

The Secretary
Clarke Inquiry
PO Box 5365
Kingston ACT 2604

By email: clarkeinquiry@ag.gov.au

Dear Sir/Madam,

Re: Submission to Clarke Inquiry into the case of Dr Mohamed Haneef

We thank the Hon John Clarke QC for accepting our submission. We welcome this Inquiry, and also encourage the spirit with which it was established —that is, in the words of Attorney General Robert McLelland, to ensure that Australia’s national security agencies are functioning as effectively as they can be, and that our counter-terrorism laws are being appropriately enforced.¹

Since its inception, the Australian Muslim Civil Rights Advocacy Network (AMCRAN) has been concerned with the practical operation of anti-terror laws and the ways in which these laws operate to target particular segments of the Australian community. AMCRAN draws on the rich civil rights heritage of the Islamic faith to introduce a Muslim perspective on civil rights issues. It does this through active engagement with the Muslim and broader community, with the media, and through political lobbying and submissions such as this.

We note that the terms of reference of this present Inquiry are heavily circumscribed – the Inquiry is temporally limited to the period from the arrest of Dr Haneef on 2 July 2007 to the date of his release 27 days later. While we will confine our comments to the terms of reference, we also use the opportunity of this submission to raise broader concerns that have arisen from the circumstances of this case.

1. 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

AMCRAN is of the view that it is extremely important to address the issue of community sentiment because it is important for all members of the community to feel safe and secure in this country, and not become unjustified targets of the law and authorities. The Muslim community has long felt targeted by the application of the anti-terrorism laws, and there has been intense fear within the community. The case of Dr Haneef has only served to heighten this fear and insecurity.

Anxieties increased as the events unfolded, as confusion grew surrounding the sequences of events and the legality of the actions of the Department of Immigration and Citizenship, the various state and federal police departments, and ASIO. Common thoughts and feelings included, ‘Is the Police

¹ Robert McLelland, media interview, 13 March 2008. Transcript available:
http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Transcripts_2008_13March2008-ClarkeInquiryintotheHaneefCase

really allowed to detain someone for so long with no charge?'; 'Is a SIM card enough to have me arrested under the laws?'; and 'Is the character test so broad that being related to someone can be an offence?' The speed with which all these events unfolded also caused anxiety within the Muslim community.

The actual questioning practice of the police when interviewing Dr Haneef has also raised concerns. While we respect any reasonable investigative methods undertaken by the police, we feel that some of the questions that the police asked Dr Haneef were completely irrelevant. For example, Dr Haneef was asked about his opinion on the situation in Iraq and Afghanistan, which mosque he attended in the UK, where the mosque was, how big it was and which year he went there.²

This line of questioning suggests some automatic or natural link between the devout practice of a Muslim and that person's propensity towards violence or violent activity. It also supports the fear that Islam itself is under interrogation in the questioning. In our survey that AMCRAN conducted in 2006, many respondents also noted that they were questioned about where and how often they prayed and whether or not they considered themselves a 'devout Muslim'.³

The cancellation of the visa immediately after Magistrate Jacqui Payne granted bail to Dr Haneef has served to exacerbate feelings of distrust towards the Government. Federal Court Justice Spender also described this occurrence as 'curious', stating that, 'there is room for the view that this was an act of circumventing the inconvenience of having him on bail'.⁴ Justice Spender has also commented on the incredibly vague and uncertain interpretation of the character test carried out by the then Immigration Minister, stating that even he would fail the character test.

The cancellation of Dr Haneef's visa, despite the failure of the prosecution case against him, increased the feelings of fear in the Muslim community, particularly because of the apparent arbitrariness of the decision, and the use of immigration law as a tool in an apparently weak criminal investigation.

Anecdotally and from our experience with working members of the Muslim community, we note that the pernicious threat of visa cancellation on flimsy grounds is likely to further discourage the community's social and political participation.

2. The administrative and operational procedures and arrangements of the Commonwealth and its agencies relevant to these matters

AMCRAN is concerned with the way that 'dead time' was used to unreasonably extend Dr Haneef's detention. After holding Dr Haneef in detention for five days, a Brisbane Magistrate granted police an extra 48 hours to 'consider the evidence already gathered'. This was after 12

² Interview between Detective Sergeant Adam Simms and Dr Haneef conducted on the 3 July 2007, pages 40 – 41.

Transcript available online: http://www.abc.net.au/4corners/content/2007/20071001_haneef/AFP_interview1.pdf

³ *Survey of Muslim community on their experience with, and perception of ASIO, the Police and counter-terrorism laws*, conducted November – December 2005, AMCRAN.

⁴ The West Australian, *I would fail character test: Haneef judge*, 18 July 2007. Available online: www.thewest.com.au/default.aspx?MenuID=145&ContentID=34797.

hours of questioning and five days of detention⁵. It is curious as to why the police did not have sufficient time to 'consider evidence' during this period, and there has not been sufficient explanation as to why another 48 hours were required, on top of the time Dr Haneef had already spent in detention.

President of the Law Council of Australia Tim Bugg has also criticised the practice of dead time, and suggests that a cap should be introduced to avoid situations such as where Dr Haneef was detained for 12 days before being charged.⁶ AMCRAN supports this proposition, as it would ensure that dead time is kept to a reasonable limit, and this would help to alleviate some of the fears within the Muslim community about the unfair operation of dead time.

