



**Submission of the**  
**HUMAN RIGHTS AND EQUAL OPPORTUNITY**  
**COMMISSION**  
**to the**  
**CLARKE INQUIRY**  
**on the**  
**CASE OF DR MOHAMED HANEEF**  
**May 2008**

**Human Rights and Equal Opportunity Commission**

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## A. SUMMARY OF SUBMISSION

1. The Human Rights and Equal Opportunity Commission ('HREOC') makes this submission to the Clarke Inquiry, which has been established to inquire into the case of Dr Mohamed Haneef. This inquiry raises important issues of law and practice and HREOC welcomes the opportunity to make a submission.
2. HREOC's submission addresses the following matters covered by the terms of reference:
  - the arrest, detention and charging of Dr Haneef;
  - the cancellation of Dr Haneef's Australian visa and the issuing of a criminal justice stay certificate;
  - the administrative and operational procedures and arrangements of the Commonwealth and its agencies relevant to these matters; and
  - deficiencies in the relevant laws, administrative and operational procedures and arrangements of the Commonwealth and its agencies.
3. HREOC makes a number of recommendations to the Clarke Inquiry which can be summarised as follows:

### *Part IC, Division 2 of the Crimes Act 1914 (Cth)*

- **Recommendation 1:** That the Clarke Inquiry recommends review and amendment of s 23CA(8)(m) of the Crimes Act to avoid the potential for arbitrary or unlawful detention in breach of Article 9 of the *International Covenant on Civil and Political Rights* ('ICCPR'). Article 9 of the ICCPR outlines the right to liberty and security of the person.

### *Section 102.7 of the Criminal Code*

- **Recommendation 2(a):** That the Clarke Inquiry recommends review and amendment of s 102.7 of the Criminal Code to include a threshold of materiality in respect of the provision of "support" or "resources".
- **Recommendation 2(b):** That the Clarke Inquiry recommends consideration of including a definition of "support" and "resources" for s 102.7 of the Criminal Code.

### *Section 501(3) of the Migration Act 1958 (Cth)*

- **Recommendation 3:** That the Clarke Inquiry recommends review and amendment of s 501(3) of the Migration Act to increase ministerial accountability for the cancellation of a visa, including requiring the Minister to comply with the rules of natural justice and the s 499 Direction.

### *Additional Recommendation*

- **Recommendation 4:** That the Clarke Inquiry recommends the establishment of an Independent Reviewer for Australia’s terrorism law regime. HREOC believes an Independent Reviewer should:
  - have the power to obtain from any agency or person information that he or she considers is relevant to the review, including intelligence agencies; and
  - be required to consider the human rights impact of counter terrorism laws.

## **B. THE PRE-CHARGE DETENTION OF DR HANEEF**

4. Part IC, Division 2 of the *Crimes Act 1914 (Cth)* (the ‘Crimes Act’) outlines the powers of detention in respect of pre-charge detention. HREOC is concerned that the Part IC, Division 2 regime does not provide detainees sufficient protection in respect of their right to liberty and security of the person (Article 9 of the ICCPR). In particular, HREOC is concerned that pre-charge detention under Part IC, Division 2 permits violations of:

- the prohibition on arbitrary detention (Article 9(1));
- the right of an individual to be informed, at the time of arrest, of the reasons for his or her arrest and be promptly informed of any charges against him or her (Article 9(2)); and
- the right of any person arrested or detained to be brought promptly before a judge or other officer authorised to exercise judicial power to rule on the lawfulness of that detention (Article 9(3)).

5. These rights are also fundamental to ensuring that any detention does not compromise the right to a fair trial (Article 14 of the ICCPR).

6. Dr Haneef was held in pre-charge detention for 12 days by the Australian Federal Police (‘AFP’) on suspicion of committing a terrorism offence. During that time, the initial investigating period was extended to 48 hours, and the AFP also obtained an order for a specified reasonable period of time (a ‘dead time period’) during which the suspension or delay of questioning was to be disregarded.<sup>1</sup>

### *The Part IC, Division 2 scheme (ss 23C – 23E)*

7. Under Part IC, Division 2, the maximum period of time during which a suspect for a terrorism offence can be questioned is 24 hours.<sup>2</sup> The actual period of pre-charge detention, however, may be much longer. This is because there are a number of reasons why time spent in pre-charge detention can be disregarded for

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<sup>1</sup> ss 23CA(8)(m) and 23CB of the Crimes Act.

