



AN ANALYSIS OF THE UNITED STATES MILITARY COMMISSIONS: AN UNJUST SYSTEM

An Expert Panel Report

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WHO WE ARE



Background

The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We have some 1,500 members and estimate that they represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

Corporate Structure

The Australian Lawyers Alliance is a company limited by guarantee that has branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. This board is known as the National Council. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a president-elect, who serves a one-year term in that role and then becomes National President in the following year. The members in each branch elect their own state/territory committees annually. The elected office-bearers are supported by ten paid staff who are based in Sydney.

Funding

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

Programs

We take an active role in contributing to the development of policy and legislation that will affect the rights of the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development, with some 25 conferences and seminars planned for 2007. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for education, exchange of information, development of materials, events and networking. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine *Precedent* is essential reading for lawyers and other professionals keen to keep up to date with developments in personal injury, medical negligence, immigration, industrial relations, criminal law, public interest and other areas of the law.

The Expert Panel

The Australian Lawyers Alliance has set up an expert panel to oversee the treatment and ongoing legal process of Australian citizen, David Hicks, who is detained in Guantánamo Bay, Cuba. The panel of expert Australian lawyers will monitor the new regulations and process under which David Hicks could face charges and a trial.

The Australian Lawyers Alliance took the step of establishing the review panel following the failure of the Australian government to support an Australian citizen in foreign legal proceedings under the first military commissions.

The panel members are Simon Morrison, Tom Percy QC and Julian Burnside QC. They will provide regular updates and analysis of proceedings for the Guantánamo Bay tribunals.

Simon Morrison is National President of the Australian Lawyers Alliance. He has been a practising solicitor for 15 years and is from Queensland.

Julian Burnside QC is a prominent Australian barrister from Victoria, human rights and refugee advocate, and author. He has a reputation for staunch opposition to the mandatory detention of asylum-seekers, and has provided legal counsel in various high-profile cases.

Tom Percy QC is a prominent Australian barrister from Western Australia. Graduating in 1977, he has been involved in high-profile criminal law cases, including the successful Button and Beamish 1960s murder appeals. He is a human rights lawyer and criminal law specialist, with a special interest in death penalty cases.

Executive summary

David Hicks has not been validly charged, nor has he faced trial or been convicted for any offence. Nonetheless, he has been imprisoned, subject to a Presidential Order at the US Naval Station in Guantánamo Bay, Cuba, for more than five years. This is an astonishing injustice that both the United States and Australian governments have allowed to transpire. The Australian Lawyers Alliance is calling for immediate action from the Australian government.

The United States Military Commissions system (MMC) is intrinsically unfair and unjust. It shows blatant disregard for basic international legal principles such as habeas corpus, the presumption of innocence and the right to a fair trial. The procedures of the MMC unashamedly breach the *Geneva Conventions* and completely ignore recognised international human rights standards.

In its Executive Summary the *Manual for Military Commissions* (MMC) states that it:

- provides for a full and fair prosecution of alien unlawful enemy combatants; and
- affords all the judicial guarantees which are recognised as indispensable by civilised people.

The MMC should be judged by the same standards as any criminal justice system, if well-recognised standards of independence and fairness are to be observed.

While acknowledging that many of the rules of procedure and evidence in the MMC are unexceptional and indeed familiar to criminal law practitioners in Australia, the MMC fails its own standards in the following ways:

- its jurisdiction is retrospective and wide-ranging;
- the hearsay rule is unfair to the accused and dilutes the common law rules of hearsay;
- important procedural rules are not predicated on principles of fairness;
- any custodial sentence imposed does not take into account time already served by the accused;
- involuntary confessions are admissible; and
- appeal provisions favour positive outcomes for the prosecution.

The Australian Lawyers Alliance seeks to alert the Australian government to the vast inadequacies of the MMC - a system the government supported with the first military commissions. While there is now a new *Military Commissions Act* and regulations,

many violations of the *Geneva Conventions* still plague the system under which Australian citizen, David Hicks, is likely to be charged.

This report focuses on the concerns that any western democracy should have about the military commissions: a system whereby evidence and procedural rules are designed for speedy convictions rather than procedural fairness.

Introduction

The Australian Lawyers Alliance aims to protect and promote justice freedom and the rights of the individual. We believe that all people are entitled to human and democratic rights as enshrined in the *Geneva Conventions*.¹

David Hicks is currently being processed through a military commissions system that is so unjust that the governments of the United States and United Kingdom will not subject their own citizens to it. However, the Australian government has allowed David Hicks to remain imprisoned for over five years, without valid charge, only now to be processed in an unfair and unreasonable system.

