This carries obvious implications for transparency and raises questions regarding due process.

Further, it now appears that at the time that matters were being played out in the Military Commission hearing room on Monday 26 March 2007, the pre trial agreement in relation to Mr. Hicks’ plea of guilty had already been finalised. Thus, much of what was occurring was contrived and being done for public and media consumption. Even Hicks had a speaking role to play which he discharged at the appropriate time.

## The Examination of Hicks’ Guilty Plea

There were essentially two counts to the charge against David Hicks. In effect, Hicks pleaded guilty to an allegation of association and training with a terrorist organisation. He did not plead guilty to an allegation of providing material support for a specific terrorist act and this allegation was not pursued.

After satisfying himself that the plea was voluntary and fully informed, the Judge announced the formal finding that the Military Commission found David Hicks guilty of providing material support to terrorism

In order to make a finding of guilt, the Judge had earlier indicated that he was required to find, not only that the plea was voluntary and informed, but also that the facts which Hicks had admitted were sufficient to constitute the elements of the offence. The Judge did not ever embark on that second exercise.

For example, the charge against David Hicks covered the period December 2000 to December 2001. In order to accept the plea and find the charge proven the Judge was required to find that the United States was engaged in an armed conflict throughout this period. In fact, the Authorisation for the Use of Military Force was not passed by Congress until 14 September 2001 in the aftermath of the Twin Towers disaster.

As a further example, in order to establish that the military commission had jurisdiction to hear the charge, the Judge was also required to be satisfied that Hicks was an “alien unlawful enemy combatant”. The Judge simply accepted the assertion in the agreed statement of facts that Hicks was an alien unlawful enemy combatant and had been found to be such by the Combatant Status Review Tribunal (CSRT). This assertion proved to be inaccurate. While Hicks had been found to be an “enemy combatant” by the CSRT he had not been found to be an “unlawful enemy combatant”. In two subsequent Military Commission trials, this has led to the dismissal of charges against the accused, albeit without prejudice.

## The Sentencing Proceedings

If ever there was any residual doubt about the total unfairness of the Military Commission process, it was dispensed with after the Prosecutor's submissions on sentence.

Those submissions were in no way confined to assisting the members of the sentencing panel to decide upon an appropriate punishment for Hicks with respect to the specific offence for which he was charged and convicted. The precise details of that offence, including what might be regarded as aggravating or mitigating circumstances, were rendered meaningless. Instead the prosecutor simply invited the members of the Commission to sentence David Hicks *for being a terrorist* and in that way, to hold him accountable for international terrorism in general. Further, the prosecutor encouraged the members of the Commission to be particularly mindful of the types of crimes David Hicks might have committed if he was not captured and the types of crimes he would always be capable of committing *because he is a terrorist*.

The members of the sentencing panel were told that, under the plea agreement, the maximum period of imprisonment they could impose on David Hicks was seven years.

After retiring briefly, the members of the sentencing panel, all serving members of the US military, agreed to impose the maximum.

The panel evidently decided that no reduction from the maximum penalty available to them was warranted by Hicks' guilty plea; his cooperation with investigations; his apparent good behaviour throughout the period of his imprisonment; his statement of contrition; and his relatively low level of involvement with al Qaeda which did not result in him participating in or providing assistance for any actual act of terrorism.

As is now known, the Pre Trial Agreement required suspension of any part of Hicks' sentence of confinement over nine months. Thus, Hicks' fate was not materially affected by the sentencing panel's harsh approach.

Nonetheless, their approach to their task raises grave concerns about a *"jury"* of senior officers of the US Military who would claim to be able to be impartial in dealing with someone who is presented to them as their enemy. The very use of the word "*jury*" in the context of this process is an insult to the principle at the heart of trial by jury – trial by one's peers

## The Plea Agreement

Several aspects of the plea agreement appear to be relatively standard and reflect the type of undertaking one would expect the State to demand of an accused in return for a reduced punishment.

However, in other respects, the agreement looks remarkably less like the product of plea negotiations and more like an attempt to protect the credibility and interests of the US Government.

The contents of the agreement, coupled with the history of the Hicks matter, serve to support the conclusion that his plea of guilty was the product of an inherently oppressive and coercive system. The agreement reflects a view on the part of the US authorities that liberty is not a right that may only be denied a person in accordance with strict procedure established by law, but rather liberty is a bargaining chip that the State may use to avoid accountability and buy impunity.

The declaration made by David Hicks that his entire period of detention as an unlawful enemy combatant was based upon his capture during armed conflict, was lawful pursuant to the law of armed conflict, and was not associated with, or in anticipation of, any criminal proceedings against him, is mere propaganda. The lawfulness or otherwise of David Hicks' detention under the law of armed conflict is not a question which can be resolved by plea negotiations. The fact that a detainee must acknowledge that his detention is lawful in order to be released, demonstrates the flaws in the process.

## Conclusions – Implications for Australia's International Standing

The *"trial"* of David Hicks, which took place in March 2007, was a charade.

A pre-trial agreement had been signed and the balance of the legal proceedings was entirely surplus to requirements, although designed to lay a veneer of due process over a political and pragmatic bargain. The veneer cracked immediately.

Ultimately, there has been no benefit from this process; only a corrosion of the rule of law.

No ground can be claimed to have been made in the so-called *War on Terror*. The Military Commission process at Guantanamo likewise has neither gained from it, nor shown any prospect of improvement.

Predictably, there has been no response from the Australian Government to the consistent and widespread criticism of the Military Commissions and Guantanamo Bay generally. Their support for this process has been shameful.

They have never put an argument to the Australian public as to why the Military Commission process is "*full and fair*". Now that the Hicks case is over, no doubt the hope is that the issue will disappear – and, regrettably, perhaps it will.

However, Australia's international standing and moral authority has been diminished by its support of a process so obviously at odds with the rule of law. Those with a concern for the protection of due process should be very concerned about the future of this process, particularly given its jurisdiction to impose death penalties.