



Australian Government
Attorney-General's Department

Inquiry into the case of Dr Mohamed Haneef –

Submission of the Attorney-General's Department

The Attorney-General's Department welcomes the opportunity to contribute to the Inquiry into the case of Dr Mohamed Haneef.

This submission will discuss the nature of the roles performed by the Department in relation to the events referred to in paragraph (a) of the Inquiry's Terms of Reference, ie 'the arrest, detention, charging, prosecution and release of Dr Haneef, the cancellation of his Australian visa and issuing of a criminal justice stay certificate.' In this way, the submission is intended to provide a concise narrative of the volumes of documents which will be provided to the Inquiry separately to this submission.

1. Chronology of key events

The following information is provided as a chronology of key events related to the arrest, detention, charging, prosecution and release of Dr Haneef:

- On 2 July 2007 the Australian Federal Police (AFP) and the Queensland Police Service Joint Counter Terrorism Team arrested Dr Haneef for his involvement with the alleged perpetrators of terrorist incidents in the United Kingdom on 29 and 30 June 2007.
- In accordance with Part 1C of the *Crimes Act 1914* (Crimes Act), the AFP sought extensions of time from magistrates for the continuing detention of Dr Haneef for investigation and was granted extensions as set out below:
 - on the morning of 3 July, a magistrate granted an extension of 8 hours
 - a magistrate granted a further extension of 12 hours from 6pm on 3 July
 - a magistrate granted an extension for investigation purposes of 48 hours on 4 July (no questioning is permitted during extensions of time for investigation purposes)
 - a magistrate granted an extension for investigation purposes of 96 hours on 6 July
 - a magistrate granted an extension for investigation purposes of 48 hours on 9 July. (The AFP applied for a further extension of time on 11 July. However, this application was withdrawn on 13 July prior to the magistrate deciding on the application.)
- On 14 July 2007 Dr Haneef was charged by the AFP for intentionally providing resources to a terrorist organisation being reckless as to whether the organisation was a terrorist organisation contrary to s.102.7(2) of the *Criminal Code Act 1995* (Criminal Code).
- On 16 July 2007 Dr Haneef was granted bail by the Brisbane Magistrates Court. Dr Haneef did not meet the conditions set for bail and was not actually released on bail.

- On the same day, the Minister for Immigration and Citizenship cancelled Dr Haneef's visa under subsection 501(3) of the *Migration Act 1958* ('the Migration Act') on the basis that the Minister reasonably suspected that he did not pass the 'character test' and that the Minister was satisfied that the cancellation was in the national interest. The Minister suspected that Dr Haneef did not pass the character test because of his 'association' with the two bombing suspects.
- On 17 July 2007 the AFP requested the Attorney-General to issue a Criminal Justice Stay Certificate under section 147 of the Migration Act to prevent Dr Haneef from being removed or deported from Australia as he was required for the purposes of administration of criminal justice, being his prosecution for providing support to a terrorist organisation. The Certificate was issued on 17 July 2007. This enabled the Minister for Immigration and Citizenship to issue a Criminal Justice Stay visa, but that visa was not ultimately issued.
- On 18 July 2007 Dr Haneef was transferred from police custody at the Brisbane Watch House to Wolston Correctional Centre. He remained in custody because he had not met bail conditions.
- Also on 18 July 2007, Dr Haneef's solicitors filed an application in the Federal Court challenging the visa cancellation decision.
- On 27 July 2007 the Commonwealth Director of Public Prosecutions (CDPP) withdrew the charge against Dr Haneef due to 'no reasonable prospect of conviction' on the available, admissible evidence. As Dr Haneef's presence was no longer required in Australia for the purposes of administration of criminal justice, on 27 July 2007 the Attorney-General cancelled his Criminal Justice Stay Certificate.
- Upon his release from police custody, Dr Haneef was detained under section 189 of the Migration Act, as an unlawful non-citizen, and was held on a residence determination (in community-based detention). Dr Haneef voluntarily departed Australia for India on 28 July.
- On 21 August 2007, in *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40, Justice Spender set aside the Minister's cancellation decision on the basis that the Minister had misinterpreted the character test under the Migration Act. Subsection 501(6) of the Migration Act provides that a person does not pass the character test in certain circumstances, including where 'the person has or has had an *association* with someone else...whom the Minister reasonably suspects has been involved in criminal conduct' (emphasis added). Justice Spender found that the Minister had applied a test of 'association' that was wide enough to encompass links that could not conceivably have had any bearing on the visa holder's character (although there was no finding of 'improper purpose').
- The Minister appealed Justice Spender's decision. On 21 December 2007, the Full Federal Court dismissed the appeal (*Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203). The Full Court held that the Minister did not apply the proper test of 'association' and so had committed a jurisdictional error. The Full Court held that there must be an association involving some sympathy with, or support for, or involvement in, the criminal conduct. The association must be such as to have some bearing upon the person's character. The Full Court held that none of the matters relied on by the Minister were capable of supporting a reasonable suspicion that Dr Haneef knew of, was sympathetic to, supported, or was involved in criminal conduct undertaken by his cousins.

