

CLARKE INQUIRY INTO THE CASE OF DR MOHAMED HANEEF

Before The Hon MJ Clarke QC

Held at The Australian Industrial Registry,  
Level 2, CML Building,  
17-21 University Avenue,  
Canberra

On Wednesday, 30 April 2008, at 10am

1 MR CLARKE: First of all, I would like to welcome those  
2 present today and to thank you all for attending and I  
3 think also offering assistance to this Inquiry.  
4

5 I now ask the clerk to read the terms of reference,  
6 please.  
7

8 MS BUTLER:  
9

10 The Inquiry is to examine and report on:  
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12 (a) the arrest, detention, charging,  
13 prosecution and release of Dr Haneef, the  
14 cancellation of his Australian visa and  
15 issuing of a criminal justice stay  
16 certificate;  
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18 (b) the administrative and operational  
19 procedures and arrangements of the  
20 Commonwealth and its agencies relevant to  
21 these matters;  
22

23 (c) the effectiveness of cooperation,  
24 co-ordination and interoperability between  
25 the Commonwealth agencies and with state  
26 law enforcement agencies relating to these  
27 matters; and  
28

29 (d) having regard to (a), (b) and (c), any  
30 deficiencies in the relevant laws or  
31 administrative and operational procedures  
32 and arrangements of the Commonwealth and  
33 its agencies, including agency and  
34 interagency communication protocols and  
35 guidelines.  
36

37 The Inquiry is to report by 30 September  
38 2008.  
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40 MR CLARKE: As is apparent, I have been asked by the  
41 Attorney-General to inquire into the matters set out in the  
42 terms of reference relating to the case of Dr Mohamed  
43 Haneef.  
44

45 The purpose of today's hearing is to provide a  
46 preliminary indication of the manner in which I propose to  
47 conduct the Inquiry, and to invite interested parties to

1 make brief statements. We are currently in the early  
2 stages of gathering relevant documents and identifying  
3 persons to be interviewed. As I become more fully informed  
4 of the issues and the nature of the material involved, it  
5 may be necessary to make changes to aspects of the  
6 Inquiry's practices and procedures that I am outlining  
7 today.

8  
9 The government has not established this Inquiry as a  
10 Royal Commission. This means that the Inquiry does not  
11 derive its authority from statute and does not have  
12 statutory powers or privileges conferred on it. If I  
13 encounter difficulties in conducting the Inquiry arising  
14 from a lack of cooperation from any person, the  
15 Attorney-General has indicated that he will consider any  
16 recommendation from me to reconstitute the Inquiry under  
17 the provisions of the Royal Commissions Act 1902. However,  
18 I have so far received assurances from each of the relevant  
19 government agencies that they will fully cooperate with the  
20 Inquiry. Each of those agencies will provide me with all  
21 relevant documents and information, and will provide me  
22 with access to any personnel who I wish to interview.

23  
24 On that basis, I am confident that the Inquiry can be  
25 effectively conducted in its present form.

26  
27 The Inquiry ultimately provides its report to the  
28 government. The Inquiry will nonetheless maintain its  
29 independence from the government in the performance of its  
30 functions.

31  
32 The report will set out my findings relevant to the  
33 terms of reference and any recommendations arising from  
34 those findings. However, it is not the role of the Inquiry  
35 to determine rights as between parties, nor to make  
36 findings with judicial effect. Under the terms of  
37 reference, the focus of the Inquiry is on the operations  
38 and activities of relevant Commonwealth departments and  
39 agencies, as well as their interaction with each other and  
40 with state law enforcement agencies.

41  
42 These matters are to be examined in the context of the  
43 case involving Dr Mohamed Haneef. The relevant events that  
44 are the subject of this Inquiry span a limited period of  
45 time - from the arrest of Dr Haneef on 2 July 2007 until  
46 his release from detention and departure from Australia on  
47 29 July 2007.

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The departments and agencies that have been identified as relevant to the Inquiry's terms of reference include: the Australian Federal Police; Queensland Police, the Australian Security and Intelligence Organisation; the Commonwealth Director of Public Prosecutions; the Department of Immigration and Citizenship; and the Attorney-General's Department.

I emphasise that the focus of the Inquiry is not concerned with the continuation of any investigation into Dr Haneef. However, the Inquiry arises out of events in which Dr Haneef was directly involved. Dr Haneef and his legal representatives have been invited to provide assistance to the Inquiry and have already indicated that they are anxious to provide that assistance.

I have already met with the legal representatives of Dr Haneef, and will make arrangements to interview the doctor at an appropriate and convenient time in the course of the Inquiry if he is agreeable to that being done.

