



# **SUBMISSION TO THE CLARKE INQUIRY**

**QUESTIONS RAISED BY THE HANDLING OF THE CASE OF DR MOHAMED HANEEF**

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# WHO WE ARE

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## Background

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The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

## Corporate Structure

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APLA Ltd, trading as the Australian Lawyers Alliance, is a company limited by guarantee with branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. This board is known as the National Council. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a president-elect, who serves a one-year term in that role and then becomes National President in the following year. The members in each branch elect their own state/territory committees annually. The elected office-bearers are supported by ten paid staff who are based in Sydney.

## Funding

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Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

## Programs

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We take an active role in contributing to the development of policy and legislation that will affect the rights of individuals, especially the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development, with some 25 conferences and seminars planned for 2008. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for education, exchange of information, development of materials, events and networking. They cover areas such as workers' compensation, public liability, motor vehicle accidents, professional negligence and women's justice. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine, *Precedent*, is essential reading for lawyers and other professionals keen to keep up to date with developments in personal injury, medical negligence, public interest and other, related areas of the law.

## Executive Summary

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The Australian Lawyers Alliance believes that the terms of the inquiry are sufficiently broad to ensure all aspects of the Haneef case are covered, with the exception of compensation and the current investigation still pending against Dr Haneef.

The Lawyers Alliance has concentrated its submission on part (a) of the terms of reference, looking at the arrest, detention, charging, prosecution, and release of Dr Haneef, the cancellation of his Australian visa and the issuing of a criminal justice stay certificate.

The main concerns of the membership of the Lawyers Alliance include;

- Excessive pressure on investigating authorities;
- The withholding of crucial evidence;
- The selective release of information and media intimidation;
- Political interference with judicial processes; and,
- The intimidation of legal representatives.

The Australian Lawyers Alliance believes that, had the Howard Government followed the recommendations made by the Parliamentary Joint Committee on Intelligence and Security in 2006 in its *Review of Security and Counter Terrorism Legislation*, the handling of the case of Dr Haneef and other cases, would not have resulted in the significant erosion of human rights.

## Introduction

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The Australian Lawyers Alliance wishes to congratulate the Attorney-General, Mr Robert McClelland, for the speed and importance placed on a wide-scale review of the handling of the case of Dr Mohamed Haneef.

The Australian Lawyers Alliance approaches this submission through its National Criminal Law Special Interest Group. This group has representatives in each state and territory in Australia and has an interest and expertise in terrorism legislation and criminal law generally. It comprises experienced criminal lawyers, and includes those who represent Dr Mohamed Haneef, Joseph Thomas, David Hicks, the supporters of the Tamil Separatists and the Barwon 13.

The Australian Lawyers Alliance wishes to address only the issues raised in part (a) of the inquiry's terms of reference, reflecting the knowledge and expertise of our membership.

The Australian Lawyers Alliance believes that the terms of the inquiry are sufficiently broad to ensure all aspects of the Haneef case are covered, with the exception of compensation and the current investigation still pending against Dr Haneef.

This submission does not intend to address the potential innocence or guilt of Dr Haneef, an issue that the Lawyers Alliance believes is irrelevant to this inquiry. Rather, the Lawyers Alliance intends to focus on how the application of terrorism legislation represents systemic problems that undermine fundamental legal principles, violate Australia's obligations under international law and deny those suspected of terrorism offences procedural fairness and natural justice. In this respect, the case of Dr Haneef is not an isolated one.

Dr Mohamed Haneef's case demonstrates a dark chapter in Australia's legal history, undermining Australia's commitment to the democratic process, its protection and promotion of fundamental human rights and respect for the rule of law.

Furthermore, the Australian Lawyers Alliance believes that the Howard Government's handling of Dr Mohamed Haneef's case raises serious doubts as to the efficacy of Australia's counter-terrorism laws. The Lawyers Alliance believes the conduct of the investigating

authorities, including the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police (AFP), demonstrates the failure of anti-terrorism measures to balance legitimate national security concerns with the level of transparency and accountability required to safeguard the rights of the individual and protect democratic probity.

## Counter terrorism measures in Australia

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Prior to 2002, offences relating to terrorism were dealt with under existing criminal offences. Following the 2001 attacks on the World Trade Centre in the United States, many countries hurriedly enacted laws specifically targeted at preventing and punishing acts associated with terrorism.

In response to this perceived threat, the Howard Government passed the *Security Legislation Amendment (Terrorism) Act 2002*, which made significant amendments to the Commonwealth Criminal Code in relation to terrorism offences.