The Australian Lawyers Alliance believes that David Hicks cannot receive justice in the flawed system to which he is being subjected. No matter what happens, in this system, injustice will prevail. The Australian Lawyers Alliance believes that Hicks must be brought home immediately.

¹ Australia ratified the 1949 Geneva Convention on 14 October 1958 and ratified the Additional Protocols I and II of 1977 on 21 June 1991

Timeline: the process as it relates to David Hicks so far

- 13 November 2001 The President of the United States of America issued a Presidential Order relating to the detention, treatment and trial of certain non-citizens in the 'war against terrorism'.
- November 2001 David Hicks is captured near Konduz, Afghanistan.
- Since his capture David Hicks has been detained subject to the Presidential Order at US Naval Station Guantánamo Bay, Cuba.
- 20 July 2003 The United States Government declares that David Hicks is eligible for trial before the First Military Commission.
- 10 June 2004 Hicks is charged with offences to be tried before the First Military Commission.
- Hicks pleads not guilty to all charges.
- August - November 2004 Pre-trial hearings before the First Military Commission begin.
- During these hearings, legal counsel on behalf of Hicks file motions challenging the jurisdiction of the First Military Commission and the validity of the charges and the trial process under US and international law.
- The First Military Commission defers ruling on these motions and postpones the commencement of the trial until at least March 2005.

Early 2005	Hicks' trial is delayed as a result of a number of civil suits challenging the detention at Guantánamo Bay and trial by Military Commission. This includes the <i>Hamdan</i> case, ² involving a direct challenge to the Presidential Order that established the First Military Commission.
November 2005	The trial of Hicks is stayed by the US Federal Court, pending delivery of the judgment in the <i>Hamdan</i> case.
29 June 2006	The <i>Hamdan</i> decision is handed down in the United States Supreme Court. It finds the Military Commission did not satisfy the requirements for a fair trial prescribed by Common Article 3(1)(d) of the <i>Geneva Conventions</i> . Hicks' charges are therefore declared invalid.
January 2007	The Regulations of the new <i>Military Commissions Acts</i> are released.

² *Hamdan v Rumsfeld*, Secretary of Defense 548 US (2006)

The *Hamdan* decision: US Supreme Court

The *Geneva Convention* was adopted on 12 August 1949 and came into force from 21 October 1950. In 1977 and 2005 three separate amendments, called protocols, were made part of the *Geneva Conventions*. A clear focus of the conventions is to outline the human rights and minimum standards of treatment of prisoners of war. It is the position of the Australian Lawyers Alliance that the *Geneva Conventions*, being a fundamental instrument of international law, must be strictly complied with.

As of 2 August 2006 when the Republic of Montenegro adopted the conventions, they have been ratified by 194 countries.

As per articles 49, 50, 129 and 146 of the *Geneva Conventions* I, II, III and IV, respectively, all signatory states are required to enact sufficient national law to make grave violations of the *Geneva Conventions* a punishable criminal offence.

On 29 June 2006 the United States Supreme Court handed down the *Hamdan* decision, which concluded no military commission can try Salim Ahmed Hamdan, the former aide to Osama bin Laden. In this decision, the Court found Hamdan was a protected person under the *Geneva Conventions*,³ and was therefore entitled, as a minimum, to the protections provided for by common article 3(1)(d).

The Geneva Conventions

- Australia, the United States and Afghanistan are and have been high contracting parties to the *Geneva Conventions* and are therefore bound by it.
- Common article 1 provides that the high contracting parties of the convention undertake to respect the convention in all circumstances.
- Common article 3(1)(d) provides that in the case of armed conflict not of an international character occurring in the territory of one of the high contracting parties, each party to the conflict shall be bound to apply, as a minimum, the following:
 - Persons taking no active part in the hostilities shall in all circumstances be treated humanely, without any discrimination based on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

³ Common article 3

- The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees that are recognised as indispensable by civilised peoples.

The Court held that the military commissions established for the trial of David Hicks and other Guantánamo Bay detainees, including the First Military Commission, were invalid. The reason for this was that its structure and procedures breached US federal statute⁴, and violated the *Geneva Conventions*.

In effect, the *Hamdan* decision struck down the charges against David Hicks.

