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The Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

19 February 2009

Via email: legcon.sen@aph.gov.au

Dear Sir,

**INQUIRY BY THE SENATE STANDING COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS INTO THE FOREIGN EVIDENCE
AMENDMENT BILL 2008**

Introduction

I act as the Australian lawyer for David Hicks and was his lead Foreign Attorney Consultant approved and appointed by the US Secretary of Defense (sic) in relation to his appearance before US Military Commissions in Guantanamo Bay Cuba.

Background

David was detained at the US Naval Station Guantanamo Bay in Cuba by the US Military.

The Bush Administration took the view that David and the other detainees selected for prosecution should not be tried in a US civilian criminal court nor in a US military court but by a special US military commission specially set up and designed for the purpose.

In what was a not very subtle attempt to more easily secure convictions the military commission was established with "special" rules of evidence which did not apply in US criminal or civil proceedings, or indeed even in US military courts.

Under those rules - which were condemned by the American Bar Association and the Law Council of Australia and numerous international jurists - it was possible for the US prosecutor to get into evidence any document even if it was obtained by coercion or contained hearsay.



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All the prosecutor had to prove was that the document had probative value to a reasonable person.

It was then up to the detainee to prove that the document was not reliable under the totality of the circumstances.

The Australian Proposal for foreign evidence

As an Australian lawyer who is in the unique position of having witnessed at first hand the highly prejudicial effect and impact of such “special” rules on an Australian citizen it is of great concern that the Australian Foreign Evidence Amendment Bill 2008 (“the Bill”) presently before the Senate seeks to have similar “special” rules of evidence introduced in Australia.

These rules are to apply to documents obtained under the Foreign Evidence Act which appear to be foreign business records and will enable an Australian prosecutor to get the documents into evidence in Australian criminal proceedings.

Such proceedings would concern offences against the laws of Australia, including those related to terrorism, tax, corporate and other matters.

What are the existing Commonwealth rules?

The existing rules for admitting into evidence a foreign business record are contained in s69 of the Commonwealth Evidence Act 1995. These require that the prosecution prove the document in question is:

- indeed a business record, and
- that the relevant representation or representations contained in that document were made by a person who:
 - had knowledge, or
 - might reasonably be supposed to have personal knowledge of the asserted fact.

Further the onus of proving these matters rests on the prosecution.

What are the proposed changes?

The Bill will completely change the position in respect of documents obtained under the Foreign Evidence Act which appear to be foreign business records.

If enacted in its current form the Bill will:

1. no longer require the prosecutor to prove the document was a foreign business record only that it *appeared* to be such.
2. dispense with the requirement on the prosecutor to show that the representation made in the document was made by a person who had or might reasonable have been expected to have that personal knowledge of the asserted fact.
3. will place the onus on the accused of trying to prove the document was not reliable or probative.

The Guantanamo Bay Amendment

If the Bill is passed, the Australian law in this respect would be as bad as the discredited and offensive rules for prosecuting detainees at Guantanamo Bay and the Bill might well become known as the "*Guantanamo Bay Amendment*".

In fact the position in Australia will be even worse than the Guantanamo Bay Rules as, at least under those Rules the prosecutor has to prove that the document has probative value to a reasonable person.

This will not be the position under the Bill where a prosecutor need show only that the document appears to be a foreign business record *and then it will be up to the accused to prove that the document was not reliable or probative.*

Recommendation

In my respectful submission for the cogent reasons above the Senate Committee should recommend that the Foreign Evidence Amendment Bill in its current form be rejected by the Senate.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'D. McLeod', with a long, sweeping flourish extending to the right.

David McLeod RFD, LL.M (Pub&Int) (Mel), LL.B (Adl)