

Controversy continues over Guantanamo Bay detainees

The American Government is still holding Australian citizens David Hicks and Mamdouh Habib in Guantanamo Bay, Cuba, for their alleged association with al-Qaeda.

American President George W Bush recently announced that six detainees were eligible to face trial by military tribunal, including Australian David Hicks. This has again flared concerns about legal processes and justice.

There have been few serious complaints about the actual conditions in which the detainees are being kept, instead the discontent lies in the ambiguous authority under which they are being kept and the unclear process by which they will be tried.

"Guilty or not, David Hicks cannot be kept in indefinite detention without charge. To do so is a fundamental breach of human rights," said South Australian Labor Senator Linda Kirk.

The legal profession in Australia has joined the outcry calling for fair judicial proceeding to ensure that justice is served.

Earlier this year, at the request of the one of our members, the Law Society wrote to Australian Prime Minister John Howard and American President George Bush, highlighting concerns regarding the judicial process (as covered in *Balance*, May 2003 page 17).

The New South Wales Law Society has openly stated that it finds the proposed trial by military tribunal as unacceptable.

"These tribunals effectively form a parallel system for trying people when the criminal justice system has determined that there may be no criminal act on which to base a prosecution. Australian has a long tradition of accepting only one overriding judicial system and one rule of law for all," Law Society of New South Wales President, Robert Benjamin, said.

"We have concerns about the justice of such military tribunals even as they

apply to American citizens, but greater fears about the implications they have for Australian citizens who may be subject to them and who have less rights than American citizens," Law Society of New South Wales President, Robert Benjamin, said.

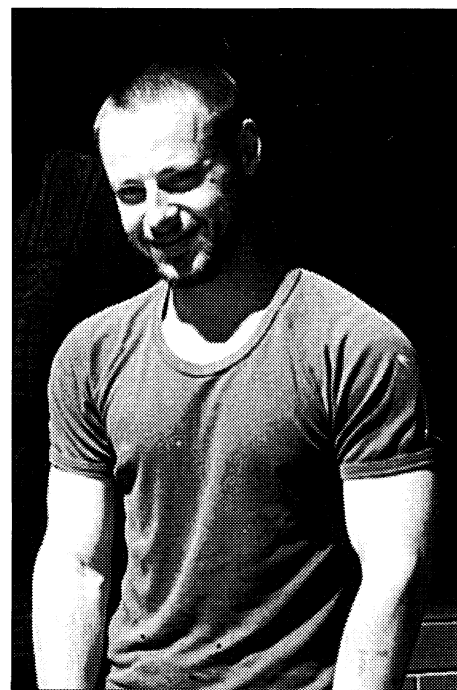
The only American citizen to be detained as an unlawful combatant, John Walker Lindh, was detained in Afghanistan in late 2001. He has since faced trial in an American court and in September 2002 he was sentenced to 20 years in jail, which he is serving near his family.

Earlier this year the full bench of the United States Federal Court ruled that the Guantanamo Bay detainees were outside United States jurisdiction because they are being held at a US naval base leased from the Cuban Government.

The Law Council of Australia has been active in voicing its concerns regarding the judicial process.

"What the United States has done in Guantanamo Bay is establish its own military law regime which is isolated and insulated from the American legal system. Unlike a civilian court or a court martial, there is no ability for review or appeal to a court – people can be held indefinitely at the whim of the United States Government," Law Council President, Ron Heinrich, said.

"The detainee is then possibly subject to trial by military commission which has significantly lower protections than a normal court, and which does not even have



Australian David Hicks at 23

the power to order someone's release if they are acquitted," Mr Heinrich said.

"Military commission proceedings, as presently proposed, are a vote of no confidence in the ordinary legal system. And, if it is necessary for terrorism, why not apply it to the 'war on drugs' or the 'war on crime', and jettison the legal system altogether," he said.

The key concerns outlined by the Australian legal profession are:

- * Indefinite detention;
- * Chief defence counsel has been appointed by the military;
- * Restricted access to lawyers, all must have security clearance;
- * Rules of evidence do not apply;
- * Trial by US military officer – the seven person military commission panel only has to have one lawyer;
- * No avenue of independent appeal; and
- * Death penalty can apply (there have

been assurances that this will not apply to David Hicks, but it can apply in other cases).

"He will be prosecuted by the military, he will be defended by the military and he will be tried by the military," Hicks' lawyer Frank Camatta told *The Age*.

The Australian Government has come under some criticism for its handling of this issue. Don Rothwell, associate professor of law at Sydney University, said: "The Australian Government has effectively abandoned David Hicks. Irrespective of what he might have done, he is still entitled to basic rights of protection from his government. It is a basic issue of human rights".

Some commentators have been critical of the Government's lack of involvement, particularly on a consular level. The inaction is in direct contrast with the dozens of other international cases where the Australian Government has become diplomatically involved to protect the

rights of citizens who have been accused, or found guilty, of drug smuggling and murder.

The Government, the Opposition and Australia's media has also come under some criticism by the sensational way in which it has dealt with the story, particularly the apparent presumption of guilt despite charges having not yet been laid.

American Ambassador to Australia, Tom Schieffler, said: "David Hicks is a dangerous man and we want to be sure that he's not allowed to hurt anyone else".

