

THE CASE OF DR MOHAMED HANEEF: AN AUSTRALIAN 'TERRORISM DRAMA' WITH BRITISH CONNECTIONS

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Abstract

This article examines the treatment of Dr Mohamed Haneef, an Indian doctor arrested under Australia's anti-terrorism legislation in July 2007 as Australian authorities including the Australian Federal Police, Commonwealth Director of Public Prosecutions, Australian Security Intelligence Organisation, (wrongfully) believed that he was linked to the terrorist attack at Glasgow airport in June 2007. The actions and responses of these two agencies, and the subsequent judicial inquiry are reviewed in the light of the media's role and press coverage as the case unfolded.

Keywords: Australian anti-terrorism legislation, Clarke Judicial Inquiry, Glasgow Airport attack, Counter-terrorism Legislation, Crimes Act 1914

Introduction

This paper begins with a brief overview of the Haneef case focusing on the major events and characters involved as the drama unfolded. The overview also explains the case's British connections because they are important to understanding the course which the case took. It then moves on to consider Australia's counter-terrorism strategy and the relevant aspects of the underpinning legislative framework, including the terrorism offences it specifies, using the Haneef case to highlight important elements of both the strategy and the framework. Here the roles and performance of the Australian Federal Police (AFP) and the Commonwealth Director of Public Prosecutions CDPP will be central concerns. The role that the media played in the

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case will be a major theme running through the paper. The paper also provides a brief analysis of the Clarke Judicial Inquiry into the case, including the recommendations it produced, before concluding with some thoughts on how Australia's counter-terrorism strategy might develop in the future.

The Case of Dr Mohamed Haneef

Dr Mohamed Haneef, an Indian doctor working as Senior House Officer at the Gold Coast Hospital, Queensland, was arrested on 2 July 2007 and held without charge for 12 days under provisions of Australia's anti-terrorism legislation (specifically part 1C of the Crimes Act, sections 23DA and 23CB). He was later charged (on 14 July) with one offence of recklessly providing support to a terrorist organisation on the grounds that his Subscriber Information Module (SIM) card was connected to failed terrorist attacks in Britain (contrary to section 102.7(2) of the Commonwealth Criminal Code). On 25 July 2006, Dr Haneef had given his SIM card to his second cousin, Sabeel Ahmed, just as he was about to leave Britain to travel to Bangalore to visit his family before travelling to Australia to take up his position at the Gold Coast Hospital. The SIM card was due to expire in August 2006, and accordingly Dr Haneef cancelled his direct debit payment authorisation soon afterwards.²

On 30 June 2007, Sabeel Ahmed's brother, Kafeel Ahmed, crashed a jeep into the entrance of Glasgow Airport from which he sustained serious burns leading to his death on 2 August 2007. The day before the Glasgow Airport attack, police had thwarted attempted car bombings outside two London nightclubs, in which Kafeel was also a central figure. Sabeel was arrested by UK police on 30 June 2007 in connection with the Glasgow attack and the failed London bombings, but did not tell them about the email he had received from Kafeel which he read and opened soon after the Glasgow attack (he was subsequently charged with withholding evidence). The email, which became known as the 'Jihad confession email', revealed Kafeel's intentions to engage in Jihad but also demonstrated that Sabeel was completely ignorant of his brother's plans. Kafeel wrote in the email 'this is the project that I was working on for some time now...everything else was a lie. And I hope you can all forgive me for being

² Submission to Clarke Inquiry into the Case of Dr Mohamed Haneef, Canberra, 21 November 2008, 14 (Stephen Keim) < <http://www.haneefcaseinquiry.gov.au> > at 31 July 2009.

such a good liar. It was all necessary.’³ The officers who arrested Dr Haneef alleged that the SIM card that he had given to Sabeel was found in the jeep that Kafeel had crashed into Glasgow Airport. This was later found to be incorrect, the SIM card being located in Sabeel’s home in Liverpool, England, at the time of his arrest.

The story of the incorrect allegation about the SIM card was broken by Rafael Epstein of the Australian Broadcasting Corporation’s *AM* programme on 20 July 2007.⁴ His report showed that while the UK police had known for six days before Haneef was charged, and soon after they began investigating Kafeel’s activities, that the SIM card was not found at the scene of the Glasgow Airport attack, no attempt had been made by the AFP, the CDPP or the Queensland Police Service (QPS) to correct the story.⁵ They also seem to have ignored the Jihad email. In other words, the AFP, the CDPP and, to a lesser extent, the QPS ignored evidence that Mohamed Haneef was innocent. Writing in *The Sydney Morning Herald* in April 2008, David Marr observed that

[t]he case against Dr Haneef always centred on allegations that his second cousin Sabeel Ahmed, a doctor practising in England, was part of a terrorist organisation. But in the Old Bailey on Friday [11 April] Mr Justice Calvert-Smith accepted there was “no sign” of Ahmed “being an extremist or party to extremist views”.⁶

Dr Haneef was granted bail on 16 July by Brisbane magistrate Jacquie Payne who noted that ‘[t]here was no evidence before me the SIM card was used in any terrorist activity’ and ‘there have been no submissions to support the element of the offence that the defendant was reckless’.⁷ Magistrate Payne adjourned the criminal proceedings until 31 August and Dr Haneef’s lawyers applied to have the charge struck out. While the CDPP agreed that the charge should be amended, it sought to defer the amendment pending the committal mention date in August. Two days after being charged, but within hours of the magistrate’s ruling, the Immigration Minister

³ Email from Kafeel Ahmed to Sabeel Ahmed, 30 June 2007
<<http://www.smh.com.au/news/national/the-jihad-confession-email/2008/04/13/1208024978809.html>> at 31 July 2009.

⁴ ABC Radio, ‘Haneef court information incorrect, source says’, *AM*, 20 July 2007
<<http://www.abc.net.au/am/content/2007/s1983454.htm>> at 31 July 2009.

⁵ *Ibid.*

⁶ David Marr, ‘Police ignored strong evidence showing Haneef’s innocence’, *Sydney Morning Herald* (Sydney), 14 April 2008, p.3.

