SPEECH TO VICTORIAN ASSOCIATION OF SOCIAL STUDIES TEACHERS – 19TH MARCH 2007

DAVID HICKS

1. CAN DAVID HICKS BE TRIED UNDER AUSTRALIAN LAW?

In Monty Python's famous Argument Sketch, Michael Palin walks into a shop and pays one pound for a five minute argument. He is introduced to John Cleese, who to his great frustration simply contradicts everything he says.

Palin protests that this is not what he paid for, saying "an argument is a connected series of statements intended to establish a proposition" and "argument is an intellectual process. Contradiction is just the automatic gain saying of any statement the other person makes". Cleese delivers the unforgettable retort "no it isn't".

When discussing whether David Hicks can be tried under Australian law, Attorney-General Philip Ruddock has adopted the John Cleese approach. He simply asserts that David Hicks can't be tried under Australian law. When asked to substantiate his claim, he says he has advice from the DPP, and emphasises the "independence" of this advice.

But then he refuses to reveal the advice, which takes us back to square one. He is simply expecting everyone to accept that David Hicks can't be tried under Australian law. He is totally unwilling to argue the point or to produce evidence.

Mr Ruddock claims David Hicks cannot be prosecuted under Australian laws, and yet he admits that he has not even seen the United States evidence! In a briefing from the Attorney-General's Department, I was advised that neither the Attorney-General, his Department, nor the Director of Public Prosecutions have seen the evidence.

He claims that if the Government were to release the advice prepared by the DPP, "it could be accused of unfairly dealing with Mr Hicks". The Government has at no stage been worried about "unfairly dealing with" David Hicks. David Hicks' lawyers have said they would welcome the release of the DPP advice. It's no good calling the DPP's advice "independent" if you treat it as your own private political plaything.

It is important to know whether the DPP or the Government turn their minds to:

- whether the laws of armed conflict apply to the David Hicks case
- David Hicks' legal status, eg, was he, or is he, a prisoner of war?
- Is David Hicks entitled to the protections of the Geneva Conventions, and if not, why not?
- Is David Hicks entitled to the protections of the International Convention on Civil and Political Rights, and if not, why not?

Underlying the issue of the secret DPP advice is the question of why the DPP has advised he cannot be charged under Australian law. Is it because of a defect or loophole in Australian law, or is it because of a lack of admissible evidence against him? If the latter, why is he being detained?

The Attorney-General has always sought to create the impression that the fault lay with Australian law, that this had now been addressed, but that it would be wrong to do this retrospectively, and so it couldn't be used to deal with David Hicks. But his refusal to release the advice means we can't have the debate. And now his cover has been completely blown by the fact that the one US charge left standing – after four have fallen by the legal wayside – is a retrospective charge, the very thing he says is unacceptable in Australia.

The US authorities have taken a domestic law offence, re-worded it, applied it to non US citizens, increased the penalty for it, and given it retrospective effect from 2006 back to 2001 and beyond.

In Monty Python and the Holy Grail a very French John Cleese informs King Arthur and his Knights that he has already found the Holy Grail. "Can we come up and have a look?" asks King Arthur. "Of course not", replies Cleese.

The Attorney-General should stop his John Cleese impersonation and release the DPP advice, so we can have an informed debate about a matter which is fundamental to the rights of Australian citizens abroad. The Attorney-General claims the Australian Government has no legal obligations to Australians abroad, but surely if it objects to Australians being tried under retrospective laws at home, it must also object to Australians being tried under retrospective laws abroad.

Devika Hovell and Grant Niemann, legal academics at the University of New South Wales and Flinders University, South Australia have concluded that the crimes with which David Hicks was originally charged by the Unites States constituted crimes under Australian law at the time of their alleged commission. They concluded that the Government's insistence that no crimes exist under Australian law with which David Hicks could be charged was quite wrong. They concluded that David Hicks could be charged under Australian law with:

- Conspiracy to commit grave breaches of the Fourth Geneva Convention in contravention of Section 6 of the Geneva Conventions Act, read together with Section 86 of the Crimes Act.
- Attempted wilful killing by a non-combatant in contravention of Section 6 of the Geneva Conventions Act (read together with Section 11.1 of the Criminal Code) and
- Engaging in hostile activity in a foreign state in contravention of Section 6 of the Crimes (Foreign Incursions and Recruitment) Act.