Legislating criminal law has typically been the constitutional domain of the states. In April 2002 the federal government requested that state governments refer their constitutional powers to the federal government, to ensure that the Commonwealth had the constitutional powers required to legislate comprehensively on the issue. It should be noted that many states also passed additional laws relating to terrorism offences in relation to bail, police powers and freedom of information, to complement the Commonwealth laws.

More amendments were made to the terrorism laws following terrorist attacks in London in July 2005. On 8 September 2005, the Howard Government announced that additional amendments to terrorism legislation would be passed. The Bill was to be released on 31 October 2005, with a final report required in just over a week, by 8 November 2005. The Bill was tabled while key legislation relating to voluntary student unionism and workplace laws were being debated, and when it reached Parliament, only two hours of debate were allocated to its discussion.

The 2005 amendments significantly extended the powers of investigating authorities: to order preventative detention of terrorism suspects for up to 48 hours under Commonwealth

jurisdiction and 14 days under state and territory jurisdiction; to issue control orders; extend the length of ASIO search warrants; and extend crimes relating to sedition and the financing of terrorism.

The Lawyers Alliance submits that these measures were made with little public scrutiny and debate despite the wide scale impact on individual rights relating to privacy, freedom of speech and association and legal access. The Lawyers Alliance submits that the legislation is disproportionate to the threat of terrorism in Australia, at the expense of fundamental human rights.

## **Counter-terrorism laws and Australia's international obligations**

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The suite of anti-terrorism legislation has a serious impact on the rights of individuals, as recognised by international law to which Australia is a signatory, particularly the *International Covenant on Civil and Political Rights (ICCPR)*.

It can be argued that the anti-terror regime is in breach of the *ICCPR*<sup>1</sup>, particularly those rights relating to liberty and security of person, arbitrary arrest and detention, arbitrary interference with privacy, and rights relating to access to the judicial system.

Two provisions of the *ICCPR*, in the context of the case against Dr Haneef, appear to have been breached, particularly Article 9.

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<sup>1</sup> Potentially Articles 2, 9, 10, 12, 14, 15, 17, 18, 19 and 22.

**Article 9**

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Australia has certain obligations under international law to ensure that individuals' rights are not unjustifiably infringed or violated.

While the United Kingdom reported that they derogated from international obligations in enacting laws relating to control orders, Australia has not made such an admission, despite the requirement that the United Nations be notified in circumstances of public emergency where the suspension or restriction of individual rights are considered to be justified.

On 16 May 2008, the United Nations Committee Against Torture issued a summary of its observations from its 40<sup>th</sup> session. The Committee held:

Concerning issues related to the State party's anti-terrorism laws and practice, the Committee was concerned about the increased powers provided to the Australian Security Intelligence Organization, especially at the lack of judicial review and the character of secrecy surrounding imposition of preventative detention and control orders, introduced by *the Anti-Terrorism Act (N°2) 2005*, as well as reports concerning the harsh conditions of detention of

unconvicted remand prisoners charged with terrorism-related offences, also taking into account their status of accused (and not convicted) persons.<sup>2</sup>

## History of the case of Dr Mohamed Haneef

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From what is currently available on the public record, it is alleged that in July 2006 Dr Mohamed Haneef gave the SIM card of his mobile phone to his second cousin, Sabeel Ahmed, prior to leaving Britain for Australia, to enable his cousin to take advantage of his remaining phone credit.

On 30 June 2007, Sabeel's brother, Kafeel Ahmed, drove a jeep containing explosive material into Glasgow International Airport in an attempt to cause a serious explosion. Sabeel was arrested shortly afterwards on the basis that he failed to provide authorities with an email sent by his brother outlining his intention to blow up the airport. It was subsequently revealed that Sabeel only opened the email containing this information 90 minutes after the attack.

Dr Haneef was arrested at Brisbane airport on the evening of 2 July 2007 as he was preparing to fly home to India. He was taken to the AFP's headquarters in Brisbane and was questioned for 12 hours without a lawyer. He was held for 12 days before being charged with recklessly assisting a terrorist organisation<sup>3</sup>, by giving his cousin his mobile SIM card. The nature of the charge provides that a party does not have to be aware that they are supporting a terrorist or terrorist organisation, but merely has to be 'reckless' to that fact. On 16 July, Dr Haneef was granted nominal bail of \$10,000 by magistrate Jacquie Payne, who said:

The Crown does not allege that the defendant has any direct association with any terrorist organisation and further the provision of the resource, the SIM card, the defendant ...was reckless as to whether the organisation was a terrorist organisation. There is no evidence or