⁷ Keim, Submission to Clarke Inquiry into the Case of Dr Mohamed Haneef, p.7.

Kevin Andrews cancelled Haneef's 457 work visa because he failed the character test of the Migration Act 1958 (Cth) (s501(3)), thus preventing his release from custody. The following day Attorney-General Philip Ruddock issued a Criminal Justice Stay Certificate under section 147 of the Migration Act that stopped Haneef from being deported requiring him to remain in detention while the criminal proceedings against him continued. Haneef was held in immigration detention and later home detention for nearly two weeks, and then allowed to return voluntarily to India on 28 July despite his visa remaining cancelled. However, the day before, on 27 July, the CDPP had withdrawn the charge against Dr Haneef on the basis that there was

no prospect of making out any offence against Dr Haneef in respect of what was alleged against him, either on the available information or the information likely to be produced from pending investigations.⁸

The Attorney-General then accordingly cancelled the Criminal Justice Stay Certificate. Justice Spender of the Federal Court of Australia set aside the visa cancellation decision on 21 August 2007, a decision later upheld by the Full Bench of the Federal Court in December 2007, dismissing an appeal by Andrews.⁹ The Full Bench observed that Mr Andrews had 'acted on a misapprehension of the proper construction of the character provisions of the Migration Act.'¹⁰ There is no scope in this paper to examine in any depth the use of the Migration Act in the Haneef case. It should be noted, however, that while Mr Andrews did not release relevant 'protected information' to Dr Haneef or to the court, he did release the same information to the media.¹¹ Federal Court Justice Spender had been '[v]ery critical' of Andrews, observing in his judgement that his actions denied Dr Haneef the opportunity 'to challenge the information in a meaningful way.'¹²

The basic details of the Haneef case as just outlined, point to a number of very important issues relating to the counter-terrorism legislation, and the criminal offences it specifies that were used to detain, arrest and charge Mohamed Haneef, the performance of the AFP and the CDPP, including their interaction, and the role of the

⁸ Submission to Clarke Inquiry into the Case of Dr Mohamed Haneef, Canberra, 21 November 2008, 29 (Law Council of Australia) <<http://www.haneefcaseinquiry.gov.au>> at 31 July 2009.

⁹ *Haneef v Minister for Immigration and Citizenship* (2007) FCA 1273; *Minister for Immigration and Citizenship v Haneef* (2007) FCAFC 203.

¹⁰ Keim, Submission to Clarke Inquiry, p.10.

¹¹ Law Council of Australia, Submission to Clarke Inquiry, 31

¹² *ibid.*

political executive. Each of these will be considered in the course of investigating the case.

The Counter-terrorism Legislation and Associated Criminal Offences and Provisions

The Crimes Act 1914 (Cth)

Mohamed Haneef was arrested under subsection 3W(1) of the Crimes Act which authorises an arresting officer to arrest a person for an offence only if the officer has *reasonable grounds* to believe that the person has committed the offence. The arresting officer must also have *reasonable grounds* for the belief that the arrest is necessary to ensure, among other things, the appearance by the person in a court or prevent the person committing another offence. Subsection 3W(2) requires that the arrested person be released if the arresting officer no longer has reasonable grounds to believe either that the person committed the offence or that holding the person is required to achieve such purposes.¹³ These statutory, or threshold tests, apply to all criminal offences and thus are not lowered in terrorism cases. Moreover, '[t]here is no special provision and test relating to terrorist offences.'¹⁴ It is also important to realise that the Crimes Act makes no provision for preventative detention.

Section 3(W) was inserted into the Crimes Act in 1994 (although elements of it can be found in earlier versions of the *Act* dating back to 1926). Part 1C of the *Act* was established in 1991 and Section 23CA in 2004 (inserted by the Anti-Terrorism Act 2004 (Cth)). In his report on the Haneef Case, Justice Clarke noted that while this chronology of the *Act's* development might give some intuition into Parliament's intent as to which clause should take precedence in the event of inconsistency, 'it is far from clear.' He also noted that there is 'no clear answer' to the question of whether, on the one hand, section 3(W) prevails over 23CA or, on the other; the two sections operate independently of each other.¹⁵

¹³ Ibid, 9; M J Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, (Volume 1), Commonwealth of Australia, November 2008, 51 <<http://www.haneefcaseinquiry.gov.au>> at p.31 July 2009.

¹⁴ Law Council of Australia, Submission to Clarke Inquiry, p.9.

¹⁵ Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef* p.233. See also S Keim, 'Dr Haneef and Me', Speech to The Queensland Council for Civil Liberties Forty Year Celebration Dinner, The Irish Club, Brisbane, 13 October 2007 and *Submission to The Clarke*

Sections 23DA and 23CB: the investigation period and dead time

While Mohamed Haneef was held in custody awaiting a charge to be brought before him, AFP and QPS officers who worked on the case made several (23DA) applications to extend the investigation period and a number of (23CB) applications for specified (dead) time. The two types of applications come under the Crimes Act and require some explanation, but it is also important to understand the process by which the investigating officers were able to make applications to extend the time that Haneef was held in custody awaiting charge and have them accepted by a magistrate. Accordingly, these applications and the process will be explained in tandem, beginning with the 23DA applications.

However, it first needs to be noted that there is an inherent contradiction between section 3(W) of the Crimes Act, which requires that an arrested person be released if the investigating officer no longer has reasonable grounds to believe that the person has committed the offence, and sections 23DA and 23CB. These sections enable the police to make repeated applications for so-called 'dead time' and, by so doing, suspend the investigation (questioning) period giving them more time to collect, collate and review evidence. As will be seen, the use made by the AFP of these inconsistent sections in the Haneef case demonstrates the difficulty in interpreting and applying the amendments to the Crimes Act that were introduced by the anti-terrorism legislation as outlined above. They also strongly suggest that the AFP did not have 'reasonable grounds' to continue to hold Haneef in detention. The difficulties with interpretation and application were compounded by the submission of inaccurate, limited and poorly prepared evidence by the AFP.¹⁶

Part 1C of the Crimes Act enables a person who has been arrested for a terrorism offence to be detained for a 'reasonable investigation period' of up to but not exceeding four hours. However, section 23DA of the *Crimes Act* enables an application to be made to a magistrate to extend the investigation period for up to 20 hours. Thus the maximum investigation period during which a terror suspect can be

Inquiry into the Case of Dr Mohamed Haneef, 20 May 2008, (NSW Council of Civil Liberties), <<http://www.haneefcaseinquiry.gov.au>> at 31 July 2009.