After this decision, the President of the United States recommended that Congress pass the *Military Commissions Act* of 2006 (the new *Military Commissions Act* 2006). The new *Military Commissions Act* 2006 was approved and signed by the President on 17 October 2006.

The new *Military Commissions Act* 2006 provides for the establishment of the Second Military Commission, which is set to try David Hicks.

David Hicks has been free of any charges since the handing down of the *Hamdan* decision and, at the time of writing, has not been charged with any further offences.

⁴ Namely, the Uniform Code of Military Justice

Jurisdiction

The interpretation of 'unlawful enemy combatants', 'co-belligerent', and implications of the retrospectivity of the laws for those charged by the military commissions are outlined as follows:

1. An 'unlawful enemy combatant' is defined in Rule 103(a)(24) Regulations of the Military Commissions (RMC) as a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents. That status is determined by a Combatant Status Review Tribunal. There is a right of appeal against such determination to a US Court of Appeal for the District of Columbia.
2. A 'co-belligerent' is defined as any state or armed force joining and directly engaged with the US in hostilities, or directly supporting hostilities, against a common enemy.
3. Rule 201(b)(1) gives jurisdiction to a military commission to try any offence made punishable by the *Military Commissions Act* (MCA) or the law of war when committed by an unlawful enemy alien combatant before, on, or after 11 September, 2001.

What constitutes 'material and purposeful support of hostilities', and the identity of 'co-belligerent' supporting hostilities against a common enemy, are foreign policy debate.

The definition of 'unlawful enemy combatant' is so wide as to include purposeful and material support of hostilities against a co-belligerent of the United States. A political analyst could imaginatively construct any number of scenarios that would fit into such a definition, but be outside 'the war against terror'.

Combined with rule 201 is timeliness, the military commission has, in effect, unlimited and retrospective jurisdiction over any perceived opponent of the United States in foreign policy. To support rule 201 would effectively endorse the ability of the United States to identify the opponent over which they have jurisdiction on the grounds that the military commissions perceive them to have opposed US foreign policy, past or present. This is an enormous jurisdiction and one that the Australian Lawyers Alliance cannot possibly support.

The Australian Lawyers Alliance therefore expresses grave concerns about the severe implications of rule 201. Rule 201 could potentially be exploited by the US government and military commissions to justify jurisdiction over a perceived opponent based purely on the fact that they have a dissenting view to that of the US government. The Australian Lawyers Alliance firmly believes that vocal and active dissent is a crucial aspect to any democracy and to the international community.

Evidence

No legal system is perfect and evidentiary laws are complex. This is why it is important to have principles governing the development of such laws. Principles such as an opposition to torture and coercion, inadmissibility of unreliable evidence such as hearsay, and the presumption of innocence, all help to frame the complexity of rules on evidence. In Australia, David Hicks, along with any other accused person, would have the protection of these basic principles. As highlighted below, such protections are not present at the military commissions.

Confessions

Under Australian law, statements obtained through the use of torture are not admissible as evidence. This is technically also true under the MCA; however, the Act permits the use of evidence obtained through abusive interrogation techniques if the admission of the evidence is found to be 'in the interest of justice'.

1. Rule 304(a) of the Military Commissions Rules of Evidence excludes a statement obtained by use of torture. But if obtained by coercion it may be admitted.
2. Torture is defined as an act specifically intended to inflict severe mental pain or suffering upon another within the actor's custody or physical control. Coercion is not defined.
3. Rule 304(c) provides that if admissibility is disputed, the military judge may admit such statement if the totality of the circumstances renders the statement reliable and possessing sufficient probative value that the interests of justice would be best served by the admission. As to statements obtained after that date, a third finding must be made. Namely, that the interrogation methods used to obtain the statement do not amount to cruel, inhuman or degrading treatment.
4. Rule 304(e) provides that if a statement is admitted into evidence, the defence can present relevant evidence in relation to the question of voluntariness, and the military judge must instruct members of the commission to give such weight to the statement as it deserves under all the circumstances.
5. Rule 304(g) provides that an oral confession may be proven by the hearer of the statement, even if the hearer reduced it to writing and the writing is not accounted for.