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<sup>2</sup> This information can be found at [http://www.unog.ch/unog/website/news\\_media.nsf/\(httpNewsByYear\\_en\)/7F803F7A7E92FA52C125744A0054BCDE?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/7F803F7A7E92FA52C125744A0054BCDE?OpenDocument)

<sup>3</sup> Pursuant to s102.7(2) of the *Criminal Code Act 1995* (Cth) carrying a maximum penalty of 15 years.

submission that the SIM card was used or associated with any terrorist attack or activity other than being in a vehicle that was used in a terrorist attack.<sup>4</sup>

However, before bail could be posted, Immigration Minister, Kevin Andrews, withdrew Dr Haneef's Australian work visa on the basis that he failed the 'character test' under s501 of the *Migration Act 1958* (Cth). Mr Andrews provided the basis of the revocation as being association with persons 'reasonably suspected' to be involved in criminal activity. As this cancellation was done 'in the national interest' under s501(3)(d) of the *Migration Act 1958* (Cth), s501(5) provided that the decision was not subject to the rules of natural justice. The revocation essentially meant that if Dr Haneef posted bail, he would become subject to immigration detention. He opted to remain in prison.

On 29 July, almost a month after Dr Haneef was taken into detention, the Commonwealth Director of Prosecutions, Mr Damian Bugg, announced that the charges would not be continued, as they could not be established beyond reasonable doubt.

On 21 August, Justice Jeffrey Spender of the Federal Court set aside the cancellation of Dr Haneef's visa. However, Immigration Minister, Kevin Andrews, appealed the decision. On 21 December, the Full Court of the Federal Court upheld Justice Spender's ruling, and the recently appointed Immigration Minister, Chris Evans, indicated that the Commonwealth would accept the ruling.

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<sup>4</sup> Stephen Keim SC, 'The Rule of Law Questions Raised by the Case of Dr. Haneef.' A paper delivered to a seminar of the Queensland chapter of the International Commission of Jurists at the Bar Common Room, Brisbane on 16 April 2008.

## Response to part (a) of the terms of reference

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### ***The arrest, detention, charging, prosecution, and release of Dr Haneef, the cancellation of his Australian visa and the issuing of a criminal justice stay certificate***

The Australian Lawyers Alliance has several concerns regarding the arrest, detention, charging, prosecution and the cancellation of Dr Haneef's Australian visa.

#### ***Pressure on investigating authorities***

One of the major arguments justifying the implementation of the anti-terrorism regime was that these extreme powers, which severely curtail fundamental rights, would be invoked only in exceptional circumstances, to protect national security.

This notion has been contradicted by a senior counter-terrorism officer with the AFP, who said that police were under significant pressure to make arrests in order to test new counter-terrorism laws.

Senior AFP agent, Kemuel Lam Paktsun, told Izhar Ul-Haque's trial<sup>5</sup> that:

At the time, we were directed, we were informed, to lay as many charges under the new terrorist legislation against as many suspects as possible because we wanted to use the new legislation. So regardless of the assistance that Mr Ul-Haque could give, he was going to be prosecuted, charged, because we wanted to test the legislation and lay new charges, in our eagerness to use the legislation.<sup>6</sup>

There is little doubt that, after holding Dr Haneef for 12 days, amid intense public and political scrutiny, the AFP would have been under enormous pressure to lay a charge. The scope of the current anti-terror regime makes this possible – the laws are still relatively untested and the wording of the legislation leaves much to interpretation. Individuals do not

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<sup>5</sup> Izhar Ul-Haque was a university student who was charged with training with a terrorist organization (Lashkar-e-Toiba) in Pakistan. The organization was not considered a terrorist organization at the time that Ul-Haque allegedly undertook the training. The case was dismissed after significant evidence was ruled inadmissible.

<sup>6</sup> Sally Neighbour 'Charge suspects to test terror laws', *The Australian* (13 November, 2007).

necessarily need to be actively aware of their association with a terrorist organisation, but can be 'reckless' to it.

Any form of pressure to secure convictions runs the risk of encouraging unnecessarily broad interpretation of laws designed for limited circumstances, abuse of process and 'tunnel vision' of investigating authorities.

### ***Withholding of crucial evidence***

A significant piece of evidence integral to the prosecuting bodies' case against Dr Haneef was that the SIM card that Haneef had given to his cousin was found in the car at Glasgow Airport. This provided a physical and temporal connection between Dr Haneef and the terrorist act.

This was later proven to be false, as the SIM card was in fact several hundred miles away. However, this fact was never corrected on the record by the AFP or the Commonwealth DPP, but rather was information released by ABC radio. There has never been any explanation or justification as to why this misleading and incriminating information remained uncorrected.