¹⁶ Ibid pp.56-73.

detained is 24 hours. In so-called 'ordinary' criminal cases, the initial investigation period of four hours can only be extended once and for a maximum of eight hours. While section 23CA(8) disregards so-called 'specific periods' when questioning of the arrested person can be 'reasonably suspended or delayed', section 23CB allows for an application specifying a period of delay or suspension to be made to a magistrate. Such a delay or suspension 'is one of the categories of "dead time" under section 23CA(8), when the investigation period does not run.'¹⁷ However, the 'reasonable time' allowing for the 'reasonable' suspension or delay of questioning of the suspect to be subtracted from the investigation period as specified in sub-paragraph 23CA(8)(m) is a category of dead time peculiar to terrorist cases.¹⁸

The first 23DA application for an eight hour extension to the investigation or questioning period was made before the Brisbane Magistrates Court at 10:05am on 3 July 2007 (Haneef had been arrested at Brisbane International Airport at about 11:00pm the previous day). Magistrate Gordon authorised the extension on the basis that he was satisfied that 'the investigation into the offence was being conducted properly and without delay and that Dr Haneef had been given the opportunity to make representations about the application' and that the reasons for the extension contained in the police application, including that urgent inquiries were continuing in the UK and other countries, showed it was necessary. Formal questioning (the first interview) of Haneef by Federal Agent Neil Thompson and Detective Sergeant Adam Simms of the QPS began at about 11:00am on 3 July and came to an end at 5:31pm that afternoon (a period of six-and-a-half hours including seven periods totalling 118 minutes when the questioning was suspended).¹⁹

Release of the First Record of Interview

This account of the AFP's two applications for extending (or, suspending) the investigation or questioning period now has to be interrupted, for the release of the first

¹⁷ Ibid p.55.

¹⁸ Law Council of Australia, *Anti-Terrorism Reform Project: A Consolidation of the Law Council of Australia's advocacy in relation to Australia's anti-terrorism measures*, November 2008, p.59 <http://www.lawcouncil.asn.au/initiatives/anti-terrorism_reform.cfm> at 15 August 2009.

¹⁹ Detective Sergeant Adam Simms, Interview with Mohamed Haneef (AFP Headquarters, Brisbane), 3 July 2007. Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, p.56. Note there is a typographical error on p 120 of the record of interview where the time indicated is 6.48pm. Given that the interview concluded at 5.31pm, it would seem the correct time was in fact 4.48pm.

record of interview by Haneef's legal team needs some examination and explanation. Hedley Thomas' breaking story in the first edition of *The Australian* on 18 July 2007 of the release of the first record of interview between Dr Haneef and Federal Agent Thompson and Detective Sergeant Simms, conducted at the AFP's headquarters in Brisbane on 3 July 2007, was a defining event in the way the case came to be played out.²⁰ It also demonstrates the important role that the media came to play in the unfolding of the case. On the evening of 18 July, Stephen Keim SC, Haneef's senior legal counsel, disclosed that he had released the first record of interview with his client.

The release of the first record of interview provided revealing insights into the less than scrupulous and professional way in which the AFP was conducting the case. It demonstrated, for example, that there were significant inconsistencies between the information that had been provided by Haneef to the police in interview and the errors of fact included in the AFP's court affidavit supporting its application to extend the investigation period. In the interview with the AFP, Haneef had admitted that he had lived in the British city of Liverpool with two other doctors but, contrary to the information contained in the police affidavit, neither of these was Sabeel nor Kafeel Ahmed. The record of interview also showed that Haneef had an explanation for his travel plans to Bangalore, again contrary to the AFP's court affidavit which stated that he 'had no explanation' about having a one-way ticket.²¹

Interviewed by Tony Eastley of the ABC's *AM* programme on the morning the transcript was released, AFP Commissioner Keelty claimed that the leak had 'undermined the prosecution...[and] provided information that should never have been provided until the court had an opportunity to hear it for the first time and test the veracity of the evidence.'²² This was an odd statement given that Keelty knew, or should have known, there was no evidence linking Haneef to the attempted terrorist attacks in Britain or to any terrorist organisation. Keelty also suggested that a contempt of court charge could be brought by the CDPP. For his part, Prime Minister Howard

²⁰ Hedley Thomas, 'Haneef: I'm no radical', *The Australian*, (Sydney), 18 July 2007. <<http://www.theaustralian.news.com.au/story/0,25197,22093642-601,00.html>> at 31 July 2009.

²¹ Hedley Thomas, 'Haneef dossier flawed', *The Australian*, (Sydney), 20 July 2007 <<http://www.theaustralian.news.com.au/story/0,25197,22102633-601,00.html>> at 31 July 2009.

²² ABC Radio, 'Leaked Haneef transcript could affect court: Keelty', *AM*, 18 July 2007 <www.abc.net.au/am/content/2007/s1981358.htm> at 31 July 2009.

denounced the release with the claim that '[w]hoever has been responsible for leaking this documents is not trying to speed the course of justice ... [they are] trying to frustrate the process and it should be condemned.'²³

Claims that the case had been incompetently conducted by the AFP and the CDPD were supported by Rafael Epstein's story, mentioned earlier, which demonstrated that Dr Haneef's SIM card had not been found in the jeep which was crashed into Glasgow Airport by Kafeel, but in Sabeel's home. Even though the British police had been aware of this for six days, at no time did the AFP try to correct the error when it applied to have the investigation period extended.