An involuntary statement may be admissible evidence in the military commissions, excluding one obtained by torture. Torture is narrowly defined, and conduct outside the definition covers a wide range of physical and mental abuses. It is only when it is ruled

admissible that the defence can raise voluntariness as an evidentiary question. The tests of admission refer to probative value, reliability and the interests of justice. The oral admission section, in effect, allows for the spectre of 'the police verbal'. Because there is no provision for compulsory recording, either by tape or video of a confession, an oral account cannot be checked and reliance is placed on the truthfulness of the interviewing official. This leaves room for huge discrepancies and abuses of power by the military commission officials. Such clear opportunities for an abuse of power is indicative of a system that does not prioritise truth and justice.

Any statement obtained by coercion in these circumstances does not conform to the stated standards of a fair prosecution, and the judicial guarantee which is regarded as indispensable by civilised people.

As an example of an Australian jurisdiction, section 464 of the *Victorian Crimes Act* sets out the regime for the taking of confessional statements, including the requirement that they be taped in order to be admissible. Prior to questioning, a suspect has a right to communicate with a friend or relative or a lawyer and must be told of the right to silence.

A confession obtained by coercion would not be admissible in Australia. Both the Australian and American legal systems have traditionally expounded principles in order to prevent violent or oppressive techniques being employed to gain confessions. This is because such evidence is fundamentally unreliable, and such treatment of an accused is inhumane. It is therefore reasonable to conclude that the military commission allows confessions that may be fundamentally unreliable. The only possible motive for this is that the military commissions prioritise a speedy conviction over the pursuit of justice. This is not the type of system to which the Australian government should willingly subject an Australian citizen.

Hearsay

The rules of the military commission continue to allow hearsay material as evidence, as long as it is deemed by the commission to be 'reliable' and 'probative'. The burden then astonishingly falls on the accused to prove that the hearsay evidence is not 'reliable' and 'probative'.

Hearsay rules in the military commissions are outlined as follows:

1. Rule 803 of the Military Commission Rules of Evidence allows hearsay evidence to be admitted. Under subsection (c), any party opposing the admission must

demonstrate by a preponderance of the evidence that the evidence is unreliable in the totality of the circumstances.

2. Under Rule 802, hearsay evidence is admissible on the same terms as other evidence. Thus, Rules 402 and 403 apply and evidence that has probative value to a reasonable person, and is not excluded on the grounds of prejudice, confusion or waste of time, will be admitted.
3. Rule 806 allows hearsay included within hearsay.

In the Australian legal system, the onus is on the party seeking to have the evidence admitted to justify its value. The military commission's hearsay rules are much wider and are justified in the discussion notes on the basis that many witnesses are likely to be foreign nationals and not amenable to process, or be otherwise unavailable. Thus, if CIA agent X testifies he heard a non-witness foreign national say the accused told him he wanted to bomb a US military base, that would be admissible. This amounts to nothing more than second-hand hearsay. The reliability of this evidence is highly questionable and does not work to assist with a just outcome. The defence could not cross examine the original maker of the statement, and would be reduced to discrediting agent X. X, who submits to have overheard the statement, under the test of Rule 803 – a very difficult forensic exercise – carries the onus in arguing for its exclusion. The test for admission by the prosecution under Rules 402 and 403 would be easy to satisfy as having probative value. Clearly an unjust result follows for the accused.

The onus on the accused to demonstrate unreliability means that, in practical terms, any hearsay evidence, including hearsay within hearsay, would invariably be admitted. This cannot be described as a fair prosecution. The basis for the exclusion of hearsay evidence is that the original witness should have their evidence tested in court. The party seeking the admission of hearsay should bear the onus of providing valid reasons for such admission.

The evidentiary rules of the military commissions are framed to ensure speedy convictions. If David Hicks were to be tried in Australia, there would be a greater focus of ensuring justice through reliable evidence.

Procedure

A dominant distinction between the Australian legal process and that of the military commissions is that there is greater transparency in the Australian system and superior reliability of evidence. Transparency provides a greater guarantee of justice for David Hicks and others. Such open rules on hearsay, stringent rules of classified information pending national security concerns, and questionable appeal processes, would not be issues of concern for Hicks if he were charged and tried in Australia, or even in the US' civil courts system.