Similarly, evidence that Sabeel was not involved in any way with the attack by his brother Kafeel, that is, the revelation that he had no knowledge of the 'confession email' prior to the attack, was in the hands of investigating authorities within 72 hours of the failed attack, the third day of Dr Haneef's detention. This evidence emerged publicly during the UK trial relating to Sabeel Ahmed. The fact that Sabeel opened the email in which Kafeel asks for forgiveness only after the attack, essentially destroyed the case that Sabeel was involved and, in turn, the suspicion that Dr Haneef was also involved. Dr Haneef's lawyer, Peter Russo, said: "We weren't shown any documents from the UK in any of the material we saw."<sup>7</sup>

Such a crucial omission is not unique in Australia's recent legal history. In the case against Joseph 'Jihad Jack' Thomas, the AFP withheld a transcript of an interview with the convicted American terrorist, John Walker Lindh. In his statement, which was not handed to Thomas' defence lawyers for almost a year after the first trial, Lindh said that the Al-Farouq training camp that Thomas visited in Afghanistan was in fact run by the Taliban, and not al-Qaeda, as

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<sup>7</sup> David Marr 'Police ignored strong evidence showing Haneef's innocence', *The Sydney Morning Herald* (14 April 2008).

had been the critical accusation. Thomas' solicitor, Rob Stary, told ABC radio's 'The World Today' program:

It exonerated Thomas insofar as any association with al-Qaeda was concerned...Now they didn't reveal that statement to us until after the jury verdict. Now ...it's the Federal Police who are responsible for furnishing this information to the Commonwealth's DPP. If they have done that it's reprehensible and someone ought to be brought to account for just, for failing to disclose relevant information to us and relevant witnesses to us.<sup>8</sup>

These examples demonstrate the way in which authorities have withheld key pieces of evidence that can serve to exonerate an individual facing serious criminal charges. With lawyers unaware of this material, they are unable to fully advocate on behalf of a client.

### ***Selective release of information and media intimidation***

The selective leaking of information was also a strategy clearly put to use by the AFP and the federal government in relation to the Haneef matter. The federal Attorney-General, Philip Ruddock, offered media comment on issues surrounding Dr Haneef, deftly creating the image of Dr Haneef as a sinister character with dubious connections.

On 8 July 2007, Mr Ruddock said, "The distinguishing factor in relation to Dr Haneef from [other doctors questioned] was that he was intent on leaving Australia ... he had a one-way ticket."<sup>9</sup> He also said:

The appearance as I am told was that he had left rather hurriedly ... His wife says it's because she gave birth to a child two weeks ago. That may be well the reason but certainly the appearance was that his intention (was) to leave with speed ... The further explanations that have been offered may be reasonable but they may also be a cover for something else.<sup>10</sup>

Such comments had the effect of contaminating the public view of a case and undermines the fundamental legal principle of innocence until proven guilty.

Mr Andrews also utilised this technique when he cancelled Dr Haneef's visa, by releasing snippets of police interviews and other evidence out of context, but at the same time

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<sup>8</sup> ABC Radio, 'The World Today' (22 August 2006), with reporter Alison Caldwell.

<sup>9</sup> News.com.au 'Haneef's smashing time in Harbour City' (9 July 2008),

<sup>10</sup> 'Haneef in a hurry to leave: Ruddock', *The Australian* (9 July 2008),

withholding the documents from examination on the basis of 'national security'. This tactic led to Stephen Keim SC, Dr Haneef's barrister, releasing an AFP transcript which exposed the level of media manipulation by the government. The releasing of the transcript was deplored by both the government and the AFP.

Justice Spender commented on the issue of selective leaking:

The Minister [Kevin Andrews] has chosen to give a selected part of what is said to be protected information to the public by way of press release, but has not sought to divulge to the Court any part of the protected information under s503A(3) of the Act. The Minister is, in a sense, presenting one case in the public arena, a case the accuracy of which cannot be challenged in any meaningful way, and a smaller and not the same case in the Court, in a way which does not permit explanation or challenge by way of cross-examination.<sup>11</sup>

This is not an isolated example. When lawyers in other cases have sought to correct information relating to their clients on the public record, they have been accused of compromising national security, undermining the judicial process and acting in contempt of proceedings.

Aruran Vinayagamoorthy and Sivarajah Yathavan were each charged with being a member of a terrorist organisation (Tamil Tigers), providing support or resources to a terrorist organisation and making funds available to a terrorist organisation. Prior to facing court, police held a press conference outlining information about the arrests.<sup>12</sup> At the time, one of the suspects had not even been charged. These actions had the effect of undermining the presumption of innocence of the accused.