Stephen Keim justified leaking the first record of interview to the media by stating that

[d]efence counsel don't normally release the records of interview of their clients in the media...because defence counsel don't normally have a document that indicates so clearly the very thin case that the police are claiming to have, in which to say that anything that my client has done was done in anything other than an innocent manner.²⁴

Keim also stated that '[m]y client...has a legal right to a copy of that document and that document was provided to him without any restrictions whatsoever. He was perfectly entitled, through me, to release that document.'²⁵ Noting that both 'sides' had attempted to use the media to their advantage, Keim observed that a double standard had been employed by the AFP explaining that

there has been a campaign of leaks, including from this document [record of interview], and from documents allegedly held by the police. There has been a campaign of selective leaks against my client and these leaks have appeared at least in *The Daily Telegraph* and in *The Australian*. As far as I know, no cabinet minister has expressed any concern about those leaks, or the impact that those leaks would have on the fair trial of my client.²⁶

The Attorney-General Philip Ruddock labelled the release of the record of interview as 'inappropriate' and 'highly unethical', but Keim was 'unapologetic and happy to be held

²³ ABC Radio, 'Haneef barrister confirms interview leak, *PM*, 18 July 2007 <www.abc.net.au/pm/content/2007/s1982072.htm> at 31 July 2009.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

accountable for his actions in releasing the document.²⁷ *The Australian* reported that the release of the record of interview by Keim 'was widely backed by leading lawyers yesterday amid fierce condemnation of the Attorney-General' while James Jupp, in a piece on the Haneef case in the *Democratic Audit of Australia*, praised the release and expressed gratitude for the 'enterprise of Haneef's barrister and *The Australian*.'²⁸

The Second Application to Extend the Investigation Period and the Applications for 'dead time'

The second 23DA application was made, again before Magistrate Gordon, after 5:00pm on 3 July because the existing 12 hour time limit for the investigation period was nearly up. It was made for similar reasons to the first, with Magistrate Gordon again accepting that these reasons showed the extension of time was necessary. He granted a 'further and final' 12-hour extension of the investigation period which brought it to 24 hours, the maximum limit. Mohamed Haneef declined to have legal representation in relation to both the first and second 23DA applications.²⁹ The imminent expiry of the second 23DA application effectively triggered three specified or dead time (23CB) applications (and a fourth, aborted, application). The first of these was made before Magistrate Gordon some time after 10.30pm on 3 July by Federal Agent John Matus and Mr Michael Rendina, Senior Lawyer, AFP Legal. The application was for a period of 48 hours. It should be noted, however, that the period of allowable dead time is not capped and is therefore virtually unlimited. Even the time taken to process a dead time application is counted as dead time.³⁰

In accordance with the reasons provided for under section 23CB to request dead time, Matus and Rendina's application stated that it: would assist the investigation and enable it to be completed; would allow for the collation and analysis of relevant information obtained from UK and other overseas authorities; enable the collection, collation and analysis of relevant material from a range of sources; and, facilitate the collection of relevant information from overseas places in different time zones,

²⁷ Ibid. For an analysis of the use of the media by Haneef's legal representatives, see Alysia Debowski, 'Old dogs, new tricks: Public interest lawyering in an "Age of Terror"' (2009) 34 *Alternative Law Journal*, 1, 15-20.

²⁸ Thomas, 'Haneef dossier flawed'; James Jupp, '*The case of Dr Haneef*', (Discussion Paper 13/07, Democratic Audit of Australia, Australian National University, July 2007) p.3.

²⁹ Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, p.57.

³⁰ Law Council of Australia, *Anti-Terrorism Reform Project* p.60.

including the UK.³¹ Magistrate Gordon accepted all these reasons and signed the certificate specifying 48 hours of dead time.

The second dead time application was 'substantially drafted' by Rendina and contained similar information and reasons for requesting dead time as contained in the first application, but this time was signed by Detective Sergeant Simms. The application was for a period of 96 hours (four days) and was made in the chambers of Magistrate Gordon after 6.30pm on 5 July.³² Rendina and Simms were present, and AFP Commander Ramzi Jabbour, Manager Counter-Terrorism Domestic, and Federal Agent Michelle Gear waited outside. Gordon authorised the application at about 7.00 the same evening. Arrangements for Peter Russo, a solicitor from the law firm Ryan and Bosscher, to represent Dr Haneef had been made earlier. However, Russo was requested to leave Gordon's chambers during the reading of the application because it contained 'sensitive information'.³³

A third dead time application was made before Magistrate Gordon on 9 July at about 4.00 in the afternoon and sought a further 120 hours (five days) of dead time. Simms and Rendina represented the AFP and Mohamed Haneef was represented by senior counsel Stephen Keim. Keim opposed the third application on the basis that the 'rules of natural justice' required Haneef and his legal representatives to be informed of the material that the AFP had placed before the magistrate. Countering Keim's submission, Rendina argued that 'Part 1C of the *Crimes Act* did not contain a requirement to provide material to the arrested person and that public interest immunity would be claimed to prevent disclosure of the material.'³⁴ Magistrate Gordon gave qualified support to the third application, specifying a further 48 hours of dead time (considerably less than the five days requested by the AFP). However, he directed that the matter be brought back to him in two days time (11 July).

A fourth 23CB application for specified or dead time was duly made on 11 July, seeking a further 72 hours of dead time (the remainder of the 120 hours that had been

³¹ The Clarke Report states that they applied under s 23CB for the dead time, but then goes on to state that the final application, signed by Matus, was made under s 23CA (8)(m). Clarke Inquiry, pp.58-59.

³² Ibid p.60.

³³ Ibid.