<sup>2</sup> ss 23CA(4)(b) and 23DA(7) of the Crimes Act.

the purposes of calculating the amount of time the detainee is being questioned.<sup>3</sup> These are known as the ‘dead time periods’. In Dr Haneef’s case, his period of detention was extended pursuant to a specific ‘dead time’ provision for the investigation of terrorism offences, s 23CA(8)(m) of the Crimes Act.

8. Section 23CA(8)(m) was inserted into the Crimes Act by the *Anti-Terrorism Act 2004 (Cth)*. At this time, the 12 hour limit (in total) on pre-charge detention was removed, and no alternative safeguard of an absolute limit was inserted in its place. There was considerable concern at the time that the provision could be used to facilitate a period of pre-charge detention far beyond the existing limit of 12 hours. Concern that an individual could be held pursuant to s 23CA(8)(m) for 48 hours was specifically rejected by the Government,<sup>4</sup> and the then Minister for Justice, The Hon Christopher Ellison, gave an undertaking that the Government would conduct an independent review of s 23CA(8)(m) after it had been in force for 3 years.<sup>5</sup> He considered that this would be an opportunity to “...exhaustively analyse the operation of the new provisions and remedy any evident operational or legal shortcomings”.<sup>6</sup> This review was due by 30 June 2007 and has not yet occurred.

#### *The prohibition on arbitrary detention*

9. The prohibition on arbitrary detention requires that both laws and their enforcement must not be arbitrary. The United Nations Human Rights Committee has stated that:

...the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.<sup>7</sup>
10. In determining whether a period of pre-charge detention violates the prohibition on arbitrariness, a proportionality test must be applied. This means considering the purpose of detention and the means by which that purpose is achieved (the nature and length of detention). The means must be ‘proportional’ to the purpose.
11. The European Court of Human Rights (‘ECtHR’) has developed some useful guidance for assessing proportionality, including:
  - (a) the extent to which the action restricting the right interferes with the right, including whether it wholly destroys the enjoyment of the right;
  - (b) whether a less restrictive, yet equally effective, alternative measure is available to the State to achieve the purpose; and

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<sup>3</sup> See s 23CA(8) of the Crimes Act.

<sup>4</sup> Senate Legal and Constitutional Legislation Committee, *Anti-Terrorism Bill 2004*, 30 April 2004, pp. 29, 35. This was the evidence of Geoffrey McDonald, Assistant Secretary, Criminal Law Branch, Attorney-General’s Department.

<sup>5</sup> 2<sup>nd</sup> Reading Speech, *Anti-Terrorism Bill 2004*, 17 June 2004.

<sup>6</sup> *Ibid.*

<sup>7</sup> United Nations Human Rights Committee, General Comment 16, § 4.

- (c) whether there are any effective safeguards or legal controls over the measures in question. This includes the adequacy of compensation or legal remedies for those affected by the measures.<sup>8</sup>
12. HREOC is concerned that there are not sufficient safeguards in respect of a grant of a ‘dead time period’ pursuant to s 23CA(8)(m) of the Crimes Act to ensure that violations of Article 9 of the ICCPR do not occur. In particular HREOC notes:
- a broad discretion is granted to an investigating official to specify the length of the requested ‘dead time period’;
  - there is no limit on how long the period may be, or how many applications may be made;
  - a suspect’s legal representative is likely to have very limited information upon which to challenge such an application; and
  - a broad range of persons are empowered to make a ruling on a ‘dead time’ application pursuant to s 23CA(8)(m), including justices of peace, who are not officials exercising judicial power.<sup>9</sup>
13. Given the significant consequences of a grant of a ‘dead time’ period pursuant to s 23CA(8)(m) of the Crimes Act, HREOC considers it is important that there are stringent checks at each step of the process to ensure that continuing pre-charge detention is both lawful and not arbitrary, as required by Article 9 of the ICCPR. In HREOC’s view, Dr Haneef’s case demonstrates that the initial concerns that a grant of a ‘dead time period’ pursuant to s 23CA(8)(m) of the Crimes Act could be used to authorise a prolonged period of pre-charge detention (significantly beyond the previous 12 hour limit) were well-founded. HREOC considers that an absolute limit on the length of pre-charge detention is an important safeguard to ensure that detention does not become disproportionate and thus, arbitrary in violation of Article 9(1) of the ICCPR.