2. Role of the Attorney-General's Department

The Department had several roles in relation to the Haneef case which are outlined below.

(a) Role of the Department's Coordination Centre

The Department's Coordination Centre is a dedicated 'crisis' coordination centre. Its role is to provide situational awareness and coordination assistance across government, non-government and State and Territory agencies in an 'all-hazards' environment. In that respect, the Centre played a coordinating role in disseminating information about the attempted attack against Glasgow Airport and the arrest, detention and charging of Dr Haneef. It did not have any analytical or decision-making role in those matters.

(b) Role of the Security Law Branch

The Security Law Branch—located within the Security and Critical Infrastructure Division of the Department—administers the terrorism offences in Part 5.3 of the Criminal Code, preventative mechanisms (such as control orders and preventative detention) in the Criminal Code, and the *Australian Security Intelligence Organisation Act 1979*. It is also responsible for Part 1C of the Crimes Act as it relates to terrorism offences. The Security Law Branch often takes a lead role within the Department, as well as across Commonwealth government agencies more generally, on national security policy issues and the coordination of particular counter-terrorism matters.

Senior officers from the Security Law Branch were involved in providing advice to government during the investigation into Dr Haneef and throughout subsequent steps in his case. Departmental officers participated in a number of inter-agency meetings and telephone discussions which were held to ensure there was proper awareness within government of what was happening in relation to Dr Haneef. The role of these departmental officers was to ensure that any discussions about legal aspects of the case, including periods of investigative detention and the policy objectives of the legislation, were properly addressed.

The Security Law Branch acted as a liaison point within the Department for coordinating the Department's various roles in relation to Dr Haneef's case and provided briefings to the Attorney-General's Office on developments in the case.

Following Dr Haneef's return to India, the Security Law Branch continued to play a role in briefing and advising the Government on his case and responding to correspondence from the public about the matter.

(c) Role of the Mutual Assistance and Extradition Branch regarding Haneef

The Mutual Assistance and Extradition Branch (MAEB) was involved in the issuing and subsequent cancellation of a criminal justice certificate for Dr Haneef.

On 14 July 2007, Dr Haneef was charged with providing support to a terrorist organisation, being reckless as to whether that organisation was a terrorist organisation, pursuant to subsection 102.7(2) of the *Criminal Code*. On 16 July 2007, Dr Haneef's temporary skilled worker visa was cancelled by the then Minister for Immigration. This action made Dr Haneef an unlawful non-citizen.

On 16 July 2007, the AFP asked for a criminal justice stay certificate (CJC) to be issued under section 147 of the Migration Act to prevent Dr Haneef being removed from Australia while he was being prosecuted. Under the Migration Act, the Attorney-General or his delegate has power to

issue a CJC. A submission was put to the then Attorney-General, the Hon Philip Ruddock MP, recommending that he issue a CJC. On 17 July 2007 Mr Ruddock issued the CJC. The Department of Immigration and Citizenship was notified the same day. (The effect of the CJC would have been that, on release from police custody, Dr Haneef would have been held in immigration detention rather than being deported. However, Dr Haneef remained in police custody as he did not meet conditions of the bail granted to him.)

On 27 July 2007, the CDPP withdrew the charge against Dr Haneef. In anticipation of the charge being withdrawn, on the morning of 27 July 2007, MAEB had provided a submission to the Attorney-General recommending that if the charges were dismissed, the CJC should be cancelled as the CJC would no longer be required to stay the removal of Dr Haneef so that he could be prosecuted. The Department notified the Department of Immigration and Citizenship that if the charges were dismissed the certificate would be cancelled. On the afternoon of 27 July 2007, following the charges being dismissed, Mr Ruddock cancelled Dr Haneef's CJC. The Department of Immigration and Citizenship was then notified of the cancellation.