³⁴ Ibid p.62.

requested on 9 July). An 'unclassified' statutory declaration by Detective Sergeant Simms of the QPS stating, amongst other things, that a further 72 hours would 'enable authorities to pursue further vital investigative avenues concerning Dr Haneef's involvement in the alleged offence' was provided to Haneef's lawyers on 11 July.³⁵ However, citing public interest grounds, the AFP sought to prevent disclosure to Haneef and his lawyers of two confidential statutory declarations that contained 'classified' information. While the AFP provided the Clarke Inquiry with a copy of one of the confidential declarations, the Inquiry only received an unsigned copy of the other because the AFP was unable to locate the signed copy.³⁶ At the hearing of the fourth application, Haneef's lawyers 'made an application for Magistrate Gordon to disqualify himself on the ground of apprehended bias...[the] application was made on the magistrate's involvement in the previous AFP applications that had been made in the absence of Dr Haneef.'³⁷

The fourth dead time application was withdrawn by the AFP on 13 July, evidently because it believed that there was little prospect in the short term of gaining any further relevant information while the investigation period was suspended. Later in the afternoon of the same day, formal questioning (the second interview) of Dr Haneef began, in the presence of Mr Russo, his solicitor. The interview ran for about 15 hours (13-14 July), including a number of breaks, and both audio and video recordings were made. However, as Clarke notes in his report,

[t]he recording equipment did not capture the resumption of the interview [after a suspension], from 5.01 to 5.57am, or the conclusion of the interview, between 6.58 and 7.00 am (during which Dr Haneef was advised that he was being charged).³⁸

The Charge Against Haneef and the Second Record of Interview

It was noted earlier on that Dr Haneef was finally charged on 14 July with one offence of recklessly providing support to a terrorist organisation on the grounds that his Subscriber Information Module (SIM) card was connected to failed terrorist attacks in Britain (contrary to section 102.7(2) of the *Commonwealth Criminal Code*). In his report, Justice Clarke outlined in detail the 'Fault Elements' in this section that are

³⁵ Detective Sergeant Adam Simms, Queensland Police Service, cited in *ibid* 64.

³⁶ *Ibid* 63.

³⁷ *Ibid* 64.

³⁸ *Ibid* 65.

contained in chapter 2.2, division 5 of the *Code*. Issues relevant to these elements that were noted by Clarke include the meaning of intention, recklessness, negligence and so on. He concluded that the fault elements 'were a distortion of English' and 'confusing and tautologous' and recommended that the section be amended because it could lead to 'judicial error' in its application.³⁹ The Law Council of Australia also expressed a number of serious concerns with the criminal offences contained in division 102 of the Commonwealth Criminal Code. These concerns include: the terrorist organisation offences cast the net of criminal liability too widely by criminalising a person's associations, as opposed to their individual conduct'; [existing principles of] 'accessorial liability ... draw a more appropriate line between direct and intentional engagement in criminal activity and peripheral association'; [the criminalisation of a person's associations has harmful implications for freedom of association and expression and is likely to subject certain sections of the population to criminal sanction] 'simply because of their familial, religious or community connections'; and, [the reach of the terrorist organisation offences] is 'unknown and unknowable ... because the definition of a terrorist organisation incorporates any organisation, whether it is listed by regulation or not, which satisfies the broad and imprecise criteria set out in sub-section 102.1(a)'.⁴⁰

The second record of interview was released by Haneef's legal representatives on 22 August 2007, nearly a month after the charge against him was withdrawn. The second release raised yet more questions about the information contained in the records of interview and the information provided to the court and released to the media by the AFP. On 23 August, the day after the second release, the AFP felt compelled to deny publicly that it had 'improperly leaked information' and also accused Haneef's lawyers of 'running their case in the media'. Evidently, any irony was unintended. The AFP also denied that its officers had selectively leaked information to damage Dr Haneef's case and reputation, claiming that the 'continuing attempt by Dr Haneef's defence team to use the media to run their case is both unprofessional and inappropriate...the AFP has acted appropriately throughout the investigation.'⁴¹ A month earlier, on 23 July,

³⁹ Ibid 260.

⁴⁰ Law Council of Australia, pp. 23-24.

⁴¹ Hedley Thomas, 'Haneef transcript discredits claims, *The Australian* (Sydney), 23 August 2007 <<http://www.theaustralian.news.com.au/story/0,25197,22292091,601.00.html>> at 31 July 2009.

Commissioner Keelty had had to admit that allegations linking Dr Haneef with a plot to bomb the Q1 skyscraper on the Gold Coast were 'inaccurate' but also had to deny that the AFP was the source of the false allegations.⁴² However, by AFP design or not, Dr Haneef's character and reputation had again been called into question.

The AFP, the CDPP and the Howard Government

The charge against Dr Haneef was withdrawn by the CDPP on 27 July 2007. This caused the Howard Government immediately to seek to distance itself from the ignominy and recrimination rapidly gathering around the case. Mr Howard, who was visiting Bali at the end of July 2007, publicly called on AFP Commissioner Mick Keelty and Director of the CDPP Damian Bugg QC to explain the debacle. Howard told reporters

[b]earing in mind that the detention of the man was undertaken by the police, and not at the request or encouragement of the government, and the case was prepared and presented by the DPP, I think that the right thing now is for those two men to explain the process, and explain the reasons...Prime Ministers don't conduct prosecutions.⁴³

In response, Damian Bugg had to acknowledge that 'a mistake had been made' and accepted that the CDPP was responsible for one of two errors of fact put before the court, that is, that the notorious SIM card had been found at the scene of Kafeel's Glasgow misadventure.⁴⁴ The other error of fact, that Haneef had lived with Sabeel and Kafeel in the UK, he blamed on the AFP. However, Keelty for his part claimed that the AFP had acted on the DPP's advice that 'there was sufficient evidence to charge Haneef'.⁴⁵ Nevertheless, in its submission to the Clarke Inquiry, the CDPP stated that it had not been provided by the AFP with the record of the first interview with Haneef nor information about the material found on Sabeel's laptop that had been seized by UK police.⁴⁶

⁴² 'Beattie blasts "crazy" leaks', *The Age* (Melbourne), 23 July 2007 <<http://www.theage.com.au/news/national/another-blunder-in-haneef-case/2007/07/23/1185042981128.html>> at 31 July 2009.

⁴³ John Howard cited in 'Haneef released as charges dropped', *The Age* (Melbourne), 27 July 2007 <<http://www.theage.com.au/news/national/terror-charges-dropped/2007/07/27/1185339250715.html>> at 31 July 2009.

