

HICKS WILL NOT GET FAIR TRIAL – LAW COUNCIL RELEASES REPORT

The military commission proceedings being pursued against Australian David Hicks are flawed, making a fair trial virtually impossible, according to a report issued in Canberra today by the Law Council.

Releasing the first report of the only independent Australian legal expert to observe the initial hearing in Mr Hicks's trial, Law Council President Bob Gotterson, QC, said he accepted the strongly expressed view of the observer, Lex Lasry, QC, that the Australian Government must now re-examine its position on the issue.

“Mr Lasry recommends the Law Council call on the Government to request the United States to remove David Hicks from the military commission process, and either place him before a court martial, the US civilian criminal justice system or return him to Australia,” Mr Gotterson told a press conference at Parliament House.

“The Law Council, having had time to review Mr Lasry's report, is in full agreement with this view. We believe the Australian Government must now improve increase its efforts to ensure fairness and justice in any proceedings under which Mr Hicks and Mr Habib might ultimately be tried.”

Mr Lasry told the Law Council that his preliminary view was that a fair trial for David Hicks is virtually impossible because:

- The military commission in this case is not independent in any sense that would generate confidence in its impartiality, because the process has been created and is exclusively controlled by the executive of the US government
- There is a strong relationship between the Presiding Officer and the Appointing Authority (in other words, the US Government); and
- Several of the current members of the commission may have a predisposition on relevant issues because they were operationally involved in Operation Enduring Freedom in Afghanistan against *inter alia* the Taliban; or because they were significantly emotionally affected by the events of 11 September 2001, or because they have already formed and expressed views adverse to the interest of the detainees at Guantanamo Bay.

“Five members of the Commission are not legally qualified – this is a concern because they are required to resolve issues of fact as a jury would and issues of law as a judge would. If they do seek assistance from the Presiding Officer, there is a genuine concern that they will abdicate their function to him because of his expertise as a military judge,” Mr Lasry said.

He also expressed concerns about the consecutive nature of the trial process. “This commission is intended to hear all six of the cases currently designated and it will presumably hear them consecutively. As was submitted to the commission, it would be extremely desirable if each case was dealt with by a separate commission rather than the present arrangements.”

“It is simply impossible to accept that non-legally qualified commission members can resolve issues of fact and law in four trials consecutively without making errors or misusing evidence. The fact that they say they are conscious of the problem and determined to avoid that consequence is of no comfort whatsoever,” he said.

Mr Lasry said he also had concerns about technical aspects of the process.

“The rules of evidence are all but absent. The rules which do exist seem to me to facilitate the admission of evidence which will never be able to be tested by cross examination and should, ordinarily, be devoid of any probative value,” Mr Lasry said.

“The consequence is a likely unfairness that goes to the root of the fair trial issue. There is also no viable appellate process which can impartially correct errors and remedy a miscarriage of justice”.

Mr Gotterson said the Council had consistently expressed concerns about the military commission process.

“Our policy has been that David Hicks will not receive a fair trial under a US military commission, and that he should be tried in the US by either a civilian court or a court martial,” Mr Gotterson said.

“We have also expressed a very strong view that it has taken far too long to charge Mr Hicks, after being held on non-reviewable detention for over two and a half years. Mr Lasry’s report has confirmed that we have been justified in pursuing this matter with the highest levels of the Government,” Mr Gotterson concluded.

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