2. GUANTANAMO BAY – A LEGAL AND MORAL BLACK HOLE.

The Government's bogus claim that David Hicks can't be charged in Australia is the basis for its justification of his detention at Guantanamo Bay.

Guantanamo Bay is a legal and moral black hole. The Prime Minister claims that the presumption of innocence is alive and well at Guantanamo Bay, but the very act of detaining David Hicks at Guantanamo Bay is a denial of the presumption of innocence. Further more his claim that the presumption of innocence is alive and well at Guantanamo Bay sits uncomfortably with the statements made not only by the US authorities but also with the remarks of his own Ministerial colleagues.

- from the Head of Guantanamo Bay, Rear Admiral Harry Harris: " I believe there are no innocent detainees here" (8 February, 2007)
- from Donald Rumsfeld: "among the most dangerous, best trained, vicious killers on the face of the earth"
- from Treasurer Costello: "the case against David Hicks is "pretty straight forward" ,"he wasn't on a backpacker tour"
- from Alexander Downer: "the fact is that David Hicks trained with Al Quaeda, which is the world's most evil terrorist organization "

These views are central to why David Hicks and others have been held at Guantanamo Bay without trial for over five years. The US authorities say that the International Covenant on Civil and Political Rights does not apply because there is a war going on. But then they also say that David Hicks and other prisoners at Guantanamo Bay are not prisoners of war and are not entitled to the application of the Geneva Conventions either. In so doing they have created a legal black hole for detainees at Guantanamo Bay where they have no legal rights at all. They then propose to fill the hole with the Military Commission Process, which falls far short of International legal standards and far short of the standards of a fair trial.

Guantanamo Bay is not only a legal black hole, it is a moral black hole also. In March last year David Hicks complained to an Australian Consular official about the removal of "comfort items" like toilet paper and soap. The next day he was transferred to a solitary cell, with no natural air or light, and he has been held in such a cell for 22 hours a day every since. Clearly the message from the authorities to him was – you are on your own here, no one can help you. David Hicks has been reluctant to see the Australian authorities ever since.

3. CAN GUANTANAMO BAY PROVIDE A FAIR TRIAL?

Guantanamo Bay fails to provide the essential guarantees of independence and impartiality which are the cornerstone of a fair trial. Labor's policy concerning David Hicks does not go to his guilt or innocence, about which we have no view and are not in a position to have a view. We have a two word policy – fair trial. Sections 268.31 and 268.76 of the Australian Criminal Code, by reference to International Treaties, specifically recognise the importance of this right. The UN International Covenant on Civil and Political Rights emphasises its importance by providing in Article 14(1) "In the determination of any criminal charge against him or of his rights and obligations in a suit at law everyone it shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

The right to a trial before an "impartial and regularly constituted court" is also recognised in Article 75, Sub Section 4 of Protocol One to the Geneva Conventions 1949. With these instruments, the common source of the entitlement to a fair trial before an independent and impartial tribunal is the principle enshrined as one of the "equal and inalienable rights of all members of the human family" in the Universal Declaration of Human Rights. Article 10 of the Universal Declaration provides "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 his obligations and of any criminal charge against him".

The US Military Commissions do not pass these tests. The Commission's Officers are appointed by the US President or his Delegate, the US Secretary of Defence. These officers act not only as a jury but also judge as they determine the sentence if an accused is found guilty.

The lack of independence and impartiality is clear enough if you think of other examples – a citizen is charged by the Police with aiding others to attack members of the Police Force and destroy items of Police property. The presiding Judge who determines the law at the trial is a Policeman. A jury is selected for the trial by the Chief of Police. The jury consists entirely of Policemen. The Chief of Police then reviews the decision of the jury before the decision becomes final. How could such a system provide either a fair trial or the appearance of a fair trial? People are entitled to be tried before a jury of their peers not by a jury of military officers.

