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Submission to the

Clarke Inquiry into the Case of Dr Mohamed Haneef

Submitted by

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1. Introduction

Amnesty International's mission is to promote and defend all human rights enshrined in the *Universal Declaration of Human Rights* and other international instruments. Amnesty International undertakes research focused on preventing and ending grave abuses of these rights. Amnesty International is the world's largest independent human rights organisation, comprising more than 2.2 million members and supporters in over 150 countries and territories. Amnesty International is impartial and independent of any government, political persuasion or religious belief.

Since the tragic events of 11 September 2001 in the United States of America, many States have enacted measures and amended legislation regarding national security to reduce the threat of terrorist attacks. As an independent and impartial global human rights organisation, Amnesty International is monitoring the enactment of such legislation and its impact on human rights.

Amnesty International acknowledges that governments have a duty to protect the rights and safety of people within their territory. Security and human rights are not alternatives; they go hand in hand. Respect for human rights is the route to security, not an obstacle to it.

Amnesty International Australia continues to closely monitor legislation to counter 'terrorism' introduced in Australia since September 2001. Amnesty International Australia has made submissions to and appeared before the Senate Legal and Constitutional Committee in May 2002 during its inquiry into the *Security Legislation Amendment (Terrorism) Bill 2002* [No 2]. Amnesty International Australia has made submissions concerning the review of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* to the Parliamentary Joint Committee on ASIO, ASIS and DSD and to the Senate Legal and Constitutional References Committee in 2002. Further submissions have been made to the Senate Legal and Constitutional Legislation Committee in the course of its inquiry into the *National Security Information (Criminal Proceedings) Bill 2004* and the *National Security Information (Criminal Proceedings)(Consequential Amendments) Bill 2004*, and its inquiry into the *National Security Information Legislation Amendment Bill 2005*.

2. Scope of submission

In keeping with Amnesty International's mission, this submission will focus on the divergences between international human rights standards and the law bearing on the treatment of Dr Haneef.

3. Deficiencies in the *Crimes Act 1914* (Cth)

There are two key deficiencies from a human rights perspective.

Amnesty International Australia's first concern is that the *Crimes Act 1914* (Cth) (*Crimes Act*) provides for a period of detention without charge which, while limited by some threshold requirements, is not subject to an absolute maximum duration. Such a provision may breach the right to freedom from arbitrary detention protected by Article

9(1) of the *International Covenant on Civil and Political Rights* (the *ICCPR*) and may constitute arbitrary detention.

Amnesty International Australia is also concerned by the limited provision of information to Dr Haneef and his legal representatives. The lack of access to information forming the basis for the arrest and ongoing detention breaches the right to be informed contained in Article 9(2) of the *ICCPR*.

Taken together, these issues pose a significant challenge to Australia's compliance with Article 9 of the *ICCPR*. Both may breach international standards and are of concern in the context of Australia's human rights obligations.

Both issues are discussed in further detail below.

Operation of the current provisions

The *Crimes Act* currently provides that, where a person is arrested for a terrorism offence, they may be detained without charge for the purpose of investigation for an 'investigation period' of up to four hours. This period may be extended under section 23DA.¹ A person is to be either released or brought before a judicial officer before the end of the investigation period. If it is not practicable to bring a person before a judicial officer during the investigation period, it must occur as soon as practicable after the expiry of that period.²

Certain periods may be disregarded in the determining the duration of the investigation period. These include such limited periods as the time (if any) that is reasonably required to convey the person from the place of arrest to the nearest premises at which the investigating official has access to facilities complying with Part IC of the *Crimes Act*, and any time during which the questioning of the person is suspended or delayed to allow the person, or someone else on the person's behalf, to communicate with a legal practitioner, friend, relative, parent, guardian, interpreter or other person as provided in the *Crimes Act*.³ In addition to these limited and specific allowances, however, section 23CA(8)(m) also permits the following to be excluded from the duration of the investigation period:

any reasonable time that:

- (i) is a time during which the questioning of the person is reasonably suspended or delayed; and
- (ii) is within a period specified under section 23CB.

Section 23CA(8)(h) permits exclusion of time reasonably required in connection with making and disposing of an application under provisions including sections 23CB and 23DA. Sections 23CA(8)(m) and (h) were central to the Haneef case, and are discussed in more detail below.

¹ *Crimes Act* s23CA(4) (the period being two hours for a person aged under 18 or an Aboriginal or Torres Strait Islander).

² *Crimes Act* s23CA(3).

³ *Crimes Act* s23CA(8)(a) and (b).

Section 23DA provides that, if satisfied of certain matters, a judicial officer may extend the investigation period. Any number of extension periods may be given, but the total of the periods of extension cannot be more than 20 hours.⁴

However, s23CA(8)(m) potentially allows for a much longer extension, in real terms, of the period of detention, as it did in the case of Dr Haneef. Sections 23CA(8)(m)(ii) and 23CB permit a further period, to be excluded in determining the duration of the investigation period, to be stipulated by a judicial officer on the application of an investigating official. Before stipulating a period, the judicial officer must be satisfied of certain matters, namely that:

- (a) it is appropriate to do so, having regard to:
 - (i) the application; and
 - (ii) the representations (if any) made by the person, or his or her legal representative, about the application; and
 - (iii) any other relevant matters; and
- (b) the offence is a terrorism offence; and
- (c) detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or into another terrorism offence; and
- (d) the investigation into the offence is being conducted properly and without delay; and
- (e) the person, or his or her legal representative, has been given the opportunity to make representations about the application.⁵

However, there is no cap to the further periods that may be stipulated under sections 23CA(8)(m) and 23CB.

