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ROBERT STARY
LAWYERS



21 November 2008

The Hon Robert McClelland MP
Attorney-General
PO Box 6022
House of Representatives
Parliaments House
Canberra ACT 2600

Dear Attorney

Re: The Report of the Clarke Inquiry

On 21 November 2008 the Honourable MJ Clarke QC is due to report on the results of his Inquiry into the Case of Dr Mohamed Haneef.

The case of Dr Haneef highlights a number of significant issues relating to Australia's current counter-terrorism measures. It is in light of these issues that our organisations call on the government to publicly release the report of the Clarke Inquiry immediately.

The Case of Dr Haneef

Based on publicly available information, the accepted circumstances of the case of Dr Haneef are as follows:

- At about 5am on 2 July 2007 the Australian Federal Police ('the AFP') received advice from UK police that, in the words of the AFP, 'a mobile telephone subscribed in the name of Dr Mohamed Haneef was linked to the terrorist attacks that occurred in London and Glasgow'.
- On the same day, Dr Haneef was arrested at Brisbane Airport and detained by the AFP to determine whether he had committed a terrorism offence. He was questioned at the airport and then taken to AFP headquarters and left in an interview room, without being further questioned, until about 2.53am.
- At about 10:15am on 3 July 2007 Magistrate Mr Jim Gordon made an order extending the questioning time to 12 hours.
- On 3 July 2007, two police officers (including Detective Sergeant Adam Simms) asked Dr Haneef about 1615 questions over about six and a half hours. Dr Haneef answered these questions without a lawyer present (he declined when asked if he wanted one). After this questioning, Dr Haneef was placed in a cell in the Brisbane watch house.
- On the evening of 3 July 2007 Mr Gordon extended the questioning time by a further 12 hours (reaching the maximum threshold of 24 hours permitted by the *Crimes Act 1914 (Cth)*)
- On 3 July, at about 11pm, Mr Gordon made an order specifying "investigative dead time" and the AFP obtained a stipulated period of 48 hours.
- On the evening of 5 July 2007 Mr Gordon made a further order for specified "investigative dead time" of 96 hours (4 days). This time Dr Haneef's lawyer, Peter Russo, was present but was asked to leave the room while the AFP applicant tendered secret and confidential material to the Magistrate.
- On 9 July 2007 the AFP made an application for "investigative dead time" of 5 days. Stephen Keim SC appeared on behalf of Dr Haneef and sought access to the material on which the AFP relied. In order to allow the AFP to obtain legal advice, Mr Gordon made an interim "investigative dead time" order for 2 days and also adjourned the matter for 2 days.
- On 11 July 2007 the AFP were represented by Mr Howe QC. Mr Kiem submitted that Mr Gordon should be disqualified for "apprehended bias" as he had been with the applicant without Dr Haneef or Dr Haneef's legal representative(s) present during previous applications (i.e. the time Mr Russo was asked to leave the room and also applications for search warrants). Mr Gordon adjourned the matter for 2 days.
- On 13 July 2007 the AFP withdrew their application for further "investigative dead time". As a result, Mr Gordon never made a decision regarding his disqualification.
- Dr Haneef was questioned for a further 12 hours from the evening of 13 July to the morning of 14 July 2007. Mr Russo was present. This exhausted the maximum 24 hours of questioning time permitted.
- On 14 July 2007, Dr Haneef was charged with intentionally providing resources to a terrorist organisation, reckless as to whether it was a terrorist organisation, by providing his second cousins with the SIM card.
- On 14 July 2007 Dr Haneef's legal representatives applied for bail. In their application they relied partly on the weakness of the evidence/case against Dr Haneef. Public prosecutor Clive Porritt argued against it.
- On 16 July 2007, Magistrate Ms Jacqui Payne granted Dr Haneef bail in respect of that charge. Ms Payne adjourned the criminal proceedings until 31 July 2007 for a committal mention.
- Immediately following the grant of bail, the Minister for Immigration and Citizenship cancelled Dr Haneef's 457 Temporary Long Stay Visa on "character grounds"
- As a result, Dr Haneef chose not to post bail in respect of that charge, and chose to remain in police custody rather than be taken into immigration detention

- On 17 July 2007, the AFP requested that the Attorney General issue a Criminal Justice Stay Certificate. Although the Certificate was issued, Dr Haneef was not issued a Criminal Justice Stay Visa and hence had no valid visa to remain in Australia.
- On 27 July 2007, the charge was dismissed, and Dr Haneef was released from police custody and taken into immigration detention (upon cancellation of his Criminal Justice Stay certificate by the AG), until he elected to leave Australia on 28 July 2007.
- On 21 August 2007, Justice Spender set aside the Minister's original decision cancelling Dr Haneef's visa. On 21 December 2007 the Full Federal Court dismissed the Minister's appeal and restored his 457 Temporary Long Stay visa
- The Minister has indicated that no appeal will be made to the High Court in respect of Justice Spender's decision.