The Inquiry is committed to adopting procedures which ensure a thorough investigation of all relevant matters, and which provide fairness to all persons concerned. Could I emphasise that I am concerned to ensure that all are accorded natural justice and that the Inquiry is conducted in a manner of the utmost fairness.

In accordance with a notice published on 19 April 2008, the Inquiry has invited written submissions to be provided by 16 May 2008.

Any relevantly interested person or organisation is welcome to provide a written submission concerning the events that are the subject of the Inquiry's terms of reference. If the person or organisation also seeks to supplement those written submissions with an oral presentation, they should indicate their reasons for so doing. The Inquiry will subsequently inform those persons from whom oral submissions would be of assistance.

Following the receipt of submissions and the collection of documentary material, I propose to conduct interviews of persons who are able to assist the Inquiry in relation to its terms of reference. Those interviews will be carried out in private meetings between myself, members

1 of my staff and the persons interviewed. If they wish,  
2 persons interviewed may be accompanied by their lawyers  
3 during the interviews.  
4

5 The interviews will be transcribed. To the extent  
6 that it is possible to do so, subject to any issues of  
7 confidentiality or national security, the transcripts of  
8 interviews will be made available to the public on the  
9 Inquiry's website.  
10

11 If there is sufficient interest, public forums may be  
12 arranged at which interested persons may be given an  
13 opportunity to make an oral submission to the Inquiry.  
14

15 My intention is that the proceedings of the Inquiry  
16 should as far as possible be made public. However, given  
17 the subject matter of the terms of reference, the Inquiry  
18 must observe restrictions on the disclosure and publication  
19 of certain material which raises issues concerning national  
20 security, or which may place at risk ongoing investigations  
21 or pending trials both in Australia and overseas. These  
22 considerations will not confine the scope of the  
23 investigations carried out by the Inquiry. However, they  
24 may affect the extent to which some of the material  
25 examined and considered by the Inquiry may be made public.  
26

27 I have been asked to provide my report to the  
28 Government by 30 September 2008. I anticipate that a  
29 report setting out my findings and recommendations can be  
30 produced in a form that is capable of being made available  
31 to the public. However, there may well be some parts of my  
32 report that will contain protected material, and  
33 publication of those parts may not be possible or  
34 appropriate. Accordingly, as the Attorney-General has  
35 acknowledged when he announced the Inquiry, my report may  
36 need to be supplemented by a confidential report.  
37

38 I have prepared a Practice Note for the assistance of  
39 interested parties which deals with the provision of  
40 written submissions and documents and the subsequent  
41 proceedings of the Inquiry and that will be handed out.  
42

43 The legal team assisting the Inquiry comprises  
44 Mr Chris Horan as counsel assisting; and Mr Rohan White and  
45 Ms Kylie Neville from Sparke Helmore Lawyers as solicitors  
46 assisting.  
47

1 I now invite the representatives of Dr Haneef, the  
2 various departments and agencies, and any other interested  
3 parties who have attended today, to announce their  
4 appearance before the Inquiry.

5  
6 Perhaps the most convenient way of dealing with that  
7 is for me to nominate certain organisations who we know  
8 will be here today and then invite other persons to  
9 announce their appearance, if they so wish.

10  
11 Following the announcement of appearances, I will be  
12 inviting each of the parties, probably in the same order,  
13 to make any short statement that they wish today, or  
14 perhaps even to ask questions.

15  
16 First of all, I call on the Australian Federal Police.

17  
18 MR J WATSON: James Watson, I am the chief counsel of the  
19 Australian Federal Police. I appear today in response to  
20 the invitation that was issued by the Inquiry to the AFP to  
21 appear at today's preliminary hearing.

22  
23 As Commissioner Keelty has previously stated, the AFP  
24 welcomes the Inquiry into the case of Dr Haneef. The AFP  
25 is committed to cooperating to the fullest extent with the  
26 Inquiry and the Inquiry team as it examines the matters  
27 covered by the terms of reference.

28  
29 As the Inquiry has commenced, it is perhaps not  
30 appropriate to make more detailed comments at this time.  
31 Noting this, however, it is the AFP's view that running  
32 false assertions on the front pages of newspapers will not  
33 assist this Inquiry in undertaking its task, nor does it  
34 assist the AFP, which should not have to spend time  
35 correcting these allegations at the expense of undertaking  
36 important operational activity.

37  
38 The AFP takes this opportunity to confirm that we will  
39 be making submissions to the Inquiry in relation to the  
40 terms of reference and, should you consider it necessary,  
41 allow the Inquiry to examine relevant members of the AFP.