The legal system in Australia has been sliding towards secret hearings in recent years, and there are about 1,000 suppression or pseudonym orders in force across Australia at any one time.<sup>13</sup> On top of this, the AFP has gone to extraordinary lengths to intimidate the media, in both the case of Dr Haneef, and others, in an attempt to prevent any version of events other than its own from being aired in the public domain.

In the case of Dr Mohamed Haneef, *The Australian* newspaper published a leaked AFP interview with Dr Haneef. At the time, AFP Commissioner, Mick Keelty, said the

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<sup>11</sup> *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273 at 311.

<sup>12</sup> 'Vic men charged for funding Tamil Tigers', *The Age* (1 May 2007).

<sup>13</sup> I Moss *et al*, *Report of the Independent Audit into the State of Free Speech in Australia*, p195.

prosecution's case against Dr Haneef has been jeopardised by the leak, which he suggested may be in contempt of court.<sup>14</sup>

In another example of media intimidation, Melbourne radio station 3CR was raided by the AFP on 22 March 2005 armed with a warrant to seize an interview, previously recorded with Rob Stary, Jack Thomas' lawyer. The warrant was issued because Stary, during the interview, had apparently contradicted statements he had made in court. The Media, Entertainment and Arts Alliance deemed this action as a 'blatant attempt at media intimidation'.<sup>15</sup>

### ***Interference with judicial processes***

The case of Dr Haneef demonstrates a clear violation of the separation of powers doctrine that is supposed to govern Australia's civic and judicial functions.

The cancellation of Dr Haneef's visa occurred immediately after he successfully obtained bail. This timing can hardly be deemed a coincidence, and demonstrates how the executive will rely on discretionary powers, however tenuous, to usurp judicial power where it does not accord with the government's agenda. Emails between senior AFP officials and senior public servants reveal that the cancellation of Dr Haneef's visa was a 'contingency plan' designed to usurp judicial power.<sup>16</sup>

This, again, is nothing new in Australia. In 2005, just days after then Prime Minister, John Howard, rushed through amendments to anti-terrorism laws, 12 men in Victoria and nine in Sydney were arrested. Steve Bracks, the premier of Victoria, said the raids had 'probably disrupted the most serious preparation for a terrorist attack that we have seen in Australia.' A lawyer for the accused was forced to point out that 'his clients had not been charged with planning a terrorist attack, but only with membership of a terrorist organisation'.<sup>17</sup>

As Rob Stary told the *7.30 Report* at the time:

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<sup>14</sup> ABC Radio 'Haneef leak may be contempt of court' *The World Today* (18 July 2007) with reporter David Mark

<sup>15</sup> 'Turning up the heat: The decline of press freedom in Australia 2001-2005', Media, Entertainment and Arts Alliance report into state of press freedom from September 2001-2005.

<sup>16</sup> Hedley Thomas, 'Secret Haneef plan exposed', *The Australian* (2 November 2007).

<sup>17</sup> Raymond Bonner, 'Australia arrests 16 in terror sweep' *International Herald Tribune*, (9 November 2005).

There's been a contamination process clearly that's taken place. It's not appropriate when one looks at the notion of the separation of powers or those principles and the role of the executive. It's simply not appropriate for state premiers or the Prime Minister or any other politician to opportunistically talk about the thwarting of a catastrophic terrorist attack. That was not borne out firstly in the nature of the charges that my clients faced in Melbourne.<sup>18</sup>

Many provisions of the legislation seek to exclude the supervisory role of the courts and undermine judicial independence. For example, s105.18 of the *Criminal Code* requires judicial officers to determine orders relating to preventative detention in their personal capacities, rather than as an officer to a court of tribunal. Requesting a review of preventative detention under the *Administrative Decisions (Judicial Review) Act 1977* is not permitted until after detention is completed.<sup>19</sup> Removing the courts from the process of administering laws that potentially have grave consequences for individual rights risks a shift to centralisation of executive power at the expense of the judicial checks and balances designed to protect the individual.

### ***Intimidation of legal representatives***

The case of Dr Haneef is also a striking example of how legal counsel can be intimidated and attacked by government and investigating authorities, diverting them from the task of assisting and advocating for their client, by having to defend themselves.

On 18 July 2007, Queensland barrister, Stephen Keim SC, leaked a transcript to the media of a record of interview by the AFP with his client, Dr Mohamed Haneef. The transcript of the interview was also displayed on *The Australian's* website, but was removed only hours after being uploaded, with an editor telling the *New York Times* that there had been 'tremendous pressure' from the government.<sup>20</sup> The transcript revealed three crucial false statements in the subsequent court affidavit drawn up by the police.