The most significant procedural issues are outlined as follows:

1. Rule 601 RMC provides that the convening authority in determining whether to refer charges against an accused can make a finding based on hearsay in whole or part. This means that, from the start of the process, hearsay evidence can have an important role in the decision to refer charges upon an accused person.
2. Classified information is privileged if disclosure would be detrimental to national security: Rule 701 RMC and Rule 505 Rules of Evidence. The effect of these rules could significantly affect the ability of an accused to understand the case against him or her:
 - exculpatory evidence can be withheld and provided only in summary or other substitute form;
 - both the accused and his/her lawyer can be excluded from the proceedings where the prosecution claims the privilege; and
 - in addition to classified information, the sources, methods or activities by which the evidence was obtained can be withheld.
3. Rule 1201 RMC sets out the review or appeal process. The initial review body is the Court of Military Commission Review and,, thereafter, the District of Columbia Appeals Court followed by the Supreme Court of the US. To succeed on review, an error of law which has prejudiced a substantial trial right of the accused must be demonstrated. In Australia, an error of law can include an unsafe and unsatisfactory verdict, thus allowing the appellant to dispute a jury's verdict on a factual basis. Rule 1201 on its face value does not seem to allow any appeal that contests the factual basis of a conviction. It is a limited right of appeal.

The procedures discussed above infringe an accused's right to a fair trial. In a fair and equitable justice system, an accused must be able to test evidence at its source. An accused must either personally or through his/her lawyer know the full extent of the

evidence against him/her in order to meet it. A right of appeal should not be limited so as to exclude appealing the factual basis of a conviction.

It is also important to note that the US government has the right to intervene in the trial and appeal any finding made, whether it be about excluding evidence or excluding the accused from access to evidence. This allows the opportunity for undue pressure to be put on the commission to make decisions in favour of the US. This is an important defect in the military commissions system and provides a huge opportunity an abuse of process, making the system completely lacking in independent fairness.

Sentence

Rule 1113 RMC (d) provides that any period of confinement begins to run from the date the sentence is adjudged. This excludes a deduction for time served awaiting trial; a deduction that is normal in Australian courts.⁵

The Australian Lawyers Alliance regards such a deduction as indispensable. David Hicks has served hard prison time for over five years – without valid charge. If he were now found guilty of acts he may be charged with under the flawed and substandard laws of the military commission, time served would not be taken into account when determining his sentence. This is an appalling abuse of process. Such an abuse would not take place in the Australian legal justice system.

The procedural unfairness and lack of due process that David Hicks, and others like him, have been and will be subjected to while being processed by the military commissions amounts to a basic violation of human rights and international law. The Australian Lawyers Alliance asserts that it is a well established principle that armed conflict – or indeed a ‘war on terror’ – does not justify the deferral of fundamental and internationally recognised rights.

⁵ See s18 of the *Victorian Sentencing Act*.

Conclusion

The military commissions system cannot produce a just and fair result for David Hicks. For Hicks to receive justice he must be brought home now. Hicks will not be given justice in Guantánamo Bay. Every day that Hicks remains in a Guantánamo Bay prison is a day that justice is denied.

The laws and processes of the military commissions system cement practices and procedure that merely oppose the notion of a fair trial. The *Military Commissions Act* 2006 and the subsequent regulations have been drawn up in direct violation of international law. David Hicks' rights, enshrined in *the Geneva Conventions*, are unreservedly disregarded.

The military commission system has basic procedural and evidentiary flaws and is internationally substandard. This makes it impossible for justice to be carried out for David Hicks through the commissions system. The military commissions also fails to meet its own standards. It has a far-reaching and retrospective jurisdiction over offences committed before, on or after 11 September 2001. The commissions allow the admission of involuntary confessions through coercion and grossly unreliably hearsay and the regulations do not acknowledge the five years of prison time already served by David Hicks in sentencing. These gross inadequacies do not exist in the Australian justice system. In fact, American citizens would not be subjected to these systematic abuses when charged and tried for US federal offences. These elements of the military commissions system fall substantially below internationally recognised standards of fairness.

The Australian Lawyers Alliance believes that the military commissions system cannot bring justice for David Hicks. It is too flawed to carry out any kind of justice. The Australian Lawyers Alliance is calling on the Australian government to bring David Hicks home immediately and not subject him to this flawed legal process.

The Australian Lawyers Alliance believes that all people have the fundamental rights to the justice and freedom that democratic countries, such as Australia and the United States, ensure when they sign up to international documents such as the *Geneva Conventions*. The Lawyers Alliance is calling on the Australian government to uphold the very principles that it has agreed to maintain. David Hicks must be removed from the unfair and unjust processes he faces in Guantánamo Bay immediately.



Simon Morrison
National President of the Australian Lawyers Alliance



Tom Percy QC



Julian Burnside QC