4. FAILURE OF THE MILITARY COMMISSIONS TO EXCLUDE EVIDENCE OBTAINED BY COERCION

While there is a ban on evidence obtained by torture, the Military Commissions Act 2006 still gives a wide discretion to the presiding Military Judge to receive evidence obtained by coercion in circumstances which would not be permitted in a regular criminal court or a court martial, and in circumstances which are regarded by the general law as being unfair and inadmissible. Article 99 of the Third Geneva Convention provides that "no moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.'

These rules are there for good reason, and they are no mere academic debating point in the David Hicks case. For example, it was recently reported that David Hicks and other Guantanamo Bay detainees were shown photos of the executed Saddam Hussein with a caption along the lines of 'Saddam Hussein failed to co-operate and look what happened to him.' This kind of conduct would not happen in Australia or in the US, because any evidence obtained after it would be thrown out at once, for the good reason that it is simply impossible to know whether a person confessing or giving evidence is doing so because they are guilty, or because they have been frightened by what they have seen.

5. FAILURE OF THE MILITARY COMMISSIONS TO EXCLUDE HEARSAY EVIDENCE

The Rules of the Military Commission permit the prosecution to rely on hearsay evidence, thereby denying to an accused person any adequate opportunity to present his defence by cross examining the authors of the statements presented against him. This is a breach of the Australian Criminal Code.

The Attorney-General has responded to this matter by saying that the rules on hearsay at the Military Commission are comparable to those applied to the International Criminal Tribunal for the former Yugoslavia. The problem with this is that the International Criminal Tribunal is a Civil Court, not a military one, and in any event hearsay evidence is only permitted conditionally, eg evidence which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment. Whereas any serving officer is qualified to serve on a military commission, only professional judges constitute the International Criminal Tribunal for the former Yugoslavia.

6. FAILURE TO ENSURE THAT ACCUSED WILL BE PRESENT FOR ALL THE EVIDENCE

Upon the request of the Government the Judge may exclude both the defendant and his lawyer from the process in which the Government argues to the Judge that classified information should be withheld. The defendant may also be prevented from seeing portions of the Government's legal filings regarding why the evidence cannot be disclosed and from participation in the discussion between the Government's Attorney and the Judge. Regular Courts-Martial procedures require both the defendant and his counsel to be present at all proceedings determining the classification of information.

The ability of the defendant to fully present his case is made more difficult by a provision that allows the Government to withhold not just classified information but also the sources, methods, or activities by which the evidence was obtained. The Military Commission rules violate the principle that the jury shouldn't be allowed to see anything that the defendant can't see. Witnesses can be shielded so that the defendant can't see them, but the jury can.

David Hicks could be convicted on the basis of hearsay evidence that he will never have the opportunity to test or challenge. Evidence may come from informants in the field, former Guantanamo detainees long released, or US or foreign security agents, none of whom the prosecution is required to produce at trial.

The Attorney-General's claim that no evidence will be admitted in the trial that the accused himself has not seen is wrong. Summaries of evidence may be admitted for security reasons. Counsel for the accused can see such evidence, but not necessarily the accused, and finally such evidence does not need to be cross examinable to be admitted.

7. UNFAIR TRIAL PROCESS IS THE REASON FOR DELAYS.

Given all these shortcomings, for as long as the US, with the Howard Government's blessing, insists on trying David Hicks at Guantanamo Bay, then challenges to the fairness of the trial, and therefore delays, are inevitable.

Defence lawyers have every right to challenge a military commission process that is fundamentally unfair. It is outrageous that the Howard Government has blamed David Hicks and other detainees for delays in the process. Even after 5 years what David Hicks has to look forward to is delays to an unfair trial process that no American citizen is subject to, and no Australian should be either. The US Court of Appeals ruled in February that "Federal Courts have no jurisdiction in these cases". It is entirely foreseeable that this decision will be appealed and that further delays will result. Either David Hicks receives a fair trial in America, under American domestic law, or in Australia under Australian law. He will not receive a fair trial at Guantanamo Bay. If it's not good enough for American citizens, it's not good enough for an Australian citizen either.