Our Concerns

In our view, the case of Dr Haneef highlights several aspects of Australia's counter-terrorism laws and policing that are of significant concern. In particular, we wish to draw your attention to the following:

1. Investigative Dead Time

The case of Dr Haneef has brought to light a number of problems related to 'investigative dead time' as provided for in Sections 23CA and 23CB of the Crimes Act 1914 (Cth) ('the Crimes Act'). Under the current laws, the Federal Police are permitted to detain suspects for the purposes of investigation for a period of 4 hours with the possibility of extension to a maximum of 24 hours in total. Not included in the 24-hour period is any 'dead time' such as for the suspect to sleep, eat, pray etc. Sections 23CA and 23CB also allow for the grant of investigative dead time upon approval by a judicial officer (a Magistrate, Bail Justice or Justice of the Peace) in circumstances such as the police requiring time to collate information relevant to the investigation or seeking to obtain information from a source outside of Australia in a different time zone.

In our view, the case of Dr Haneef demonstrates that currently the grounds for the grant of investigative dead time are inadequate. First, the initial grants of investigative dead time were for 2 and then 4 days. In the context of a regime which permits a maximum arrest period (exclusive of dead time) of 24 hours, these were manifestly excessive. Second, at a certain point it became apparent that the police did not have sufficient evidence to make out a charge against Dr Haneef. While Dr Haneef was originally arrested 'for a terrorism offence', the purpose of that arrest could no longer be maintained by the police and yet, they were still able to obtain extensions of the investigative dead time. Furthermore, it has been reported that documents released under FOI laws indicate that at the time Dr Haneef was charged, the Commonwealth DPP was of the opinion that the case against him was weak. These two occurrences – the grant of excessive investigative dead time, and the repeated extension of investigative dead time notwithstanding the lack of police evidence incriminating Dr Haneef – clearly indicate that the grounds for granting investigative dead time, and for determining the parameters thereof, are inherently inadequate.

The case of Dr Haneef also raises questions about the role of the judiciary in extending investigative dead time. The statutory provisions governing the granting of investigative dead time permit that dead time to be repeatedly extended, such that a person might be indefinitely detained, contrary to the principle of habeus corpus. Dr Haneef's experience demonstrates that the mere fact that it is a Magistrate from whom the police seek any grant or extension of investigative dead time is not sufficient to ensure that the principle of habeus corpus prevails.

Given the lack of police evidence to support continued detention of Dr Haneef, the case also raises the concern that a presiding Magistrate may simply become a rubber-stamp for the demands of the police.

We also note that a decision was never made (due to the AFP withdrawing their application) regarding Mr Kiem's submission that the Magistrate, Mr Gordon, should be disqualified on the grounds of "apprehended bias" as he had been alone with the applicant during previous applications without neither Dr Haneef nor his lawyers present.

We are also concerned that Dr Haneef was not represented by a lawyer when the first order relating to investigative dead time was made. Given the deprivation of liberty involved and the complexity of the relevant laws, it is imperative that a detainee be represented and that submissions be made in respect of the police application on behalf of that person.

2. The Purpose of Arrest

We are also concerned that the operation of Sections 23CA and 23 CB of the Crimes Act, as demonstrated by the case of Dr Haneef, creates a situation in which the long-accepted purpose of arrest – established in Commonwealth law by Section 3W of the Crimes Act – is flouted. That is, the operation of those provisions appears to have given rise to a situation in which the police have arrested a person primarily in order to investigate that person rather than because they have some basis on which to bring charges against that person.

In the case of Dr Haneef, it is now accepted that the police did not have sufficient evidence to connect Dr Haneef to the terrorist act – they simply had a small amount of evidence that connected him to a person who was in turn linked to a person involved in the act. As has later been confirmed, this evidence was never sufficient to charge Dr Haneef.