*The right to know the charge against you*

14. The ICCPR provides a number of essential procedural safeguards to ensure that the individual’s right to liberty and security of the person is respected.
15. Article 9(2) of the ICCPR requires anyone who is arrested to be informed, at the time of the arrest, of the reasons for his or her arrest and to be promptly informed of any charges against him or her.
16. The ECtHR has held that it is not sufficient to inform a detainee that he or she has been arrested pursuant to particular powers of the police, for example emergency legislation. In *Ireland v United Kingdom*,<sup>10</sup> Ireland alleged that the United Kingdom’s detention of IRA suspects under emergency legislation violated the equivalent of Article 9(2) of the ICCPR (amongst other

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<sup>8</sup> John Wadham, Helen Mountfield, Anna Edmundson, Caolfhionn Gallagher, *Blackstone’s Guide to the Human Rights Act 1998* (4<sup>th</sup> edition, 2007), para. 2.113.

<sup>9</sup> See s 23CB(3) of the Crimes Act, and para. 17 below.

<sup>10</sup> *Ireland v United Kingdom* (1978) 1 EHRR 91.

violations).<sup>11</sup> The ECtHR held that it was a breach of the equivalent of Article 9(2), on its own,<sup>12</sup> to not tell detainees the reason for their arrest and to only tell them that they had been arrested pursuant to the emergency legislation. The ECtHR held that there was not a sufficient degree of specificity to enable the detainee to know why he had been arrested. A similar concern could be raised in respect of informing a detainee that he or she had been arrested on suspicion of a terrorism offence.

*The right to be brought promptly before a court*

17. Article 9(3) of the ICCPR provides, in part, that anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other judicial officer and shall be entitled to trial within a reasonable time or to release. The United Nations Human Rights Committee has emphasised in its General Comment to Article 9 that “promptly” means no longer than a “few days”.<sup>13</sup> In addition, such a judicial officer must be independent of the executive, personally hear the person concerned,<sup>14</sup> and be empowered to direct pre-trial detention or to release the person arrested.<sup>15</sup>
18. HREOC is concerned that the procedure for the grant of a ‘dead time period’ pursuant to s 23CA(8)(m) of the Crimes Act does not guarantee that an individual will be brought before a judge or another officer empowered to order the individual’s release from detention when an application for ‘dead time’ is made. Section 23CB(3) permits a broad range of persons to make a ruling on a s 23CA(8)(m) application, including any justice of the peace.<sup>16</sup> A justice of the peace is not an officer authorised by law to exercise judicial power and is also not empowered to order the individual’s release from detention.
19. In addition, there is also no guarantee in s 23CA(8)(m) that the individual will be brought before a court for the hearing of the application.<sup>17</sup> An application for ‘dead time’ extension may be made in writing, or by telephone, telex, fax or other electronic means. HREOC notes that it is an important procedural safeguard that the detainee is brought before a court, and an essential element of Article 9(3) of the ICCPR. There are a number of reasons for this safeguard, including ensuring that the detainee is not subjected to maltreatment while in custody, and for ensuring that the detainee’s representative has the opportunity to respond to the argument for the detainee’s continued detention.

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<sup>11</sup> The ECtHR held that it was a violation of Article 5(2) of the European Convention on Human Rights (‘ECHR’), which is identical to Article 9(2) of the ICCPR, except that Article 5(2) of the ECHR also requires that the information is provided in “a language that the person concerned understands”.

<sup>12</sup> The ECtHR held that as the United Kingdom had lodged a valid derogation pursuant to Article 15 of the ECHR, declaring a “public emergency”, the violations of the right to liberty and security of the person, amongst other violations of the ECHR, were permissible.

<sup>13</sup> United Nations Human Rights Committee, General Comment 8. This also comports with the jurisprudence of the ECtHR, see *Brogan v UK*, Series A 145-B.

<sup>14</sup> The duty to accord a personal hearing arises from the right to “be brought” before a judge.

<sup>15</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2<sup>nd</sup> edition, 2005), p.231.

<sup>16</sup> s 23CB(3) of the Crimes Act.

<sup>17</sup> See s 23CB(4) of the Crimes Act.