8. THE BRITISH GOVERNMENT GOT THIS RIGHT.

Attorney-General Ruddock's defence of the Howard Government's handling of the David Hicks case has included the statement that "the US made it clear early on that a detainee would not be repatriated unless the detainee would be prosecuted. Under our law at the time, this was not possible". Now earlier in my remarks I have challenged the accuracy of the second sentence, but the first sentence is clearly wrong. The fact is that the British Government succeeded, where the Australian Government didn't even try.

- Nine British citizens were detained by the Government of the United States at Guantanamo Bay.
- In July 2003, two of the British detainees in the same Presidential decree as David Hicks – were designated as eligible to stand trial by the United States Military Commission. They were Feroz Abbasi and Moazzam Begg.
- The British Government immediately made representations to the Government of the United States that it had serious concerns about the first Military Commission.
- The position of the British Government expressed to the Government of the Unites States was that the first Military Commission would not provide a process for a fair trial by international standards, and that the British detainees should be tried either in accordance with international standards or returned to the United Kingdom.
- On 19 February 2004 the British Government reached agreement with the United States Government for the release of five of the nine British detainees and shortly thereafter these detainees were returned to the United Kingdom.
- As a result of further negotiation initiated by the British Government, the legal proceedings before the first Military Commission against Mr Abbasi and Mr Begg were suspended in July 2004.

- In January 2005 the British Government reached a further agreement with the United States Government for the release of the four remaining British detainees. On 25 January 2005 these detainees were returned to the United Kingdom. On arrival they were arrested by officers from the Metropolitan Police and taken to Paddington Green Police Station for questioning under the Terrorism Act 2000. By 9pm on Wednesday 26 January all four had been released without charge.

9. MAJOR MORI

I want to say a few words now about Major Mori. At a time when America's international standing has suffered as a result of President Bush's handling of the war on terrorism, Major Mori's conduct of the David Hicks case has been a shining example of all that is best about America. Major Mori has been objecting to the Military Commissions set up at Guantanamo Bay and demanding that David Hicks be tried in a US court or an Australian court – this is work the Howard Government should have been doing.

Instead the Howard Government has expressed the legal view that it has no obligation to Australian citizens abroad, and its political view has been to accept everything the US tells it about Guantanamo Bay and David Hicks.

The Howard Government has cited Major Mori's vigorous advocacy of David Hicks as grounds for its confidence that he will get a fair trial, but reports a fortnight ago that Major Mori could face disciplinary action over the case, and therefore be taken off the case, should finally cause the penny to drop for the Government – that David Hicks will not get a fair trial at Guantanamo Bay.

Major Mori comes from the tradition of Military lawyers or JAGS, who are heirs of both the 17th Century English civil law, which appointed the British army's first Judge Advocate General and abolished torture, and the 18th Century American Revolution which enshrined this same prohibition on coerced testimony in the US Constitutions Fifth Amendment. By contrast, the American neo-cons are seeking to revive for the American presidency the sovereign prerogatives of the Tudor-Stuart monarchs: the power both to overturn laws and to order torture. When we listen to Major Mori appeal to ideals of justice and condemn the abuse of presidential power, we are hearing the echoes of a long ago ideological and institutional war.

These military lawyers have resolutely fought the Bush administration, becoming an important bulwark of opposition to policies of endless incarceration and denial of legal rights. At every major turn in this five year debate the military's top JAGS have spoken out with stunning effectiveness, checking the Bush administration and sparking opposition to its policies in both Congress and the Courts.

This campaign has reached as high as Colin Powell, a career officer who was Bush's first Secretary of State, now saying that any tampering with the Geneva Conventions would cost America "the moral basis of our fight against

terrorism" and make it impossible "to remind our soldiers of our moral obligations with respect to those in our custody".

10. IS DAVID HICKS A PRISONER OF WAR?

Neil James of the Australian Defence Association takes the view that David Hicks has been detained because he was a belligerent for one side in a war and was captured by the other side. Mr James takes the view that it is therefore quite legitimate to detain him to prevent him from re-joining the conflict, and that the Laws of Armed Conflict should apply. It follows from this that it is wrong to try David Hicks as a criminal, and Mr James suggests that he should be returned to Australia provided he gave undertakings not to resume activities as a belligerent and to abide by this parole until the conflict ended. He says that because Australia is an ally of the US in the war in Afghanistan he could be readily transferred to Australia. He thinks that releasing Hicks on parole is the easiest resolution to negotiate with the US and the International Committee of the Red Cross, and is also the most humane solution.