After the announcement that Hicks would face trial by military commission, Federal Justice Minister Chris Ellison led a delegation to Washington to negotiate specific details of the trial process.

"We have every faith in the American judicial system, and we've come to

continued next page

BACKGROUND

Adelaide-born Hicks, 27, has been in detention since he was captured in Afghanistan by the Northern Alliance in November 2001. Habib, 47, was born in Egypt but is an Australian citizen. Previously he resided in Sydney, where his wife and four children still live. He was arrested in Pakistan in December 2001 and has been in detention ever since.

Hicks and Habib have been given no consular assistance, have not had access to their own lawyers and are yet to be charged. The future of these two Australians, and others like them held in Guantanamo Bay, still remains uncertain - at the very least they face indefinite detention.

The detainees have not been given Prisoner of War (POW) status under the Geneva Convention (which would mean they could not be interrogated) - instead the United States Government has labelled them 'unlawful combatants'. This status means that they can be detained until the end of 'the war on terrorism'.

The key justification for their 'unlawful combatant' status seems to be in the fact that they were not wearing uniforms. Regardless, America's treatment of the detainees has still come under attack.

The main arguments stem from:

* Article 9 of the Universal Declaration of Human Rights states: "No-one shall be subject to arbitrary arrest, detention or exile..."

* Article 10 of the Universal Declaration of Human Rights states: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him"

* Article 5 of the Third Geneva Convention provides that prisoners in a military conflict are entitled to a hearing in a competent tribunal to determine their status.

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LAW**

ALRC's work praised at World Genetics Congress

The International Congress on Genetics, held in Melbourne, praised the Australian Law Reform Commission's (ALRC) work on human genetics.

The ALRC recently published a two volume report - *Essentially Yours: the protection of human genetic information in Australia* - which includes 144 recommendations of how to deal with the ethical, legal and social implications of 'New Genetics'.

The report covers a wide range of areas, including the regulation of human genetic research and genetic databases; genetic privacy and discrimination; and regulating the use of genetic testing and information in employment, insurance, immigration, parentage testing, sport and other contexts.

The report is the result of a two-year public inquiry, which was jointly conducted by the ALRC and the NHMRC's Australian Health Ethics Committee.

Speaking at the International Congress on Genetics, Dr Francis Collins (who chaired the international Human Genome Project) described the ALRC's report as "a truly phenomenal job" and "ahead of what the rest of the world is doing".

High Court Justice Michael Kirby (who is a member of UNESCO's Bioethics Committee and the Ethics Committee of the Human Genome Organisation) praised the report, saying that "Increasingly, decisions are going to be made about all of us on the basis of our genetic profile. I hope the Parliament will examine the [ALRC's]

proposals and not just simply put them into the too-hard basket."

ALRC President, David Weisbrot, welcomed the positive reactions to the report, and noted that the recommendations were directed to a large number of bodies, including government, professional and industry associations.

"Our genetic scientists have demonstrated they are among the world's best. Australia is now in an excellent position to lead the world in developing public policy to harness the benefits of this research in the public interest. This is an opportunity and a challenge that we should not let slip," Professor Weisbrot said. ①

Controversy continues over Guantanamo Bay detainees **cont from page 13...**

Washington in an effort to ensure that the procedures in relation to any military commission involving David Hicks is a fair and transparent one."

The four key concessions that seem to have come from the negotiations are that:

1. the death penalty has been ruled out;
2. the Government has undertaken not to monitor lawyer-client communications;
3. Hicks may be able to serve any term of imprisonment in Australia; and
4. an Australian lawyer will be able to act as a consultant for the military defence team (however negotiations are continuing as to whether the lawyer will be able to have any direct contact with Hicks).

"The United States Government has assured Australia, that in the matter of David Hicks, the prosecution does not intend to seek the death penalty. The Department of Defence does not intend to monitor communication that Mr Hicks may have with military and

civilian defence counsel," Senator Ellison said.

"As well as that, it has been agreed that the United States will work on ways to provide family members with additional contacts with Mr Hicks that [is] to include telephone contact.

"... the prosecutor has indicated... that he does not intend to produce evidence which would result in the accused being excluded from the trial, there is a provision where that can occur where there are matters of security involved.

"We understand that the trial will be conducted in Guantanamo Bay and will be public."

In June, the Law Council sent an open letter to the Prime Minister and all members of Parliament to express its "deep and widespread concern" about circumstances under which David Hicks and Mamdouh Habib are being detained. The letter was also signed by the Law Society NT, and the respective law societies and bar associations of each jurisdiction.

"Australian lawyers are concerned that

fundamental legal norms are being abandoned by the United States in its treatment of the two men, and are calling for Mr Hicks and Mr Habib to be dealt with according to principles of legality," Law Council President, Ron Heinrich, said.

"Australian lawyers do not accept that the war on terrorism justifies indefinite detention without judicial oversight. It is unconscionable that both men can be held indefinitely without clarity of their status, or any certainty as to what criminal charges, if any, either will face," Mr Heinrich said.

The Law Council will seek permission from the United States to send a trial observer on behalf of the Australian legal profession to attend any hearings involving the two men. It has labeled the lack of independent judicial oversight as "totally unacceptable".

Despite recent negotiations in Washington, concerns about a free, fair and independent trial have not been alleviated and this issue does not seem to have an end in sight. ②