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David Hicks and the US Military Commissions Process: Next Steps
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JURIST Guest Columnist **Don Rothwell** of ANU College of Law, Australian National University, says that while passage of the new Military Commissions Act in the United States presents new challenges for Australian Guantanamo detainee David Hicks, it also creates an opportunity for the Australian government to reconsider its erstwhile refusal to press for the protection of his rights...



The recent passage of the Military Commissions Act by the US Congress has attracted attention on the other side of the world. An Australian, David Hicks, has been held at Guantanamo Bay since early 2002 following his detention in Afghanistan in December 2001. Not only is Hicks one of the longest-serving Guantanamo detainees and the only Australian currently being detained, but he was charged under the original military commission process. The Australian government anticipates new charges will be laid against Hicks in the future.

Compared to other major coalition partners, Australia has been mostly silent as to the plight of its nationals held at Guantanamo. No concerns were raised over alleged torture and mistreatment claims made by Hicks and the other Australian at Guantanamo, Mamdouh Habib (who has since been released). Likewise, few concerns were expressed over the military commission process itself. When complaints were raised within Australia over the delays in bringing Hicks to trial, the Australian government even sought to lay the blame on the Hicks legal team for joining in the appeals challenging the validity of the original military commissions.

Notwithstanding Australia's legitimate right to call upon the US to ensure that any trial of Hicks is consistent with US and international legal standards and that his treatment whilst in detention is in conformity with international law, the Howard government has instead preferred to take a minimalist position towards exercising diplomatic protection of one of its citizens. Even considering the initial refusal of the

US government to apply Geneva Conventions Common Article 3, the conditions under which Guantanamo detainees have been held and the extraordinary trial procedures of the military commissions, the Australian government insisted that what was occurring was perfectly legal and referred to its own internal legal advice in support of that position.

Whilst the Australian government has not exactly backtracked since the recent US Supreme Court ruling in *Hamdan* it has urged the US to put in place an alternate process and bring Hicks to trial as soon as possible. Australian Attorney-General Philip Ruddock was in the US at the time of the passage of the Military Commissions Act and had discussions with Alberto Gonzales about the Hicks case. Ruddock seemed satisfied with the Act, and has controversially stated that sleep deprivation would not be contrary to the torture prevention provisions of the Act.

What then are the possible scenarios for Hicks at this point? The prospect that he may be returned to Australia to face trial can be immediately ruled out. The Howard government has consistently maintained that it does not have the legal capacity to try Hicks for war crimes or acts of terrorism due to a deficiency in Australian law at the time of the events of 2001. The first option then would be that fresh charges are laid under the Military Commissions Act and Hicks is eventually convicted. The original 2004 charges against Hicks included being a member of an al Qaida criminal conspiracy to commit - amongst other acts - attacks upon civilians and civilian objects and terrorism, attempted murder against Coalition forces whilst not enjoying combatant immunity, and aiding the enemy. What fresh charges may be brought remains to be seen, though it is important to note the doubt the Supreme Court cast over conspiracy charges in *Hamdan*. If Hicks was to be convicted then two outcomes seem certain. The first is that he would not be subject to the death penalty. The recently arrived US Ambassador to Australia, Robert McCallum, made that clear during his first Canberra press conference. The second, is that Hicks would be eligible for return to Australia under a deal which would allow him to serve part of whatever goal term he faced in Australia.

The second option for Hicks is that he challenges the validity of the Military Commissions Act, or that his trial is delayed as a result of challenges brought by others. Given the concerns which have already been raised over the Act by Amnesty International, the American Civil Liberties Union and by legal scholars, there is every prospect that this will occur. By the time the various appeals have been heard and final rulings issued by the Supreme Court, this could be another few years of Hicks'

life spent at Guantanamo.

Even if Hicks were found not guilty of any charges brought against him, this would not automatically result in his release. No matter what interpretation is placed on the circumstances of his original detention in Afghanistan, the US would seem within its rights to continue to maintain that Hicks is a prisoner of war who can continue to be detained until the end of hostilities. While that is a position consistent with the Geneva Conventions and one which has been advanced in Australia by Ambassador McCallum, presently it is difficult to foresee when a formal cessation of hostilities with terrorist forces will occur. Under this scenario, Hicks could possibly face indefinite detention as a POW. Of course some Guantanamo detainees have been released, however, almost without exception the released detainees had not been charged, were no longer considered useful for intelligence gathering, or were from countries which actively challenged the legitimacy of their detention. Hicks does not fall within one of these exceptions.

With Hicks' de facto POW status now effectively confirmed there is the potential for the Howard Government to request his transfer to Australia. As both a party to the Geneva Convention and also the Afghan conflict, there is nothing under international law which would bar such a transfer.

For the time being, the Howard Government persists in its support of the revamped US military commission process. But can it legitimately continue its unquestioning support of the US when its previous legal advice has been shown up by the Supreme Court as wrong and when there are possible flaws with the new Act? Australia's support for the US position in its campaign against international terrorism is understandable in political terms – it must not be forgotten that Prime Minister Howard was in Washington on 11 September 2001 and that Australians have borne the brunt of terrorist attacks in Bali. The ANZUS Security Treaty has also provided a framework for Australia's close military and security cooperation with the US since 2001. However, Australia needs to maintain a balanced approach between support for one of its closest allies and protection of one of its citizens.

One way forward would be for the Howard government and the Hicks legal team to jointly seek independent legal advice on the constitutional and international legal validity of the revised military commissions. If such advice – which should be publicly released – supports Hicks being tried, then the government can with some confidence continue its current policy of support for the US position. If not, then a

more proactive position needs to be taken to ensure Hicks' rights are protected. No matter what David Hicks is alleged to have done, as an Australian citizen he remains entitled to the protection of the law and of the Australian Government. The US would be doing exactly the same for its own if they were detained in Australia.

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