Mr Keim was threatened with formal investigation and a complaint was lodged with the Legal Services Commissioner in Queensland. The complaints were made by AFP commissioner, Mick Keelty, as well as Brisbane solicitor, Russell Biddle. Former Attorney-

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<sup>18</sup> ABC Television, *7.30 Report* (9 November 2005), transcript available at <http://www.abc.net.au/7.30/content/2005/s1501567.htm>.

<sup>19</sup> S105.51(4) of the *Criminal Code*.

<sup>20</sup> Raymond Bonner, 'Transcript Shows Doctor Cooperated With Australian Investigators', 19 July, 2007, <http://www.nytimes.com/2007/07/19/world/asia/19australia.html>.

General, Philip Ruddock, accused Mr Keim of jeopardising his client's access to a fair trial, saying:

Leaking of material and allegations that there has been other material in the public arena, heightens my concern about the way in which these issues have been addressed....You won't get a fair trial for any individual if you have leaking of material.<sup>21</sup>

Mr Keim's decision to leak the transcript was based on his frustration at the selective leaking of information by government bodies seeking to demonise his client, which failed to provide an accurate picture of the events surrounding his alleged involvement.

At the time, the Australian Lawyers Alliance said:

The government was able to speak on Dr Haneef's matter after he had been granted bail and released allegations that had not been presented in court. If the Attorney-General is genuinely interested in stopping leaks to the media, he should be investigating what appears to be a leak from the Australian Federal Police to the press earlier this week.<sup>22</sup>

Kevin Andrews, Philip Ruddock and Mick Keelty also attacked Peter Russo, Dr Haneef's solicitor, for releasing the second interview, labelling his actions as 'unprofessional and inappropriate' conduct.<sup>23</sup>

The *National Security Information (Criminal and Civil Proceedings) Act 2004*, s39, provides that where the Attorney-General gives notice that issues are likely to arise in proceedings that may prejudice national security, defence lawyers can be required to seek a National Security Clearance, or risk being taken off a case.<sup>24</sup> Requiring such security clearance also has a discriminatory effect on those who cannot afford legal representation, as while private clients can afford to pay for a barrister who does not wish to be security cleared, those under Legal Aid cannot be represented unless the barrister submits to the clearance where required.

In June 2006, Victorian Legal Aid instructed the court for the Barwon 13 it was unable to fund the barristers appearing for the defendants, as the barristers did not wish to submit to the federal government's National Security Clearance, in accordance with instructions from

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<sup>21</sup> ABC News, 'Haneef transcript's release 'lawful', (19 July 2007).

<sup>22</sup> Australian Lawyers Alliance press release (19 July 2007) accessible at [http://www.lawyersalliance.com.au/documents/independence\\_of\\_judiciary\\_at\\_risk\\_2\\_.pdf](http://www.lawyersalliance.com.au/documents/independence_of_judiciary_at_risk_2_.pdf).

<sup>23</sup> ABC News, 'Russo defends release of Haneef interview transcript', (23 August 2008).

<sup>24</sup> *National Security Information (Criminal and Civil Proceedings) Act 2004*, s39(5).

their clients, and due to concerns that their personal information would be misused. The Managing Director at Victorian Legal Aid, Tony Parsons, at the time said:

I mean, in a sense the government has put these people in jail, and now the Commonwealth is saying you can have a lawyer but you can only have one that has the Government's seal of approval. And that's the kind of stuff that, you know, one might be familiar with in banana republics but not in our robust democracy.<sup>25</sup>

Then Attorney-General, Philip Ruddock, said that barristers are not necessarily trustworthy - making references to tax avoidance - before accusing the relevant barristers of undermining their clients' right to a fair trial.

Mr Ruddock said:

If people are going to be put on their trial, surely they want to be represented by somebody who can be entrusted with all the information... I think the legal counsel who are arguing they should not have to comply with the law are doing their clients a disservice.<sup>26</sup>

These actions, aside from being hypocritical, severely inhibit a practitioner's ability to focus on representing their client. It personalises the practitioner, making them subject to media scrutiny, smears and slurs, and puts them in a position where they have to defend their professionalism, ethics and skill rather than concentrating on representing their clients.

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<sup>25</sup> Josie Taylor, 'Security check holds up terrorism trial lawyers', ABC Radio (14 June 2006).

<sup>26</sup> News.com.au, 'Tax a reason to check lawyers', (7 June 2006).

## General comments

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The handling of the case of Dr Haneef raises serious questions as to the efficacy of Australia's national security regime. The fundamental concern of the Lawyers Alliance is to ensure that laws relating to national security remain fair and free of political interference.