⁴⁴ Damian Bugg cited in *ibid.*

⁴⁵ Mick Keelty cited in *ibid.*

⁴⁶ Submission to Clarke Inquiry into the Case of Dr Mohamed Haneef, Canberra, 21 November 2008, 25 (Commonwealth Director of Public Prosecutions) <<http://www.haneefcaseinquiry.gov.au>> at 31 July 2009.

Despite Bugg's assertions, the decision finally to charge Haneef relied on advice provided to the AFP by Clive Porritt of the CDP. Porritt first met with the investigative team a full 10 days after Haneef's arrest. Moreover,

[a]t that meeting, Porritt was informed that Haneef's SIM card had been found on Kafeel Ahmed at Glasgow - an inaccuracy which was corrected the following day by the AFP in the briefing paper for Porritt, but was never specifically drawn to his attention.⁴⁷

The briefing paper also suggested that Dr Haneef had no explanation for his travel at the time of his arrest and that he had lived in the same house in England with Sabeel and Kafeel. As noted above, these were both errors of fact. In any event, there was hardly a consensus view amongst the members of the investigative team that Porritt's advice warranted bringing a charge against Haneef. Indeed, the two police officers who conducted the first interview with Dr Haneef, Federal Agent Thompson and Detective Sergeant Simms believed there was not enough evidence against Dr Haneef to sustain a charge and refused to add their names to the charge sheet.⁴⁸ Clarke observed that both officers 'felt under considerable pressure at this time'.⁴⁹

The AFP, and its Commissioner Mick Keelty, fared even less well than the CDP in the wash-up of the case. In its submission to the Clarke Inquiry, the AFP claimed that its officers had 'acted professionally' and were motivated only 'by the need to protect the Australian public and public interests'.⁵⁰ However, in commenting on the role of AFP, particularly counter-terrorism commander Ramzi Jabbour, Clarke was far from flattering. Not only was the evidence used to charge Haneef 'completely deficient', Jabbour, who was otherwise an 'impressive, dedicated and capable' officer, was in this instance 'unable to see that the evidence he regarded as highly incriminating in fact amounted to very little'.⁵¹ Clarke also observed that Jabbour had 'lost objectivity' a damning indictment of such a leading figure in Australia's 'war on terror'. As already

⁴⁷ Andrew Lynch, 'Learning from Haneef', *Inside Story*, 5 February 2009, p.2 <<http://inside.org.au/learning-from-haneef>> at 31 July 2009.

⁴⁸ David Marr and Geesche Jacobsen, 'AFP accepts no blame in Haneef case', *The Sydney Morning Herald* (Sydney), 24 October 2008 <<http://www.smh.com.au/new/national/afp-accepts-no-blame-in-haneef-case/2008/10/23/1224351449265.html>> at 31 July 2009.

⁴⁹ Clarke cited in *ibid.*

⁵⁰ Australian Federal Police submission cited in *ibid.*

⁵¹ Clarke cited in David Marr, 'ASIO knew he was clean on day 2', *The Sydney Morning Herald* (Sydney), 24 December 2008 <<http://www.smh.com.au/news/opinion/asio-knew-he-was-clean/2008/12/23/1229998528332.html>> at 31 July 2009.

seen, and beginning with the release of the first record of interview, the Haneef case had already brought Keelty into the public and media spotlight. The collapse of the case is widely regarded as having led to his resignation from the AFP on 6 May 2009, which took effect on 2 September.⁵² Many commentators in the media held Keelty to be ultimately accountable for the AFP's leaking of incorrect and misleading information to the press, and for the errors of fact contained in the material provided to the CDPP by the AFP, all of which have already been well rehearsed in this paper.⁵³

The Haneef case naturally produced scepticism and unease in the Australian community about the way the in which the case had been handled by the Howard Government and by the AFP and the CDPP. Central to these concerns and misgivings were the former Government's apparent attempts to use the legal system and law enforcement agencies as vehicles for pursuing its political and ideological agenda in the run-up to the 2007 Federal election and the manner in which this was seen to compromise long-established legal principles and presumptive rights. The role of Immigration Minister Kevin Andrews is instructive in this respect.

The Migration Act gave Andrews very wide discretion to use the *Act's* character test to revoke the visas of non-citizens like Haneef. There is obviously no doubt that Haneef knew, through kinship ties, Sabeel Ahmed the brother of Kafeel who had crazily attacked the Glasgow Airport but whether these ties were actual associations with criminal suspects was at the time a matter of considerable conjecture.⁵⁴ In such cases, the Immigration Minister would also have been able to use the even broader justifications of 'national interest' or 'national security' to cancel a visa. However, at the time that Haneef was granted bail and subsequently had his visa cancelled, Andrews did not use either of these justifications but claimed that his decision was consistent with secret evidence supplied to him by the AFP.⁵⁵ By the time the Clarke Inquiry

⁵² See, for example, Cameron Stewart, 'Top cop bottoms out', *The Australian* (Sydney), 7 May 2009 <<http://www.theaustralian.news.com.au/news/story/0,,25439504-28737,00.html>> at p.7 September 2009. Stewart's article notes that "Mick Keelty's slide from the height of his powers began during the Mohamed Haneef affair in mid-2007".

⁵³ See, eg, G Barns, 'Could the real Mick Keelty please stand up?', *Crikey* (Sydney), 30 January 2008.