42  
43 MR CLARKE: Thank you. The Australian Security and  
44 Intelligence Organisation.

45  
46 DR S DONAGHUE: I seek leave to appear on behalf of ASIO.  
47 I do not make seek to make any submissions to the Inquiry

1 now save to place on the record, as Mr Clarke has already  
2 indicated, that we intend to cooperate fully with the  
3 Inquiry and that cooperation will, of course, extend both  
4 to the provision of submissions, to access - to the  
5 provision of access to any document that the Inquiry feels  
6 it needs to see and to interview any witnesses who the  
7 Inquiry wishes to contact.

8  
9 MR CLARKE: Thank you very much. Queensland Police  
10 Service.

11  
12 MR W KELLY: Wayne Kelly, I am counsel with the Office of  
13 the Queensland Police Service Solicitor and I wish to  
14 mention the appearance of the Queensland Police Service as  
15 an agency with an interest in the matters the subject of  
16 this Inquiry. The Queensland Police Service welcomes the  
17 opportunity to contribute and to participate in the Inquiry  
18 and will render such assistance as is reasonably required  
19 of it by the Inquiry, noting of course the potential for  
20 prevailing national security and the operational priorities  
21 that apply.

22  
23 MR CLARKE: Thank you very much, Mr Kelly. Commonwealth  
24 Director of Public Prosecutions.

25  
26 MR J CARTER: My name is James Carter, Deputy Director in  
27 the Commonwealth Director of Public Prosecutions.

28  
29 On behalf of the Commonwealth Director of Public  
30 Prosecutions, I announce the appearance of the Office of  
31 the Director of Public Prosecutions before this Inquiry.

32  
33 May I take this opportunity to confirm the commitment  
34 that this office has made to cooperate fully with the  
35 Inquiry. The DPP understands that there has been public  
36 disquiet surrounding the prosecution of Dr Mohamed Haneef.  
37 It is important that the public has confidence in the  
38 criminal justice system and the CDPP is supportive of  
39 processes that can contribute to maintaining that public  
40 confidence.

41  
42 Being mindful of this, the CDPP will make a submission  
43 covering all aspects of its involvement in this matter and  
44 will assist the Inquiry in any way that it can. The office  
45 is pleased to assist the Inquiry in its work.

46  
47 MR CLARKE: Thank you very much. The Department of

1 Immigration and Citizenship.

2

3 MR C HODGES: Chris Hodges, an Assistant Secretary in the  
4 Legal Division. The Department of Immigration and  
5 Citizenship - DIAC - looks forward to fully cooperating  
6 with the Inquiry in all of its facets.

7

8 To assist the Inquiry, DIAC has prepared a list of  
9 documents which the Inquiry may wish to examine; and a list  
10 of officers whom it may wish to interview.

11

12 MR CLARKE: Thank you very much, Mr Hodges. The  
13 Attorney-General's Department.

14

15 MR G McDONALD: Geoff McDonald, I represent the  
16 Attorney-General's Department. I head up the Security and  
17 Critical Infrastructure Division. Our department has been  
18 involved in various aspects of this matter and will provide  
19 the Inquiry with every assistance that we can possibly give  
20 you and we wish you the very best with your Inquiry.

21

22 MR CLARKE: Thank you very much, Mr McDonald. And Dr  
23 Mohamed Haneef.

24

25 MR SJ KEIM SC: May it please the Inquiry, my name is  
26 Keim, I am a member of counsel, instructed by Maurice  
27 Blackburn and Company, lawyers, and I will come back and  
28 make a statement when you come back to me. Thank you.

29

30 MR CLARKE: I understand that the Law Council of Australia  
31 has a representative present who wishes to announce his or  
32 her appearance.

33

34 MS S MOULDS: Sarah Moulds, I am here from the Law Council  
35 of Australia. We do not wish to make any submissions at  
36 this point but we will be making a written submission.

37

38 MR CLARKE: Thank you very much. Is there anyone else who  
39 would like to have an appearance noted here today?

40

41 MR FREER: I am the ACT Branch President of the Australian  
42 Lawyers Alliance. Similarly to the Law Council, we would  
43 seek leave to observe, maintain a watching brief, on these  
44 proceedings and to make written submissions if deemed  
45 necessary. Thank you.

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47 MR CLARKE: Thank you very much, Mr Freer. That seems to

1 be the sum total .