A combination of factors led to a significant erosion to longstanding legal procedure and principles in the case of Dr Haneef. In a climate of fear, the government sought to justify the enactment of the terrorism laws and demonstrate their effectiveness. The combined effect of intense political pressure to secure successful convictions, heightened paranoia, selective leaking to the media and a general lack of due process and accountability led to a situation where individual rights and democratic processes were unjustifiably undermined.

The Australian Lawyers Alliance believes that the counter-terrorism laws lack considered analysis and public discussion, as they were all hurriedly passed through parliament in a culture of fear and perceived 'threats' to national security. This prevented flaws and weaknesses in the legislation from being exposed and debated, and allowed the government to severely curtail individual rights and freedoms with limited justification and public scrutiny.

The fact that a government breaches human rights in its own domestic laws does not justify those actions or make them acceptable. Unlike the United Kingdom, Australia lacks any formal and comprehensive recognition of human rights. Therefore, there is no comparative tool available to highlight gross human rights abuses or yardstick with which to measure the proportionality of any infringements.

While most members of the public cannot imagine finding themselves in Dr Haneef's predicament, they should nonetheless remain vigilant to any restriction of their rights. Many terrorism laws have been drafted with broad terminology, to allow the potential net of persons who can be affected to be cast wider and wider. Recent cases within the United Kingdom also demonstrate the ways in which the reach of such laws can be extended. Poole Borough Council has recently revealed (under freedom of information laws) that it used the *Regulation of Investigation Powers Act* - legislation designed to eliminate terrorism - to spy

on a family to determine if they were in the correct catchment area to enrol in a local school, and also to monitor people gathering shellfish.<sup>27</sup>

The Australian Lawyers Alliance believes that the anti-terror laws have not yet proven either their effectiveness or necessity. There have been few successful convictions of terrorism offences, with evidence often deemed inadmissible or unreliable hearsay, such as in the cases against Izhar Ul-Haque<sup>28</sup> and Zaky Mallah.<sup>29</sup> Dr Haneef is yet another example of how these laws can be abused and manipulated to compromise due process, without offering greater protection to Australian citizens.

The Australian Lawyers Alliance recognises the need to protect and maintain Australia's national security. However, this should not be at the expense of the dramatic curtailment of the individuals' fundamental rights and freedoms or of appropriate democratic process and scrutiny.

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<sup>27</sup>Steve Morris, 'Council used terror laws to spy on fisherman', *The Guardian* (14 May 2008).

<sup>28</sup>*R v Ul-Haque* [2007] NSWSC 1251

<sup>29</sup>*R v Mallah* [2005] NSWSC 317

## Recommendations

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The Australian Lawyers Alliance believes that, had the Howard Government followed the recommendations made by the Parliamentary Joint Committee on Intelligence and Security in 2006 in its *Review of Security and Counter Terrorism Legislation*, the handling of the case of Dr Haneef and other cases, would not have resulted in the significant erosion of human rights. As such, the Lawyers Alliance supports these comprehensive recommendations.

These recommendations are extracted below.

### Rationale and Accountability

#### Recommendation 1

The Committee recommends that the Government support/sponsor a study into the causes of violent radicalisation in Australia to inform Australia's counter-terrorism strategy.

#### Recommendation 2

The Committee recommends that:

- the Government appoint an independent person of high standing as an Independent Reviewer of terrorism law in Australia;
- the Independent Reviewer be free to set his or her own priorities and have access to all necessary information;
- the Independent Review report annually to the Parliament;
- the *Intelligence Services Act* 2001 be amended to require the Parliamentary Joint Committee on Intelligence and Security (PJCIS) to examine the reports of the Independent Review tabled in the Parliament.

### Effectiveness and Implications: Impact on Arab and Muslim Australians

#### Recommendation 3

The Committee recommends that Australian police forces review their media policies to ensure that official statements do not prejudice the right to fair trial and are sensitive to the wider implications for the community.

#### **Recommendation 4**

The Committee recommends that Attorney-General's Department increase its effort to ensure that comprehensive information about the terrorism law regime is available to the public in appropriate community languages.

#### **Recommendation 5**

The Committee recommends that Australia's counter-terrorism strategy encompass:

- a commitment to the rights of Muslims to live free from harassment and enjoy the same rights extended to all religious groups in Australia;
- wide dissemination of information about mechanisms for complaint or redress in relation to law enforcement, intelligence agencies and the media; and
- a statement on the importance of informed and balanced reporting to promote social cohesion.