3. Legal policy issues raised by the case of Dr Haneef

While this submission primarily focuses on providing a factual account of the roles undertaken by the Department in advising government in relation to the case of Dr Haneef, it is worthwhile to address three specific issues falling within the Department's portfolio which we anticipate will receive attention in various submissions to the Inquiry. These issues are: the length of Dr Haneef's detention for investigation; the decision to grant Dr Haneef bail; and the release of evidence into the public domain outside of the court process.

Length of detention for investigation purposes

Criticisms about the length of time for which Dr Haneef was detained need to be considered with appropriate recognition of the legislative regime for detention. Dr Haneef's detention was subject to judicial oversight, this being a feature of the regime for investigative detention provided under Part 1C of the Crimes Act. Contrary to some public depictions of the effect of the legislation, these laws cannot be used to detain a person without charge indefinitely. The features of the regime are:

- Australian Federal Police may detain a person for a period of four hours, which may be extended by a judicial officer to a maximum of 12 hours, or to a maximum of 24 hours in relation to persons suspected of having committed a terrorism offence.
- In addition, the person's detention may be extended by periods of time necessary to enable the person to rest, receive medical attention or speak to a lawyer, among other things.
- In terrorism cases, a judicial officer may also approve additional periods of time where it is necessary for police to collect and analyse information from overseas authorities, operate between different time zones or translate material. During these additional periods of time, questioning must be suspended.

The Department is aware of publicly stated concerns that the length of time Dr Haneef was held under the provisions of Part 1C of the Crimes Act was significantly longer than that foreshadowed by the Department to the Senate Legal and Constitutional Legislation Committee which enquired into proposed amendments to Part 1C. Comments made by the Department to the Committee related to an earlier version of the provisions concerning detention periods—which did not provide for judicial oversight—and not to the version as passed by Parliament. The current regime with its provision of judicial oversight provides accountability of the actions of investigating officers and

ensures that any period of investigative detention is appropriate to the particular circumstances of that case, and at the same time certain.

Granting of bail in relation to terrorism offences

Relevant to the Inquiry's examination of the prosecution of Dr Haneef is an understanding of the bail provisions in relation to terrorism offences. Section 15AA was inserted into the Crimes Act by the *Anti-Terrorism Act 2004* in order to create a presumption against granting bail when a person is charged with or convicted of a terrorism offence, or other serious offences. Only if the bail authority is satisfied that exceptional circumstances exist can bail be justified.

As the Inquiry would be aware, Dr Haneef was granted bail by Magistrate Payne of the Brisbane Magistrate's Court on 16 July 2007. In granting bail, the Magistrate concluded that the exceptional circumstances for the grant of bail could be reached by an accumulation of factors which in this case were that:

- Dr Haneef was not alleged to be a member of a terrorist organisation
- the fault element of the offence with which he was charged was recklessness
- Dr Haneef left the SIM card with a family member
- Dr Haneef was a doctor – a student member of the medical profession
- Dr Haneef had no criminal history
- Dr Haneef could return to work
- Dr Haneef had a good employment history
- Dr Haneef's passport had been seized
- Dr Haneef may have been under surveillance.

These types of factors in themselves had never before been considered 'exceptional' by more senior courts on previous occasions of applications for bail under section 15AA. The outcome of the bail application, and the interpretation of the exceptional circumstances test, was not anticipated by relevant policy officers.

Release of evidence into the public domain

The Department notes the public debate that followed the release of evidence—prior to court consideration of such evidence—in the Haneef case. The Department is of the view that important public policy considerations underpin the convention and practice that evidence in criminal proceedings should not be publicly released except with the sanction of the courts. The dissemination, by any party, of evidence without court approval could operate to undermine court processes.

4. Conclusion

The Department notes that the Inquiry is asked to consider deficiencies in relevant laws. In this regard, the Inquiry may find it useful to consider reviews conducted into various aspects of the counter-terrorism legislation, including by the Security Legislation Review Committee (SLRC) and the Parliamentary Joint Committee on Intelligence and Security (PJCIS). A copy of the SLRC report was tabled in Parliament on 15 June 2006 and is available at <www.ag.gov.au/slrc>. Copies of two PJCIS reports, one tabled on 4 December 2006 and the other 20 September 2007 can be found at <www.aph.gov.au/committees/pjcis>. (We note that these reviews have not dealt with the investigative detention powers in Part 1C of the Crimes Act.)

The Department trusts that this submission assists the Inquiry in its understanding of the roles undertaken by the Department in advising government in relation to the case of Dr Haneef, and that it provides useful context to the bundles of contemporaneous documents provided by the Department.

The Department would be very willing to further assist the Inquiry through making available relevant officers who can provide oral accounts of their involvement at the time.

16 May 2008