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Before I ask Mr Keim to make a statement, could I point out that it is the intention, as I think I probably said earlier, to publish the submissions on the Inquiry's website, and should there be any portion of submissions that are confidential and are required to be kept confidential for any one of a number of reasons, it is very important that be made clear so that all that is published is the open material which the party is content to have published on the website, bearing in mind that the Inquiry wishes to have as much as possible made public.

Yes, thank you, Mr Keim.

MR KEIM: Thank you, sir. As indicated earlier, leave is sought to appear on behalf of Dr Mohamed Haneef.

Dr Haneef was arrested and incarcerated from 2 July until 14 July 2007 without being charged with any criminal offence. He was then charged with a criminal offence and taken before a court where an application for bail was made. He was remanded in custody for two days while the court reserved its decision concerning bail.

Dr Haneef was granted bail with sureties amounting to \$10,000. However, before an attempt to raise bail was made, the Minister For Immigration, Mr Andrews, cancelled Dr Haneef's work visa and ordered that he be placed in immigration detention.

On 27 July, 11 days later, the Director of Public Prosecutions, after an investigation, came to a view 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 come in from then pending investigations.

Mr Andrews stated that these developments made no difference to his previous decision to cancel Dr Haneef's visa but he allowed him that day to go into residential detention in a unit in Kangaroo Point, Brisbane. 24 hours later, Mr Andrews allowed Dr Haneef to return home to India.

On 21 August 2007, Justice Spender of the Federal Court set aside the decision to cancel Dr Haneef's visa.

1 The minister appealed but a full Federal Court dismissed  
2 the appeal on 21 December 2007.

3  
4 In January 2008, the new minister announced that he  
5 would not be applying for special leave to appeal the  
6 decision of the full Federal Court.

7  
8 Dr Haneef continues to have his reputation imperilled  
9 and his personal safety threatened by public statements  
10 made by the Australian Federal Police that he continues to  
11 be the subject of investigation by that organisation. A  
12 statement to this effect was made as late as early this  
13 month.

14  
15 These statements are made despite the fact that no  
16 attempt has been made to interview Dr Haneef about any  
17 matter since his release on 27 July 2007. It is apparent,  
18 even from this very bare statement of the facts of  
19 Dr Haneef's case, in my submission, that a series of  
20 appalling decisions have been made by police prosecution  
21 and immigration officials, including possibly by persons at  
22 a high level in those organisations.

23  
24 It is Dr Haneef's intention in the Inquiry to provide  
25 maximum assistance to the Inquiry so that the full facts of  
26 his case can be laid bare and the persons responsible for  
27 such bad decision-making can be made accountable for their  
28 decisions.

29  
30 Further, because Dr Haneef's reputation continues to  
31 be sullied by innuendo that he is a person of sufficiently  
32 dubious conduct to deserve to be investigated for now over  
33 10 months and continuing, he is very keen to clear his name  
34 once and for all.

35  
36 And I do note the limitation in the terms of reference  
37 that you pointed out in your introductory statement, and  
38 the continuation of the prosecution as a matter for this  
39 Inquiry to investigate is a matter that those who instruct  
40 me shall take up with the Attorney-General over the next  
41 few days.

42  
43 I wanted to address procedure briefly. As you  
44 indicated in your outline, or your outline statement, the  
45 Attorney-General has confirmed that this Inquiry has been  
46 set up without statutory or other powers, including a  
47 complete inability to compel witnesses to testify or

1 produce documents.

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I will hand up at the end a letter from the Attorney-General to those who instruct me dated 18 March 2008 which confirms that.

In discussions with staff at the office of the Attorney-General, my instructing solicitors have been advised that the Attorney-General would consider providing coercive powers to your Inquiry should you, as the person charged with conducting the Inquiry, make such a request. This is also stated in the transcript of the media conference received with the letter of the Attorney-General to which I just referred.

As you are aware, my instructing solicitors have urged upon this Inquiry that you seek such powers by requesting same of the Attorney-General. I will hand up a letter from those who instruct me to you dated 18 March and, although you have initially met our request with a refusal - and that is contained in a letter from you to those who instruct me dated 25 March 2008 - I am instructed to renew that request orally.

I am also instructed to request that the legal representatives of Dr Haneef be (a) given notice of the witnesses to be interviewed and the time and place of those interviews, (b) allowed to attend at those interviews, to question those witnesses and to receive transcripts of those interviews after they have taken place and (c) to be given access to relevant documents received by the Inquiry.

I wanted to briefly outline some recent events which in my submission highlight the need for coercive powers.

