# Law Council calls for access to justice


**The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies, which are constituent bodies of the Law Council.**

**MILITARY COMMISSION RULES CONFIRM NO JUSTICE FOR DAVID HICKS**

The Law Council has called on United States law makers to ensure that David Hicks is not placed at the mercy of the new military commission process, urging that he should be released if he cannot be dealt with by a properly constituted court.

In a letter to senior members of the US Congress, the Law Council has expressed grave concerns about the military commission system and has asked them to intervene in the process.

"We were both disappointed and deeply concerned when the new Military Commissions Act was passed by Congress and signed into law by the President during the run-up to the recent mid-term elections," Law Council President Tim Bugg said.

"Although now a creature of the Congress rather than the Pentagon, the military commissions regime remains fundamentally flawed and fails to provide fundamental fair trial guarantees."

He has urged members of the US Congress to amend the Military Commissions Act or take any other steps available to them to ensure Mr Hicks and fellow Guantanamo Bay detainees receive a fair hearing before regularly constituted court.

In his letter, Mr Bugg said, the Law Council had raised three simple points.

"Mr Hicks should be able to challenge the legality of his detention in US Courts."

"He must be brought promptly to a trial before a regularly constituted court affording, in the words of the Geneva Convention, 'all the necessary judicial guarantees recognised as indispensable by civilised peoples'.

"Failing that, he should be released and repatriated.

"The construction of a specially designed but inferior and deficient system of justice to deal with people pre-ordained as terrorists diminishes the moral standing of our two societies."

New military commission rules, produced by the US Defense Department earlier this year, confirm that the process established to try David Hicks falls well short of fair trial standards.

Mr Bugg said the Manual for Military Commissions, which was submitted to Congress by the Secretary of Defense, reaffirms the Council's concerns over the fairness of the system.

"After the Military Commissions Act was passed last year, we knew that this new regime established to try Guantanamo detainees was fundamentally flawed and unfair," Mr Bugg said.

"The manual, which contains the rules of evidence, simply confirms our fears."

Mr Bugg said the manual confirms that David Hicks could be convicted on the basis of hearsay evidence that he will never have the opportunity to test and challenge.

"The rules even allow hearsay within hearsay, meaning that Mr Hicks could be placed in a position where he doesn't have the opportunity to cross examine the person twice removed from the witness who actually made an allegation about him."

"The manual also makes it clear that evidence which is used against Mr Hicks may come from informants in the field, former Guantanamo detainees long released and US and foreign security agents, none of whom the prosecution is required to produce at trial."

Worse still, Mr Bugg said the manual indicated that any alleged "confessions" by Mr Hicks, regardless of whether they were extracted by the use of coercion, are admissible.

"In other words, the right to silence has been thrown out the door."

"Regardless of what lip service they pay to defendants' rights, the military commissions are designed to rubber stamp decisions about guilt that were made long ago."

Mr Bugg was also critical of the Australian Government's blind defence of the new system, questioning assertions made by Attorney-General Philip Ruddock that the new military commissions contained appropriate "safeguards".

"Safeguards are more than mere promises or assertions. Whilst it is true that the new Military Commissions Act superficially acknowledges certain rights, it does not go beyond that," Mr Bugg said.

"The Attorney-General's comments echo previous statements made by the Government in support of the former military commission process – a process ultimately rejected by the highest court in the United States."

The Federal Court has been asked to intervene in Mr Hicks' case – the first time this matter has been brought before an Australian court.

Law Council President Tim Bugg said he could understand why Mr Hicks' legal representatives had taken this latest course of action.

"There should be no legal black holes. No one should be left in legal limbo without charge, unable to challenge the legality of their detention and unable to make a bail application," he said.

The Federal Court action has been brought by Mr Hicks against the Federal Government, the Attorney-General Philip Ruddock and the Foreign Affairs Minister Alexander Downer. His lawyers are seeking declarations and orders that would compel the Australian Government to request his release and repatriation.

"This application to the Federal Court is a statement of facts – David Hicks is being held in indefinite detention without charge."

"It is also a statement of international law – there is no apparent lawful authority for David Hicks' ongoing detention; he has not been determined to be a POW and the military commissions before which the US proposes to try him are not compliant with the Geneva Conventions.

"It is not surprising that Mr Hicks' lawyers have turned to the Australian courts. For many in the legal profession, and the wider community, it is simply impossible to accept that our Government could act with such disregard for the welfare of one its own citizens, and we would have no way of stopping them."