⁵⁴ Lynch, 'Learning from Haneef', p.2

⁵⁵ Stephanie Peatling, 'Haneef free to work as appeal dropped', *The Sydney Morning Herald* (Sydney), 17 January 2008 <<http://www.smh.com.au/news/haneef-free-to-work-as-appeal-dropped/12008/01/16/1200419885940.html>> at 15 August 2009.

commenced on 30 April 2008, however, it was being reported that Andrews would testify to the inquiry that the AFP had withheld from him the important information which proved that Sabeel Ahmed was not a member of a terrorist organisation and was not involved in the attempted London nightclub and Glasgow Airport bombings.⁵⁶ And, as noted above, Spender J of the Federal Court, in overturning the Minister's decision to cancel Haneef's visa, was pointedly critical of the latter's selective public release of this protected information while not being prepared to divulge any of it to the court.⁵⁷

In any event, the Minister's dealings with the Australian Security Intelligence Organisation (ASIO), and the advice which it gave to the government, are even more baffling. ASIO did not have enough evidence to issue an adverse security assessment in relation to Haneef – which is the equivalent of issuing a non-adverse assessment. Its assessment was thus inconsistent with that made by the AFP, and ASIO repeatedly provided this advice to the government as the affair progressed. The Minister knew of ASIO's advice at the time that he made his decision to cancel Haneef's visa but gave it 'no weight'. Instead, he claimed perversely that 'he was not aware that ASIO had found no evidence of Haneef's foreknowledge of or involvement in the United Kingdom incidents' and '[s]omewhat astoundingly...said even if he had known he didn't think it would have made any difference [to his decision to cancel the doctor's visa].'⁵⁸ The Attorney General also knew of ASIO's advice. For ASIO's part, in its submission to the Clarke Inquiry, it stated that it had "consistently" advised the Howard government that it had no evidence connecting Haneef to a British terrorist plot, days before the government stripped the Indian doctor of his visa.⁵⁹ A series of emails between AFP officers and staff in the Minister's office, published in *The Australian* in late 2007, suggested the existence of, what the journalist called a 'secret plan', to ensure that Haneef would remain in custody even if granted bail by Payne M. Nevertheless, a spokesperson for the Minister stated that "there was absolutely no deal or arrangement or contingency instigated or discussed by the minister or any of his staff at all, ever."⁶⁰

⁵⁶ Michael McKenna, 'Haneef evidence withheld', *The Australian* (Sydney), 30 April 2008 <<http://www.theaustralian.news.com.au/story/0,23620701-2702,00.html>> at 31 July 2009.

⁵⁷ Clarke Inquiry, p.199.

⁵⁸ Ibid..

⁵⁹ Y Narushima and M Metherell, 'We never suspected Haneef – ASIO', *The Sydney Morning Herald* (Sydney), 30 July 2008.

⁶⁰ H Thomas, 'Secret Haneef plan exposed', *The Australian* (Australia), 2 November 2007.

Well-known defence barrister, Greg Barns, took a different view of the emails. He suggested that the emails demonstrated that ‘the AFP in conjunction with the [g]overnment were essentially completely undermining the judicial process. They were ripping up the doctrine of the separation of powers.’⁶¹

More worryingly from the point of view of unrestrained ‘executive over-reach’, it was revealed in a case heard before the Commonwealth Administrative Appeals Tribunal (AAT) in 2007 that representatives of the Department of Prime Minister and Cabinet met on 4 July with officials from the Departments of Immigration and Citizenship and Foreign Affairs and Trade to discuss how the Haneef case should be handled. The action in the AAT was initiated by Haneef’s lawyers in a bid to assist the Clarke Inquiry to procure documents relating to the case, because the Clarke Inquiry itself did not have the power to compel the production of such documents by government departments and agencies. One of the documents sought in the action was the options paper developed by those departments represented at the 4 July meeting, which set out the possible courses of action that could be taken should the AFP decide to bring charges against Haneef. In the view of Haneef’s lawyers, ‘the involvement of Mr Howard’s department raised the possibility the former Prime Minister may have colluded with his Immigration Minister to create a political storm similar to the Tampa controversy which helped the Coalition win the 2001 election.’⁶² It is inconceivable that the Prime Minister was not briefed by his senior advisors about the meeting. While most of the requested documents were provided to Haneef’s legal team, about 15 documents that government lawyers claimed either were subject to public interest immunity or were exempt from freedom of information legislation were not released. The Department of Immigration and Citizenship refused to release the options paper to the AAT.

Well into 2009, the Haneef case was still able to attract significant media attention not least because the drama which he endured continued to be entwined with that of some

⁶¹ Ibid.

⁶² E Schwarten, ‘Howard’s department involved in Haneef case’, *The Age* (Melbourne), 17 June 2008. For a discussion of the Tampa controversy, see D Marr and M Wilkinson, *Dark Victory* (2003).

of the other important players, most notably retired AFP Commissioner Mick Keelty.⁶³ At a more elevated level, the case remains for many Australians a troubling episode in the history of Australia's 'war on terror' because it demonstrated some unpleasant and unwelcome facts about how the country's political, law enforcement and legal systems have been distorted by the strategy adopted to deal with the terrorism threat. These distortions originated in the Howard Government's legislative panic after the events of September 11, 2001 - a panic which continued for the remainder of its time in office.

The Clarke Inquiry, the Media and Haneef

As early as July 2007, at about the same time as the release of the first record of interview, the federal opposition and organisations such as the Australian Council for Civil Liberties began calling for an independent, judicial inquiry into the case. For their part, the Australian Greens Party wanted a Royal Commission to investigate the case (a Royal Commission has far more extensive coercive powers than a judicial inquiry including the ability to compel witnesses to give evidence and produce documents).⁶⁴ As the federal election approached, and more information relating to political interference in the case came to light, the calls from the opposition for an inquiry grew louder. On 3 November 2007, the Leader of the Opposition said that, if elected, a Commonwealth government formed by the Australian Labor Party would hold a full judicial inquiry into the Haneef case. This commitment came after it was confirmed that an AFP officer and staff member of the Minister had in fact developed the contingency (or, 'secret') plan referred to above to ensure that Haneef would remain in custody under the *Migration Act* even if a magistrate released him. The information was contained in an email sent from the AFP to the Department of Immigration and Citizenship, and was obtained by Haneef's lawyers following a freedom of information application in their quest to have the doctor's visa reinstated.⁶⁵

Labour Commonwealth Attorney General, Robert McClelland, announced on 14 March 2008 that John Clarke QC, a former New South Wales Supreme Court judge, would conduct a judicial inquiry into the Haneef affair. The Clarke Inquiry was asked to

⁶³ See, for example, Sally Neighbour, 'Haunted by Haneef', *The Australian* (Sydney), 17 August 2009 <<http://www.theaustralian.news.com.au/story/0,2519725934457-28737,00.html>> at 7 September 2009.

