

Citizenship & David Hicks: an interview with David McLeod

Interview by Richard Beasley

The Halifax bomber flown by Flying Officer Douglas McLeod was shot down over Isnabruk, Germany in 1942. It was night time, and the crew was forced to bail out. All were captured, and all but one would survive the war.

Upon his capture, Doug McLeod was imprisoned at Stalag Luft III, along with other Allied air force prisoners of war. Stalag Luft III was soon made famous by a daring but largely unsuccessful escape, itself made even more famous by the 1963 film starring Steve McQueen.

McLeod was liberated by the Russians in 1945, and returned to Australia to study law, and in partnership started his own law firm.

Sixty years after his father's release from a prisoner of war camp, David McLeod, also a lawyer, found himself at a modern day POW camp, if that is not too glorious or inaccurate a term: At Camp Delta, at Guantanamo Bay, Cuba; as the principal Australian lawyer for Guantanamo 'Detainee 002' – David Matthew Hicks.¹

When he arrived at the gates and barbed wire fences of Camp Delta, McLeod told me that he briefly thought of his father, and the three years he spent as a POW. His father, he told me, made little complaint – at least to him – of his years in the Stalag, or about the treatment he received from the German soldiers and guards. Whether this was as much a product of the reticence of men of his era for complaint about such things, or of the German guards' general compliance with the Geneva Convention, McLeod isn't sure.

'His only real complaint was with the Russians', he told me. 'After the German guards all disappeared one morning in 1945, they thought they were free, but the Red Army then arrived and locked everyone back up.'

Soviet suspicion about Allied airmen was either alleviated, or forgotten about after a few days, and the POWs, including McLeod's father, were liberated all over again.

If Douglas McLeod didn't complain about Stalag Luft III, the same cannot be said of David McLeod and Camp Delta, and the treatment enjoyed by his client Hicks.

There were some obvious reasons why McLeod was chosen to be the Australian lawyer for David Hicks. He is a group captain in the RAAF (the army equivalent of full colonel), and is the head of the RAAF Defence Legal Service in South Australia. He had practical experience too. Only 18 months prior to becoming involved in the Hicks case, McLeod had seen active service for three months in the Iraq war, as a legal adviser to the group commander of the Orion contingent in the Persian Gulf. And, over a 25 year period, he estimates that he had been involved in at least 100 court martial and other disciplinary hearings as an advocate. From a military and legal perspective, he appeared a sound choice. But there were other issues at play.

'I was considered conservative politically, which was probably a fair enough description', McLeod told me. 'There was a perception I think, that I was someone the government might listen to. David, by 2005, needed as much PR and political level assistance as he did legal.'



David McLeod, Australian lawyer for David Hicks, talks to media at his office in Adelaide. Photo: Sam Mooy / Newspix

Until February 2005, Hicks's Australian lawyer had been Stephen Kenny, another Adelaide-based practitioner, but one unlikely to describe himself as 'conservative politically'. Kenny, McLeod told me, 'did a fantastic job for David.' Rightly or wrongly though the perception grew that Kenny's criticism, however valid, was strident enough that it might not be helping to soften the harsh and even aggressive stand that the Australian Government had adopted against Hicks. In May 2005 McLeod was asked to accept the Australian brief for Hicks.

Reading through the transcripts of interviews McLeod gave to the press after becoming Hicks's legal adviser, the change in tone from his early interview to the later is both obvious and startling. As well as changing his rhetoric, acting for Hicks it seems has changed McLeod as both a lawyer and as a man.

In his first interview after his appointment, prior to travelling to Guantanamo to meet his client, McLeod indicated a concern to not unduly upset a government that generally became excitable at the first hint of criticism. He described the Australian Government as 'being very sensible and sensitive to the issues involved', and because of that he anticipated that a 'dialogue [would] ensue that would be in the interests of both the Australian Government and David Hicks'.²

'Well, I was wrong about that', McLeod says now when this is read to him.