We can only assume, therefore, that the police hoped to obtain additional evidence in order to make out some charge against him. This means that the arrest becomes less about charging a suspect and more about a 'fishing expedition'.

Section 3W(2) of the Crimes Act makes such 'fishing expeditions' unlawful, by requiring the release of any arrested person if a constable ceases to believe on reasonable grounds that that person committed the offence for which s/he was arrested. The case of Dr Haneef shows, however, that in practice the operation of the investigative dead time provisions undermines this crucial statutory protection of the principle of habeus corpus.

3. The Offence of Providing Support to a Terrorist Organisation

The case of Dr Haneef also illustrates the danger inherent in the breadth of the terrorism and terrorist organisation offences contained in Part 5.3 of the Commonwealth Criminal Code. In particular, we refer to the Section 102.7 of offence providing support or resources to a terrorist organisation. This offence may be committed recklessly or with knowledge and it may involve either direct or indirect provision of support/resources. This means that, despite the extremely tenuous link between Dr Haneef and the actual act of terrorism ie the Glasgow car bombing, he was able to be arrested 'for a terrorism offence' and subsequently detained for an extended period while the police conducted their investigations. Even though the police had insufficient evidence to ultimately charge Dr Haneef with this offence, the breadth of the offence is such that even a tenuous link to a terrorist act was able to give rise to an arrest and extended detention.

4. Cancellation of Visa

The Minister's cancellation of Dr Haneef's 457 visa on 'character grounds' also raises a number of significant issues. In brief, those issues are:

- (a) The question of onus of proof. Contrary to the presumption of innocence, an affected person must satisfy the Minister that they pass the character test.
- (b) Secrecy provisions. Contrary to the rule of law, the affected person may not see the evidence relied upon in the making of a decision on character grounds'. That is, the affected person may not see the information supplied by law enforcement or intelligence gathering agencies.
- (c) Criminal record. The definition of a 'substantial criminal record' is based upon the penalty and not the offence. This is particularly egregious where substantial penalties have been imposed on a person for offences which are not offences (or are considered minor offences) in Australia or where a person has been convicted in a country with a dysfunctional judicial system.
- (d) Criminality by association. A person may fail the character test on the basis of their association with another person who is merely suspected of criminal conduct. Not only is this contrary to the presumption of innocence, but it condemns a person's character on the basis of their association with someone who, under Australian law, is presumed to be innocent.

While this is not an exhaustive list of the issues raised by the arbitrary cancellation of Dr Haneef's visa, in our view it demonstrates some of the deficiencies in the current system.

Good Government relies upon transparency and accountability. Dr Haneef's case illustrates how a lack of transparency and accountability can adversely impact on human rights and erode the public's faith in Government. Similarly, a failure to publish the findings of the Clarke Inquiry will send the wrong message to Government agencies and further erode public confidence in their operation. We therefore strongly urge the immediate release of the findings of the Clarke Inquiry.

Should you have any queries regarding the above, please do not hesitate to contact Marika Dias of the Federation of Community Legal Centres (Vic) Inc, spokesperson for our coalition, on (03) 9391 2244 or 0424 054 314 or via email at marika_dias@clc.net.au.

Yours faithfully



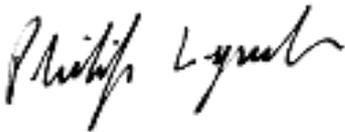
Marika Dias
Convenor, Anti-Terrorism Laws
Working Group
Federation of Community Legal
Centres (Vic) Inc



Michael Pearce SC
President
Liberty Victoria



Pratheepan Balasubramaniam
Australian Tamil Rights Advocacy
Council



Philip Lynch
Human Rights Law Resource Centre



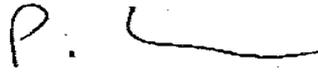
Mat Tinkler
Acting Executive Director
Public Interest Law Clearing House



Alastair McEwin
Director
Combined Community Legal
Centres Group of NSW



Rob Stary
Robert Stary & Associates



Dr Patrick Emerton
Lecturer, Faculty of Law, Monash
University Lecturer and Associate,
Castan Centre for Human Rights Law



Robin Banks
Chief Executive Officer
Public Interest Advocacy Centre
Ltd

Per



John Tebbutt
Civil Rights Defence



Chairperson
Australian Muslim Civil Rights
Advocacy Council