**FAIR TRIAL MYTHS AND THE MILITARY COMMISSIONS ACT**

The Attorney-General, Philip Ruddock, claims the Military Commissions Act guarantees a number of fundamental "safeguards".

"Safeguards" are more than mere promises or assertions.

While it is true that the Military Commissions Act superficially acknowledges certain rights, it does not go beyond that. Fair trial rights are not safeguarded by assertion – rights are safeguarded by transparent and robust procedures enforced by an independent and impartial judiciary.

Some things are too important for spin. Let's deal in facts.

**Mr Ruddock claims the Military Commissions Act safeguards the presumption of innocence until proven guilty:**

If this is true – then why is David Hicks detained without charge and why does the Military Commissions Act deliberately attempt to deny him any opportunity to challenge the legality of his ongoing detention in a US Court?

"Innocent until proven guilty" is more than a mantra. A Government can not publicly label a person a dangerous terrorist and detain him for years without charge and then claim that it respects the presumption of innocence.

Mr Ruddock claims the Military Commissions Act safeguards the right to be present throughout the trial and to have access to all the evidence the prosecution intends to adduce at trial:

Actually, the Military Commissions Act still allows for a defendant to be denied access to parts of the evidence brought against him if that evidence includes classified information the disclosure of which is said to be detrimental to national security. For example, instead of receiving a complete copy of a particular piece of evidence, a defendant may receive that evidence with classified parts deleted or with classified parts replaced with a summary of the information. Further, the defendant may simply receive a statement of relevant facts that the classified evidence would tend to prove.

**Mr Ruddock claims the Military Commissions Act safeguards the right to cross examine prosecution witnesses:**

Unlike in a regular criminal court hearsay evidence is admissible before the Military Commissions. This means, for example, that defence force personnel could give evidence about things that other people, not present at the trial, allegedly said about David Hicks while under interrogation or as paid informants. Therefore, David Hicks might be able to cross-examine the defence force personnel but not the person who made allegations against him.

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**Mr Ruddock claims the Military Commissions Act places a ban on evidence obtained by torture:**

Although there is a prohibition on the admission of evidence obtained by use of torture – the Military Commissions are still permitted to admit evidence obtained by coercion. Given what we know about the types of interrogation techniques which have been approved by the US Government and that Government's conveniently narrow definition of torture, there remains grave cause for concern that improperly obtained evidence, and evidence that would certainly never be admitted by an Australian Court will be used to convict detainees like David Hicks.

At any rate, the Military Commissions Act allows, for national security reasons, information to be withheld from a defendant about the sources, methods or activities by which US Government obtained evidence. This could make the right to challenge the admissibility of evidence obtained by torture largely illusory. In fact, it could make the ability of a defendant to challenge the reliability of evidence used against him very difficult in general.

**Mr Ruddock claims the Military Commissions Act safeguards the right to remain silent:**

While David Hicks can not be compelled to testify at his own trial, information obtained from him under interrogation, including by use of coercion, can be admitted against him. The right to remain silent at trial has little meaning if an accused has already been forced to make "confessions" during the course of intensive and involuntary interrogation.

**One claim Mr Ruddock does not make is that the Military Commissions Act safeguards the right to trial without undue delay:**

Even Mr Ruddock, who was also vocal in his support for previous military commission regime which was later declared illegal, does not claim that the Military Commissions Act protects the right to trial without undue delay. That would be an almost impossible claim to make given that David Hicks has already spent five years in detention and given that the Military Commissions Act specifically states that the speedy trial provisions of the Uniform Code of Military Justice do not apply.

The right to trial without delay is not just a matter of convenience. The ability of David Hicks to properly prepare and present his defence has been substantially prejudiced by the delay in bringing and hearing of charges against him.

This delay has been caused not only by the two and a half year hiatus in initially bringing charges against David Hicks but also by the determination of the US authorities to prosecute him outside of any established judicial system which might guarantee him a fair hearing.

**LAND RIGHTS – GIVE INDIGENOUS COMMUNITIES FAIR CHOICE**

The Law Council expressed serious concern late last year at proposals by the Federal Government to withhold vital services from Aboriginal communities unless they agreed to sign their townships over to the Commonwealth for 99 years.

In December, the Federal Minister for Indigenous Affairs, Mal Brough, offered to invest $10 million for a school in the Tiwi Island community but only on the condition that they sign a lease over their own township to the Commonwealth.

A $10 million investment in housing at Wadeye, in the Northern Territory, was tied to a similar agreement.