The military commission process that Hicks was subject to when McLeod was first appointed as his Australian lawyer was, to quote McLeod 'a complete sham'. Lord Steyn of the House of Lords, having called Guantanamo Bay a 'legal black hole', has described it this way:

The prisoners have no access to the writ of Habeas Corpus to determine whether their detention is even arguably justified. The military will act as interrogators, prosecutors, defence counsel, judges, and when the death sentences are imposed, as executioners. The trials will be held in secret. None of the basic guarantees for a

fair trial need be observed. The jurisdiction of the United States courts is excluded. The military control everything.³

Although delicate initially with the government, McLeod nevertheless was on the front foot concerning the legality of the three charges that Hicks then faced (subsequently dropped after the US Supreme Court decision in *Hamdan v Rumsfeld*) and for which he had then been detained for three and a half years without trial.

The first charge was 'conspiracy'.

'A charge previously unheard of under the rule of law', McLeod told me.

Unsurprisingly, four of the eight justices of the US Supreme Court who sat on *Hamdan v Rumsfeld* ruled that conspiracy was not a valid offence under the rule of law.

The second charge was 'attempted murder by an underprivileged belligerent'.

'I still don't know what that means', McLeod said. 'I'm not sure the prosecution did either. The suggestion was that David could somehow be curiously liable for members of the Taliban who were shooting at US forces. It was ridiculous.'

The third charge was 'aiding the enemy'.

'The first time that David Hicks ever heard of the name 'Al Qaeda'', McLeod told me, 'was when he was in detention at Guantanamo Bay'.

Hicks was originally detained in Afghanistan by the Northern Alliance. Although some members of the then federal government like to perpetuate the myth that Hicks was captured on the battlefield while fighting with Taliban forces, he was actually first detained in civilian clothes while attempting to catch a taxi – from a taxi stand – to Pakistan. He was handed over in December 2001 by the Northern Alliance to the US military for a fee of \$1000.

'I think that David thought – in a real sense – that he was defending Afghanistan, not waging some international war of terror', McLeod said.

In any event, in *Hamdan v Rumsfeld*, the US Supreme Court ruled that such a charge required the defendant to have an allegiance to the United States, something not owed by an Australian citizen.

While the original charges may have been fundamentally flawed, McLeod saw that the bigger picture was to get a change of attitude from the government. Ultimately, given Australia's cooperation with the US in the Iraq war, they had the power to bring Hicks home in the manner the British had with its nationals at Guantanamo Bay. Hence the softly-softly approach on the government in the early interviews. That all changed in late June 2005 when McLeod saw his client at Camp Delta.

Upon his return McLeod told the ABC that the conditions at Camps X-ray and Delta were 'an absolute and utter disgrace'.⁴ He compared them to enclosures at a zoo. A man who does not give the impression of being likely to often succumb to hyperbole, he was 'shocked, genuinely shocked' when he first saw David Hicks.

'He looked like he was dying, like someone from a cancer ward', he said. 'He was pallid. His eyes were sunken. He had long greasy hair. His face was bloated. His skin was almost translucent.'

At this point, Hicks had spent 16 months in solitary confinement. He was in his cell 23 hours a day. He was taken out for one hour at night.

For the length of their interview – conducted in a tiny hut in the camp and in the presence of Hicks's military lawyer Major Michael Mori and Michael Griffin – Hicks was chained to a bolt in the floor.

'The first time David walked more than 20 feet in a straight line in over five years was on the tarmac at Adelaide airport when he returned to Australia', McLeod told me.

David Hicks has always maintained that he was tortured during the period of his detention. He has alleged that:

- ◆ he was beaten during interrogations, including while handcuffed
- ◆ he was deprived of food, sleep and access to reading material, or any social contact
- ◆ he had his head rammed into a wall several times while blindfolded
- ◆ he was threatened with firearms and other weapons.⁵

Despite McLeod's concerns about the unfairness of the commissions, the federal attorney-general (Philip Ruddock) continued to make a number of public declarations as to what he said were 'fundamental safeguards' that would ensure a fair trial for David Hicks under the regime.