This analysis proceeds on the assumption that David Hicks was a Taliban soldier. This may be correct, but is a question of fact about which I am not in a position to know. Neil James' analysis highlights the failure of the Howard Government to turn its mind to the issue of whether David Hicks was an Al Quaeda operative, a Taliban soldier, both or neither. The legal consequences of these situations are different. However when I asked the Attorney-General's Department about this issue, they had never tried to form a view and had no intention of forming a view about these fundamental threshold questions.

11. DAVID HICKS TREATMENT AT GUANTANAMO BAY.

David Hicks father and legal counsel have expressed concern about his treatment at Guantanamo Bay and about his mental health. I mentioned earlier on that David Hicks was removed to a solitary cell the day after he complained to Australian authorities about his treatment. The Attorney-General's Department has confirmed that this transfer occurred the next day, and that the Australian Government made no protest about this apparent punishment or reprisal for David Hicks exercising his right to speak to an Australian consular official.

The reason they give for not protesting is that the US authorities have informed them that the transfer was coincidental. This is hard to believe, and it certainly wouldn't look that way if you were David Hicks.

I am equally unimpressed with the Government's silence on the refusal of the US authorities to allow David Hicks access to an independent mental health assessment. In place of a serious assessment we got a cavalier assurance from Foreign Affairs Minister Downer that he'd received advice that David Hicks was in good shape. It turned out that this came from a consular official who had visited David Hicks for 5 minutes and didn't even speak with him. For

the Minister's benefit, some consular official waving as they walk past on a tour of inspection does not constitute an independent mental health assessment!

12. TIME FOR PRIME MINISTER HOWARD TO ACT.

We now have Prime Minister Howard showing an ability to walk both sides of the street, claiming he has been responsible for David Hicks' upcoming arraignment, saying " I do think this is the result of the representations that I have made ". Before he claimed he was not to blame for the slow trial process. But the Government's new policy – speedy conviction – is no substitute for a policy of fair trial.

John Howard should pick up the phone, like the British Government did, and say "either you try David Hicks in America in accordance with international legal standards, or you return him to Australia to face justice here.

And John Howard should make this demand, not because an election is around the corner, but because this issue has long since ceased about David Hicks, and has become an issue about us – about whether Australia still believes in a fair trial, even in difficult and challenging cases, and understands that an essential ingredient of a fair trial is trial by a jury of your peers.

The Australian Government did not object when David Hicks was transferred from Afghanistan to Guantanamo Bay without going before a court, tribunal or independent adjudicator of any kind to determine his status.

The Australian Government did not object when the US announced that those captured as part of the war on terror would not be entitled to the Geneva Conventions.

The Australian Government did not object when US authorities specifically located detainees at Guantanamo Bay on the basis of legal advice that it was not sovereign US territory and therefore was outside the jurisdiction of US courts.

The Australian Government did not object when, after the US Supreme Court held that it could consider applications from the detainees, the US Congress passed the Military Commissions Act seeking to oust the jurisdiction of the courts.

For the first two and a half years of his detention David Hicks was held without charge and without access to a lawyer. The Australian Government did not object.

The US authorities refused to try David Hicks before an ordinary US court or court martial because he was not a US citizen. Instead they set up a Military Commission with all the shortcomings I've outlined. The Australian Government did not object.

When the US Supreme Court threw out the first Military Commission, the US authorities continued to detain David Hicks without charge and went to Congress seeking legislation to authorise the Military Commission. The Australian Government did not object.

Now that David Hicks has spent over five years in detention and all that remains against him is one charge – material support for terrorism – which is a retrospective charge, surely the Australian Government must now say, enough is enough, and object. It is time we joined the UK Attorney-General, the UN Committee against Torture, the European Parliament, the German Chancellor, the Irish Foreign Minister, former US Presidents Jimmy Carter and Bill Clinton and a deafening chorus of other international figures who have all said that Guantanamo Bay should be closed. It's time.

KELVIN THOMSON
MEMBER FOR WILLS.