Legislative history

In early drafts of the bill, a version of the mechanism now contained in sections 23CA(8)(m) and 23CB was tied specifically to the additional time required to obtain relevant information from overseas authorities operating in different time zones. The additional period permitted was capped at the number of hours constituting relevant time differences.⁶ In subsequent drafts of the Bill, this level of specificity was removed and is not present in the legislation as it stands.⁷

Given that the extension mechanism in section 23DA is strictly circumscribed, allowing only a maximum additional 20 hours to be added to the investigation period, it appears unlikely that Parliament intended the mechanism in sections 23CA(8)(m) and 23CB to permit the extension of detention (albeit without questioning), for an unlimited period or up to several days at a time.

Deficiencies of the provisions from a human rights perspective

It appears from publicly available information that Dr Haneef was held in detention without charge for twelve days.

⁴ *Crimes Act s23DA(7)*.

⁵ *Crimes Act s23CB(7)*.

⁶ *Anti-Terrorism Bill 2004*, Explanatory Memorandum, pp 3-4.

⁷ See *Anti-Terrorism Bill 2004*, Supplementary Explanatory Memorandum, p 5.

An account of events written by Dr Haneef's lawyer indicates the various orders made during this period to permit questioning and/or detention to continue.⁸ These events are summarised below:

- Day 1 (2 July): Dr Haneef was arrested.
- Day 2 (3 July): at about 10.15 am the Australian Federal Police (AFP) obtained an extension of investigation period from four to twelve hours, and at about 11.05 pm obtained a stipulated period of 48 hours;
- Day 4 (5 July): the AFP obtained a further stipulated period of four days;
- Day 8 (9 July): the AFP sought a further stipulated period of five days but this time Dr Haneef's counsel sought access to the material on which the AFP relied, and the Magistrate adjourned the hearing to permit counsel for the AFP to seek instructions, providing a further period of two days;
- Day 10 (11 July): At the hearing, further legal disputes resulted in another adjournment, involving a further two day delay; and
- Day 12 (13 July): the AFP withdrew their application for a five day period under s23CB.

Regardless of what Parliament may originally have intended the provisions to accomplish, it is clear from the experience of Dr Haneef that sections 23CA(8)(m) and 23CB, together with the discounting under section 23CA(8)(h) of periods required for the resolution of applications under these provisions, potentially allow for very significant extensions of the period of detention.

Amnesty International Australia is concerned that the provisions discussed above allow detention that would otherwise be unlawful in Australia.

Freedom from arbitrary deprivation of liberty is a fundamental right provided in Article 9 of the *ICCPR*⁹ and is a requirement of any system founded on the rule of law. Amnesty International Australia is concerned by any legislative provision which permits extension of the period of detention without charge. Of particular concern is a provision which, like s23CB, is not subject to any specified maximum duration. A period of detention without charge that is capable of extension runs the risk of constituting arbitrary detention and appears contrary to Article 9. The uncertainty around the maximum possible detention period and the possibility of continuous extensions raises significant concerns in the context of Australia's international human rights obligations. That the detention is lawful under the *Crimes Act* does not prevent the detention from being arbitrary and in breach of the *ICCPR*. In accordance with the jurisprudence of the Human Rights Committee, arbitrariness "must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law".¹⁰ Accordingly, the regime under which Dr Haneef was detained may amount to arbitrary detention.

⁸ Peter Russo, 'Haneef: Peter Russo's Story' (2007) 27(10) *Proctor* 22.

⁹ Article 9 provides, "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention." ...

¹⁰ *Albert Womah Mukong v Cameroon*, (458/1991), 21 July 1994, UN Doc. CCPR/C/51/D/458/1991 para 9.8

4. Deficiencies in the Provision of Information

As outlined above, one of Dr Haneef's lawyers, Peter Russo, has detailed the various applications made to extend the time of Dr Haneef's detention. Russo also confirms the lack of access to the information that formed the basis of Dr Haneef's continuing detention. Amnesty International Australia understands that Dr Haneef and his lawyers Russo and Stephen Keim SC were initially unable to see the material that the Australian Federal Police relied upon in their application for an extension of the detention time.¹¹ They were subsequently given access to a limited amount of information.

International law requires that anyone who is arrested or detained must be informed immediately of the reasons why they are being deprived of their liberty.¹² Such information is essential to allow the person to challenge the lawfulness of their arrest and detention. If they are charged, it is required to start the preparation of the defence. The Human Rights Committee has stated that "it [is] not sufficient simply to inform [the detainee] that he [is] being arrested under the prompt security measures without any indication of the substance of the complaint against him".¹³

Amnesty International Australia is concerned that the denial of information to Dr Haneef limited his opportunity to challenge the legality and extension of his detention. The denial of the detainee's access to relevant information undermines the protection that the legislature endeavoured to provide by requiring a judicial officer to be satisfied that the person detained, or their legal representative, had been given the opportunity to make representations about the application before granting a period of time under s23CB.¹⁴

5. Conclusion

Amnesty International Australia believes that the legislative provisions under Australia's anti-terrorism legislation that can be used to prolong a person's arrest without charge and without information about the substantive grounds for their arrest, are not consistent with Australia's obligations under the International Covenant on Civil Rights, and are susceptible to abuse.

¹¹ Peter Russo, 'Haneef: Peter Russo's Story' (2007) 27(10) *Proctor* 22.

¹² Article 9(2) *ICCPR*.

¹³ *Drescher Caldas v Uruguay* (43/1979), 21 July 1983, 2 Sel. Dec. 80

¹⁴ *Crimes Act* s23CB(7)(e).