McLeod would not comment directly on those specific allegations, other than to say this: 'of course he was tortured. He was detained for over five years without a trial. He was placed in solitary confinement for a prolonged period. He was in a cell for 23 hours a day. He knew that the British detainees and also the other Australian had all been discharged from detention. He went for years without knowing what was going to happen to him. That is torture. It is physical and mental torture.'

McLeod did offer me an even more precise example. When he visited Guantanamo Bay, on a noticeboard that the detainees had access to,

was a picture of Saddam Hussein being hanged. There was a message next to it: **'This is what happens to those who do not co-operate.'**

'We asked them (the guards) to take it down', McLeod told me. 'Eventually they did.'

Despite the conditions that Hicks was forced to endure, and despite the extreme concern McLeod had for his client's physical and mental condition, the Australian Government remained entirely unsympathetic. According to the then foreign minister, Alexander Downer, Hicks's only problem was a 'bad back', and he was not, apparently, 'depressed'.⁶ At Camp Delta or X-Ray, who would be? A camp psychiatrist, so Downer reported, assessed his mental health as 'good'.⁷

Conversely, McLeod – whose dealings with Downer during the time Hicks remained at Guantanamo, became more and more strained – thought his client would 'die in custody'.

'After my first trip to Guantanamo', McLeod said, 'I made a decision that it was important that we fight a public relations battle for David.'

This was primarily because McLeod thought that Hicks had absolutely no hope of a fair hearing under the military commission system that was set up under the new legislation rushed through Congress after *Hamdan v Rumsfeld*. Despite McLeod's concerns about the unfairness of the commissions, the federal attorney-general (Philip Ruddock) continued to make a number of public declarations as to what he said were 'fundamental safeguards' that would ensure a fair trial for David Hicks under the regime. These included the right to be present at trial (an odd standard for fairness) and the right to cross-examination.

'What the attorney did not point out', McLeod said, 'was that the prosecution could present its case entirely on written statements and documents. It is very hard to make headway cross-examining a piece of paper.'⁸

Perhaps this, together with the fact that there was a likelihood that evidence would be presented that had been obtained by inhumane methods, led observers like Lex Lasry QC to describe the military commission process 'as a charade that only served to corrode the rule of law'⁹, and commentators like Robert Richter QC of the Victorian Bar to describe them as something that 'would have done Stalin's show trials proud'.¹⁰

McLeod began to use a stronger tone when publically discussing the government's position. At about this time the Fairfax journalist Michelle Grattan offered him some advice. 'She told me that I would get nowhere with the government or Howard for David until 50.1 per cent of the population was against the government's position.'

He began publicly describing Ruddock as 'smug' and 'lacking common sense', and posed the rhetorical question on the ABC as to whether his client would 'have to die in custody' before his own government would say 'that's enough'.¹¹

'I felt that the government was spending more time in demonising David Hicks than attempting to resolve the situation where a national had been detained without charge for a number of years', McLeod said. 'That, to me, made no sense then, and makes no sense now.'

The government has to show some allegiance and support for its citizens when they are in trouble. The British went in to bat for their nationals. We didn't. We let our national be the last Western man left in that bloody awful place. A new country ought to believe in itself enough to look after its own.

Still, this criticism is moderate compared to that of Richter QC, who in an article published in *The Age* suggested that the then attorney-general could be charged with war crimes for 'counselling and procuring an illegal process' in relation to an unfair trial or illegal process. He also described Ruddock as a 'liar' and challenged him to sue for defamation.¹²

As at the date of writing this article, it appears no such charges, nor any defamation proceedings have been brought.

'The really frustrating thing is', McLeod told me, 'that if government had simply asked the United States to send David back home, they would have. I just find that unforgivable.'

The thing that most disappointed McLeod, he said, was that the government placed its own political ends 'ahead of the citizenship of one of us.'

'The government knew that the evidence against David was paper-thin [the chief prosecutor, Mo Davis, has recently stated that the evidence was so weak that charges should not have been brought], and they knew that the military commission process was a farce. They knew that David was being kept in the most appalling conditions, and had been for years, and they knew he would be sent home if they asked. But they wouldn't ask.'