⁶⁴ 'Ministers accused of "driving" Haneef case', *ABC News*, 28 July 2007.

⁶⁵ B Nicholson and J Breusch, 'Haneef inquiry "a must"', *The Age* (Melbourne), 3 November 2007.

examine and report on ‘the arrest, detention, charging, prosecution and release of Haneef, the cancellation of his Australian visa and issuing of a criminal justice stay certificate.’⁶⁶ Among its other terms of reference, the Clarke Inquiry, like the earlier Street Review (which was commissioned to examine the AFP’s and ASIO’s investigation into, and the failed prosecution of, terrorism suspect Izhar Ul-Haque)⁶⁷, was to examine and report on improving co-operation, co-ordination and ‘interoperability’ between Commonwealth agencies including the AFP, ASIO and the CDPP.

The Clarke Inquiry was for the most part conducted in private (the opening day of the inquiry and a one-day public hearing on 30 April 2008 were its only public hearings). It was not given the power to compel witnesses to give evidence or face cross-examination, and witnesses were not given indemnity against defamation or self-incrimination. In all, the Clarke Inquiry made ten recommendations, the most important of these being ‘that consideration be given to the appointment of an independent reviewer of Commonwealth counter-terrorism laws’.⁶⁸ The Rudd Government has accepted this recommendation but has been slow in putting it into effect.⁶⁹

Commenting on the release of Clarke’s report, just before Christmas 2008, George Williams noted that ‘it exposed in graphic detail the mishandling of the case and the flaws and deficiencies in the law...but made a disappointing set of recommendations.’ Even though the legislation used in the Haneef case allows for the indefinite detention of a person who has not been charged with a criminal offence, ‘Clarke passed the

⁶⁶ M Rix, ‘The Haneef Case and an Independent Reviewer of Terrorism Law’ (2009) 34 *Alternative Law Journal* 1, 50-1.

⁶⁷ Sir L Street, *The Street Review: A Review of Interoperability Between the AFP and its National Security Partners* (2008) <http://www.afp.gov.au/_data/assets/pdf_file/71833/The_Street_Review.pdf> at 30 September 2009.

⁶⁸ Clarke Inquiry, above n 2, Recommendation 4.

⁶⁹ In June 2009, the National Security Legislation Monitor Bill was introduced into the Commonwealth Parliament. A Senate committee recommended in September 2009 that this legislation be enacted (albeit with some amendments: Senate Finance and Public Administration Committee, Parliament of Australia, *National Security Legislation Monitor Bill 2009* (2009). Debate on a private members Bill (the Independent Reviewer of Terrorism Laws Bill 2008) had been blocked by the Commonwealth government in the House of Representatives in early 2008. It was subsequently considered, and substantially endorsed, by a Senate committee: Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Independent Reviewer of Terrorism Laws Bill 2008* (2008).

buck in finding that the legislation should be reviewed again by someone else'.⁷⁰ The Clarke Inquiry also drew criticism for its failure to 'unearth improper political interference or opportunism'. Andrew Lynch, for example, attributes this to restrictions on who could give evidence and what they were able or willing to say when they did. He points out that the Immigration Minister's 'former chief of staff declined to provide a statement, while ... [the Prime Minister] neither provided a statement himself nor granted permission for his former advisor, Jamie Fox, to do so'.⁷¹ For his part, the then Attorney General, whose portfolio responsibilities included the AFP and ASIO, did speak to the Clarke Inquiry but only for about an hour. And, Clarke had considerable difficulty in gaining access to Cabinet (including National Security Committee) documents.

In the early stages of the case, as the Australian Press Council's review of the press media's coverage of Haneef highlights, the media was primarily concerned with the narrow criminal and law and order dimensions of the case.⁷² Its human rights dimensions, and the broader implications of the counter-terrorism measures contained in Australia's terrorism law for the rights and liberties of Australians and for the rule of law in this country, were largely overlooked. It was only as the case proceeded and gathered momentum with the release of the first and second records of interview that these broader dimensions began to become more prominent themes in the reporting of the case. And, as the media began to include these broader dimensions in its coverage, so did other major issues become media freedom and how the various parties involved in the case, in particular, the Government, its senior ministers and the AFP attempted to use the media to their advantage by discrediting Haneef and his legal counsel. The important point to be drawn from the Haneef case is that media scrutiny of executive government and the protection of human rights and civil liberties, and ultimately the protection of national security, are inextricably linked in Australia as in any other country. As executive government steadily grows in power in Australia and other democratic countries around the world, and the counter-balancing power of parliaments and legislatures declines in proportion, it becomes increasingly important

⁷⁰ G Williams, 'Time to change terrorism laws', *The Sydney Morning Herald* (Sydney), 24 February 2009.

⁷¹ Lynch, 'Learning from Haneef', p.3.

⁷² Australian Press Council, '*State of the News Print Media in Australia Report*' (2008) <<http://www.presscouncil.org.au/snpma/snpma2008>> at 31 July 2009.

for the media and other civil society organisations to hold the executive, and the law enforcement, prosecuting and security agencies it oversees accountable and answerable for their actions.

Conclusion

The Haneef case demonstrates how the operationalisation of Australia's counter-terrorism strategy can so adversely affect the human and legal rights, in effect, of any individual going about their day-to-day business unmotivated by any intention to plan, prepare for, or conspire with others to commit a terrorist act. After all, it is not very significant for people to give their mobile phone SIM card or a mobile phone itself to relatives or friends without regard to whether or not at some time in the future it might become involved through no fault of their own in a terrorist incident or be somehow entwined in a terrorist fiasco. Thus, the case also demonstrates the need for careful, sensitive and highly professional investigations, intelligence collection and prosecutions in such cases that are free from unwarranted or improper interference by the political executive. Any attempt by the political executive to exceed its authority in this way should be exposed and detailed by the media, as it was in this case. It remains to be seen whether the case of Dr Mohamed Haneef will turn out to be unique in this respect.