A matter which has come to light in recent days indicates in my submission the importance of the Inquiry having coercive powers. On Friday 11 April this year a Criminal Court judge, Justice Calvert-Smith in London, accepted that an email sent by Kafeel Ahmed to Sabeel Ahmed proved that Sabeel had no knowledge of his brother's activities prior to his opening the email some hours after Kafeel set himself on fire outside Glasgow airport. It was to Sabeel that Dr Haneef in July 2006 had given his SIM card, which was the act for which he was arrested.

Despite the fact that by 5 July 2007 two Australian

1 police were in London to cooperate with British police, and  
2 about the same time, in fact I think the woman police  
3 officer in question arrived at Brisbane airport at  
4 approximately 6am on 5 July - despite the fact that that  
5 officer was in Brisbane to cooperate with Australian  
6 police, this email was never given to Dr Haneef's lawyers,  
7 it was not given to the court that heard the bail  
8 application, and it appears from recent newspaper reports  
9 not to have been given to Mr Andrews when he considered  
10 whether to cancel Dr Haneef's visa.

11  
12 That also seems to be the case from the immigration  
13 documentation relating to the cancellation of the visa  
14 which was served on Dr Haneef the day that his visa was  
15 cancelled at about shortly before 4pm that day.

16  
17 This failure to provide information, despite the  
18 continuous flow of information from the United Kingdom to  
19 Australian authorities - and that flow of information is  
20 documented inter alia in a statutory declaration declared  
21 by Simms on behalf of the Australian Federal Police to  
22 Mr Gordon as part of a detention application on 11 July  
23 2007 - that failure despite that continuous flow of  
24 information for that document to be made available to the  
25 relevant entities which I have mentioned suggests the real  
26 likelihood in my submission that documents which are  
27 embarrassing to certain agencies may not see the light of  
28 day in the absence of coercive powers.

29  
30 For this reason, among the others that I have  
31 mentioned, I am instructed to submit to the Inquiry that a  
32 request be made to the Attorney-General for coercive powers  
33 to be provided to the Inquiry.

34  
35 Thank you for the opportunity, sir.

36  
37 MR CLARKE: Thank you, Mr Keim. Anyone wish to say  
38 anything more? I should respond to two matters that  
39 Mr Keim raised.

40  
41 MR KEIM: Can I provide to those who instruct you a copy  
42 of the letters to which I have referred and the notes from  
43 which I spoke.

44  
45 MR CLARKE: I reiterate that I should just respond to the  
46 request that is contained in the statement Mr Keim has made  
47 for me to seek to have this converted to a Royal

1 Commission.

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As he has pointed out, I earlier responded to a request of that nature saying that I intended to carry out the task which had been conferred upon me, and that is to conduct this Inquiry, albeit without any statutory backing. That intention remains.

First, I think there is little purpose at this time seeking to convert this matter into a Royal Commission. I have not got the power to do that. I can simply request it, but in requesting it, to have any chance of success I would need a persuasive case, and at the present time I have no case at all. We have not started on the matter at all in substance. So that any such request now would in my view be a waste of time, but even more importantly, having been given the assurances I have had both today and personally from the heads of the various departments, that I will be given full access to all documents, confidential or otherwise, and that I will be given full cooperation, I have confidence that this Inquiry will be able to continue and provide a proper report, let me emphasise, a proper report, dealing with the facts and an analysis of those facts and recommendations flowing from those facts.

If at any time I find that I cannot give a proper report, or am hindered in progressing towards a proper report, I will then make the request that is mentioned to have the matter converted, or take other steps short of that to endeavour to get the material which is necessary for there to be a proper report. But I do want to emphasise that any report that bears my name will be a proper report, a full investigation.

Mr Keim also in paragraph 13 of his statement made a number of requests. We have thought long and hard about the manner of carrying out this Inquiry. We have been careful and astute to ensure fairness and procedures of natural justice, but having regard to the manner in which it is necessary to carry out the Inquiry efficiently I have to deny the request in paragraph 13(a) and (b); and in response to the request that Dr Haneef's representatives be given access to relevant documents, that access will be available, as it will be to any member of the public, on the website.

What does not go on the website will be obviously

1 confidential documents, but the others that we get access  
2 to will be published on the website. I do not mean to  
3 suggest by that every document, because I gather there is a  
4 very, very large amount of documents, but every document to  
5 which reference is made in any interview, or to which it is  
6 likely that we will be directing our attention in writing  
7 the report.

8  
9 Having said that, I have I think reached the end of  
10 what I want to say today. If anyone wishes to say anything  
11 more before we adjourn, they are welcome to do so.  
12 Otherwise, I will adjourn immediately.

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14 AT 2.30PM THE INQUIRY ADJOURNED ACCORDINGLY  
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