I asked McLeod what impact acting for Hicks had had on him as a lawyer, and as a man. 'The lasting thing I've taken from acting for David is the importance of the Australian Government placing a value on citizenship. Not just for those of us that they like, but for all of us. The government has to show some allegiance and support for its citizens when they are in trouble. The British went in to bat for their nationals. We didn't. We let our national be the last Western man left in that bloody awful place. A new country ought to believe in itself enough to look after its own. Instead it was the 'mother country' that took the lead. That I think is a real shame.'



Photo: Newspix

The obligation of the government to assist Australian citizens was at the centre of proceedings brought in the Federal Court in late 2006, on behalf of Hicks. In this case – terminated after Hicks’s plea bargain was agreed – McLeod instructed Bret Walker SC and Kate Eastman of the New South Wales Bar (Major Mori was also granted leave to appear) in proceedings that were heard at the interlocutory stage before Tamberlin J. ‘In the claim we essentially sought an order in the nature of *habeus corpus*, for David’s return to Australia. It was based on an obligation or a duty of the government to protect Australian citizens abroad.’ A duty which, the solicitor-general argued on behalf of the government – unsuccessfully – was so untenable that the claim should be struck out.

Given his military and legal background, and given the allegations his client made about torture, I asked McLeod his views on what are now called ‘enhanced interrogation techniques’- the Bush administration’s euphemism for torture.

‘The third Geneva Convention and the laws of war do not allow torture’, McLeod said.

He told me that he agreed entirely with the president of the Supreme Court of Israel, Aaron Barak, who has held that ‘the violent interrogation of a suspected terrorist is not lawful even if doing so may save human life by preventing impending terrorist acts’. The unlawfulness of torture

is simply one of the prices and consequences of living in a free and democratic society. It is part of our security.

It was after the Federal Court proceedings survived the strike out attempt that McLeod was called by Downer’s chief of staff, and summoned to the family home of the then foreign minister in the Adelaide Hills. Within a short period of time following that meeting – relative to the time he had spent in detention – Hicks pleaded guilty to the somewhat un-specific charge of ‘material support of terrorism’, and was soon on a flight home back to Adelaide to spend seven months at Yatala prison before his release – subject now to a ‘control order’.

McLeod says he was not entirely happy with the deal that was ultimately reached for his client – for whom he is still acting – but would not elaborate on the record. He is pleased that he’s been released, is taking steps to assimilate back into society (with help from people like Dick Smith) – and that he is now, usually, off the front page.

Only one question for me remained: ‘in the end, even when public opinion had swung behind David to an extent – at least in terms of the unfairness of detention without charge or trial for so long – why didn’t the Government simply ask the US to send him home?’

‘Because, I think, John Howard is a very, very stubborn man’, McLeod said.

Just ask Peter Costello.

Endnotes

1. Sydney Lawyer Michael Griffin was also appointed as a ‘foreign attorney consultant’ for Hicks.
2. (ABC PM programme, 1/6/05).
3. ‘Guantanamo Bay: The Legal Black Hole’, Twenty Seventh F A Mann Lecture, 25 November 2003, By Lord Justice Johan Steyn.
- 4.
5. www.news.com.au from AAP 10 December 2004 – ‘What Hicks Claims Happened at Guantanamo Bay’.
6. www.news.com.au , 14 June 2006, ‘Hicks tortured in jail, says expert.’
7. *The Age*, 1 February 2007, ‘Hicks charges false’.
8. See generally. ‘A fair go for Hicks’, published in *The Age*.
9. ABC News Online, 25 July 2007, ‘Law Council slams Govt in Hicks report’.
10. *The Age*, 1 April 2007, ‘A trial that was uncomfortably close to Stalinist theatre’.
11. *The Sydney Morning Herald*, ‘Hicks mental health slides’, 7 October 2006.
12. *The Age*, 18 and 27 February 2007 – ‘Hypocrites breaking our law at every turn’, and ‘Ruddock safe from law, despite silk’s challenge’.