"The approach adopted by the Government leaves Indigenous communities with an unenviable choice. To secure educational opportunities for their children, entire communities are at risk of losing rights over their land for three generations or more," Law Council President Tim Bugg said.

Mr Brough claimed that only non-essential services will be considered in negotiations over these leases.

"Australians would be astonished to learn that the Government considers schooling and housing to be 'non-essential' for Indigenous communities."

"No Australian should be made to choose between having schools and housing for their children, or giving away their land.

"Mr Brough must separate any offer of services to these communities from negotiations over such leases. Indigenous Australians must have the right to a free and informed choice about how they will deal with their land."

**SCATHING REPORT ECHOES LCA'S CUSTOMARY LAW CONCERNS**

The Law Council has called on the Australian Government to re-think proposed new sentencing laws after a Senate Committee warned that the legislation could discriminate against Aboriginal and Torres Strait Islanders.

A report by the Senate Committee condemned the Crimes Amendment (Bail and Sentencing) Bill 2006, which seeks to exclude customary law and

cultural factors from the sentencing process.

Law Council President Tim Bugg said courts must have access to all available sentencing and bail options, particularly when dealing with Indigenous offenders.

Mr Bugg said implementing the Bill in its present form would seriously undermine the ability of courts to exercise practical judicial alternatives

He commended the committee on its findings; findings it was required to make within a very short time-frame.

The Senate Committee rejected the Government's view that the Bill would assist in addressing violence and abuse in Aboriginal communities.

The committee recommended that the "cultural background" of an offender should remain an essential consideration in sentencing.

"It is time now to stop playing politics and focus on the real issues of concern. The Law Council supports practical measures to protect Indigenous women and children from violence and to improve the lives of Aboriginal people."

"The Government should stop demonising Aboriginal culture and work together with State and Territory Governments, Indigenous community leaders and other key stakeholders to address Indigenous disadvantage."

**BLACK DAY FOR INDIGENOUS AUSTRALIANS**

The Law Council condemned the Federal Government's refusal to heed warnings against passing laws which will lead to more Indigenous and Multicultural Australians being incarcerated.

Changes to the Crimes Act 1914, rushed through Parliament without adequate consultation, effectively require a court to ignore an offender's Indigenous cultural background when sentencing or considering bail.

"These changes are a major step backwards in Indigenous and Multicultural policy in Australia," Law Council President Time Bugg said.

"They will inevitably result in discrimination against Indigenous offenders and those whose background, beliefs and values differ from white, Anglo-Saxon Australia."

The Government forced the amendments through the Senate, ignoring bipartisan warnings by a Senate Committee that the reforms were discriminatory and would do nothing to address violence and abuse in remote Indigenous communities.

The Law Council has provided evidence demonstrating that Indigenous members of society are already subject to the same, if not harsher penalties in the courts as all other Australians.

November's changes to the Crimes Act were made at a time when rates of Indigenous incarceration are greater than they were at the time of the Royal Commission into Aboriginal Deaths in Custody.

"This latest move by Government shows complete disregard for the capacity of Australian courts to appropriately balance relevant matters in court proceedings.

**ONLINE MEDIATION GOES ON TRIAL**

The Law Council of Australia will commence a six-month trial of an online chatroomstyle mediation facility on its website, beginning in February.

The system provides separate 'rooms' to which password-protected access is available to various combinations of parties and lawyers.

There are rooms for private sessions with the mediator and separate rooms for each side, to which even the mediator has no access.

This enables lawyers to confer with their clients without the need to meet face-to-face, either before or during the mediation.

Developed by TheClaimRoom.com (TCR), the ODR software has been described by Colin Rule, author of *'Online Dispute Resolution for Business'*, as:

> *"The best dedicated ODR communication environment currently available anywhere in the world".*

Lawyers for disputants wishing to use the system will click a link on the welcome page and complete a brief enquiry form. A TCR representative will contact the enquirer to explain the system, open the case and invite the other participants to log in. The parties may appoint their own chosen mediator or, if they wish, TCR will appoint a mediator from its own accredited panel of mediators with ODR training.

The only cost is a case fee of $70 per party, which includes all its representatives and which will be shared equally by TCR and the Law Council. TCR will provide a Helpdesk to users.

The technology can also be seen at www.themediationroom.com

The Law Council is encouraging lawyers to consider using this system during the trial period and will seek feedback to determine whether to continue after the six month trial.

For further information email hendryk.flaegel@lawcouncil.asn.au