AMCRAN is also concerned about the secrecy and lack of publicly available details relating to Dr Haneef's detention and interrogation. The facts of the Dr Haneef case, however limited, have been made known through the heavy media exposure and engagement that took place around the investigation. However, we cannot depend on every anti-terror investigation being attended by the same level of media scrutiny.

3. The effectiveness of cooperation, coordination and interoperability between Commonwealth agencies and with state law enforcement agencies relating to these matters

With the simultaneous deployment of multiple authorities, it was unclear at the time of the investigation precisely which powers Dr Haneef was detained under, and which authorities were responsible for his questioning. Initially, it appeared that Dr Haneef was being preventatively detained in anticipation of developments overseas - however, did this preventative detention take place under State or Federal provisions? What was the involvement of the Australian Security Intelligence Organisation in the questioning process?

We note that the operational activities of certain agencies are covered by strict secrecy offences. An individual will be liable for up to five years imprisonment, for example, if they discuss 'operational information' relating to the conduct of ASIO officials when questioning people under an ASIO Act warrant. Nowhere is the concept of 'operational information' delimited in the legislation or any public document.

Through the routine application of the laws and non-disclosure provisions, individuals will likely be stifled and prevented from seeking review or even discussing the operational procedures of agencies. The heavy penalty for 5 years imprisonment for disclosure is also likely to weigh heavily on the minds of the individuals and therefore encourage them to err on the side of caution'.⁷ Non-disclosure and secrecy offences are an anathema to transparent policing and accountability, and work to cloak the operation of security and intelligence agencies.

⁵ BBC news, *Australia extends Haneef Inquiry*, 9 July 2007. Available online: <http://news.bbc.co.uk/2/hi/asia-pacific/6283058.stm>

⁶ Tim Bugg, interview on Meet the Press, 22 July 2007.

⁷ Amnesty International (2003) 'Concerns Regarding the *ASIO Legislation Amendment Bill 2003*' at <http://www.amnesty.org.au/airesources/report-03-12-03.html>.

This conclusion is supported by our own research. In a 2006 AMCRAN survey of the Sydney Muslim community's interactions with counter-terrorism authorities,⁸ a high proportion of those who had had contact with law enforcement authorities had difficulty specifying exactly which authority they had been in contact with.

This confusing overlay of authorities is a significant problem from an accountability perspective. Firstly, the difficulty in identifying precisely which authority was involved in questioning will make it difficult for individuals to approach the appropriate agencies to raise their concerns if there was any inappropriate use of powers. Also, different levels of secrecy and non-disclosure apply to interactions between different authorities. The difficulty in identifying authorities makes it likely that secrecy offences applicable only to certain agencies will be misunderstood by detainees, and attributed to interactions with all authorities.

4. Having regard to (a), (b) and (c), any deficiencies in the relevant laws or administrative and operational procedures and arrangements of the Commonwealth and its agencies, including agency and interagency communication protocols and guidelines.

Dr Haneef's case illustrates some of the serious problems with the application of the anti-terrorism laws. In particular, it illustrates: application of extended detention to apparently innocuous activity (such as leaving a SIM card behind), a lack of transparency and accountability in the process, and the confusing interplay of state police, federal police and intelligence organisations' powers.

Dr Haneef's case is certainly not an isolated example of the questionable application of anti-terrorism laws by authorities. In the recent case of *R v Ul Haque*, New South Wales Supreme Court Justice Adams found that AFP officers involved in the investigation had committed the common law wrongs of kidnapping and wrongful detention in relation to their questioning of Izhar Ul Haque. In the pre-trial comments of the Ul Haque case, AFP officer Kemuel Lam Pakstun indicated that the AFP, around the time of the Haneef case, had been issued a memorandum to charge 'as many people as possible' to test the breadth of their powers under anti-terror provisions.⁹ The effect of this is to heighten the concerns of the Muslim community over the application of the laws.

We note that the powers of the AFP have not been substantially changed or limited since the date that these comments were made, and so the potential for their discretionary application remains.

Conclusion

The issues we have raised are pertinent issues for the Muslim community, especially given their concerns over the application of the laws. The Muslim community has long felt targeted by the laws, and the unfortunate circumstances of Dr Haneef's case have only served to increase and realise the fear and confusion within the Muslim community. This is not only a question of rights and law, but a very important practical consideration in developing an environment of trust for efforts to prevent the scourge of terrorism.

⁸ See footnote 3.

⁹ 'Charge as many as possible', News.com. Available online: <http://www.news.com.au/story/0,23599,22747968-2,00.html>.

The concern over the laws, however, is not unique to the Muslim community. The Tamil, Kurdish and Somali communities have similarly reported the stifling effect that the broad and vaguely-worded anti-terrorism offences have on community participation.

The issues we raise need to be addressed, and ideally, should be the subject of an extensive review. This review is necessary in order to set out all the concerns and fears of the community, and to amend the broad nature of their application. This review needs to be an independent review, and we support the initiatives raised by Mr Petro Georgiou in attempting to bring this about.

AMCRAN believes that this is the best and most effective way to examine all the concerns that have been raised over not only Dr. Haneef's case, but also that of Izhar Ul-Haque.

We thank you for the opportunity to make this submission.

Yours faithfully,

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