## **Treason**

#### **Recommendation 6**

The Committee recommends that:

- the offence of treason be restructured so that conduct constituting treason apply only to persons who owe allegiance to Australia or who have voluntarily placed themselves under Australian's protection;
- the conduct of others, which falls within the scope of paragraphs 80.1(1) (a)(b)(c), should be dealt with separately;
- the offence of assisting the enemy under paragraph 80.1 (e) and (f) be clarified to cover 'material assistance';
- paragraph 80.1 (f) be amended to require knowledge of the existence of armed hostilities.

## **International Terrorism**

### **Recommendation 7**

The Committee recommends that the requirement that the person intends to advance a political, religious or ideological cause be retained as part of the definition of terrorism.

### **Recommendation 8**

The Committee recommends that the current exemption for advocacy, protest, dissent and industrial action be retained as part of the definition of terrorism.

### **Recommendation 9**

The Committee recommends that psychological harm not be included in the definition of a terrorist act. Alternatively, that the Government consult with the States and Territories on this issue and give consideration to the question in light of other amendments to the definition.

### **Recommendation 10**

The Committee recommends that 'threat' of terrorist acts be removed from the definition of terrorism and be dealt with as a separate offence.

### **Recommendation 11**

The Committee recommends that the definition of terrorism recognise that international organisations may be the target of terrorist violence.

### **Recommendation 12**

The Committee recommends that to remove doubt the definition of terrorism be amended to include a provision or a note that expressly excludes conduct regulated by the law of armed conflict.

### **Recommendation 13**

The Committee recommends that a separate hoax offence be adopted but that penalties reflect the less serious nature of a hoax as compared to a threat of terrorism.

### **Recommendation 14**

The Committee does not recommend the repeal of 'advocacy' as a basis for listing an organisation as a terrorist organisation but recommends that this issue be subject to further review.

The Committee recommends that 'risk' be amended to 'substantial risk'.

#### **Recommendation 15**

The Committee recommends that the Government consider:

- replacing the membership offence with an offence of participation in a terrorist organisation; and
- whether 'participation' should be expressly linked to the purpose of furthering the terrorist aims of the organisation.

#### **Recommendation 16**

The Committee recommends that the training offence be redrafted to define more carefully the type of training targeted by the offence. Alternatively, that the offence be amended to require that the training could reasonably prepare the individual or the organisation to engage in, or assist with, a terrorist act.

#### **Recommendation 17**

The Committee recommends that:

- it be a defence to the offence of receiving funds from a terrorist organisation that those funds were received solely for the purpose of the provision of representation in legal proceedings; and
- that the legal burden be reduced to an evidential burden.

#### **Recommendation 18**

The Committee recommends that the offence of providing support to a terrorist organisation be amended to 'material support' to remove ambiguity.

#### **Recommendation 19**

The Committee recommends that the offence of 'associating with a terrorist organisation' be re-examined taking into account the recommendations of the Sheller Committee.

#### **Recommendation 20**

The Committee recommends that strict liability provisions applied to serious criminal offences that attract the penalty of imprisonment be reduced to an evidential burden.

## **Suppression of the Financing of Terrorism**

### **Recommendation 21**

The Committee recommends that:

- section 103.1 be amended by inserting 'intentionally' after 'the person' in paragraph (a) and removing the note;
- that recklessness be replaced with knowledge in paragraph (b).

The Committee recommends that paragraph 103.2(1)(b) be redrafted to make clear that the intended recipient of the funds be a terrorist.

### **Recommendation 22**

The Committee recommends that:

- external merit review of a decision to list a person, entity or asset under section 15 of the Charter of the United Nations Act (COUNA) should be made available in the Administrative Appeal Tribunal;
- section 15 and regulation 6 be amended so that the Minister must be satisfied on reasonable grounds that the person, entity, asset or class of assets falls within the scope of United Nations Security Council Resolution (UNSCR) 1373;
- COUNA should be amended to provide that a person or entity listed by regulation is entitled to seek review as a step in the process of review by the Sanctions Committee.

## **Border Security**

### **Recommendation 23**

That the *Customs Act* be amended to specify that access to passenger information for the purpose of another law of the Commonwealth is limited to the investigation of serious crimes prescribed by regulation.

**Recommendation 24**

The Committee recommends that:

- the *Customs Act* be amended to specify that retention of passenger information be permitted for a limited time in order to conduct analysis;
- that the Minister for Customs report to the Parliament on the status of negotiations with European States in relation to passenger information.

**Recommendation 25**

The Committee recommends that the Privacy Commissioner retain an ongoing oversight role in relation to passenger name records, which includes biannual monitoring of the Passenger Analysis Unit.

**Recommendation 26**

The Committee recommends that:

- the subject of a seizure warrant involving entry to premises should be provided with a statement of rights and obligations;
- that Customs bear the onus of proving the basis of the seizure.