20. HREOC considers that these are significant structural weaknesses of the pre-charge detention legislative framework.

**Recommendation 1:** That the Clarke Inquiry recommends review and amendment of s 23CA(8)(m) of the Crimes Act so as to introduce procedural safeguards to ensure compliance with Article 9 of the ICCPR. Specifically, HREOC recommends:

- (a) the Crimes Act should require that a detainee is promptly brought before a court;
- (b) that only a judge or magistrate should be empowered to hear and grant an application for a ‘dead time’ extension pursuant to s 23CA(8)(m) of the Crimes Act; and
- (c) an application for a ‘dead time’ extension pursuant to s 23CA(8)(m) of the Crimes Act cannot be granted other than in court.

### C. THE CHARGING OF DR HANEEF

21. Dr Haneef was charged on 14 July 2007 with the offence of intentionally providing support or resources to an organisation that would help the organisation in preparing, planning, assisting in or fostering the doing of a terrorist act, reckless as to whether the organisation was a terrorist organisation, contrary to s 102.7(2) of the Criminal Code.
22. HREOC notes that both the Security Legislation Review Committee (‘SLRC’) and the Parliamentary Joint Committee on Intelligence and Security (‘PJCIS’) have recommended that s 102.7 be amended to resolve the ambiguity of the term “support”.<sup>18</sup>
23. Particular attention has been directed at the potential of s 102.7 to unduly restrict the right to freedom of expression. In the view of both the SLRC and PJCIS, s 102.7 was not intended to prohibit the publication of views that appear to be favourable to a terrorist organisation and its stated objective. The PJCIS concluded that the underlying policy rationale of s 102.7 “...would indicate that the conduct must be some type of *material support* not mere words”.<sup>19</sup>
24. HREOC considers that the lack of an express threshold of materiality, and the lack of a definition in the Criminal Code of “support” and “resources” give s 102.7 an unduly broad scope. HREOC supports the PJCIS’s recommendation that s 102.7 be amended to increase the threshold of the offence, at the least in respect of “support”, to “material support”,<sup>20</sup> as well as to considering applying this to “resources”.

<sup>18</sup> See Security Legislation Review Committee, *Report of the Security Legislation Review Committee*, 21 April 2006 (‘SLRC Report’) p. 13; and Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, 4 December 2006 (‘PJCIS Report’), p. 79.

<sup>19</sup> *Ibid*, PJCIS Report, p. 79 (emphasis added).

<sup>20</sup> Note 11, PJCIS Report, p. 79.

25. HREOC notes the submission of Lex Lasry QC to the PJCIS.<sup>21</sup> Mr Lasry QC highlighted that “support” and “resources” form the actus reus for the offences in s 102.7 and, accordingly, should be defined with certainty. He noted that the equivalent of this offence in the United States, §2339A in Title 18 of the United States Code, defines “material support or resources”. The definition in §2339A is as follows:

As used in this section –

(1) the term ‘material support or resources’ means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

(2) the term ‘training’ means instruction or teaching designed to impart specific skill, as opposed to general knowledge; and

(3) the term ‘expert advice or assistance’ means advice or assistance derived from scientific, technical or other specialised knowledge.

26. HREOC agrees with Mr Lasry QC that a definition of “support” and “resources” would significantly assist in the application and interpretation of the s 102.7 offences.

**Recommendation 2:** That the Clarke Inquiry recommends review and amendment of s 102.7 of the Crimes Act to:

- (a) include a threshold of materiality in respect of the provision of “support” or “resources” to a terrorist organisation; and
- (b) consider inserting a definition of “support” and “resources” into the Criminal Code.

#### **D. THE CANCELLATION OF DR HANEEF’S VISA AND ISSUE OF CRIMINAL JUSTICE STAY CERTIFICATE**

27. HREOC is concerned by the overly broad nature of the Minister for Immigration and Citizenship’s power to cancel a visa on the ground of character under s 501(3) of the *Migration Act 1958 (Cth)* (the ‘Migration Act’). This is a power which the Minister exercises in a personal capacity, and it is subject to only limited grounds of review.
28. HREOC notes that under s 501(3), the Minister is not required to comply with the rules of natural justice or the Direction issued under s 499 of the Migration Act which provides detailed guidance in respect of the refusal or cancellation of

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<sup>21</sup> Lex Lasry QC, *Review of Security and Counter Terrorism Legislation*, 17 July 2006 <http://www.aph.gov.au/house/committee/pjcis/securityleg/subs/sub12.pdf>.

a visa under s 501 of that Act.<sup>22</sup> HREOC further notes that what constitutes the ‘national interest’ (s 501(3)(d)) is left to the Minister’s discretion.

29. The decision to cancel a visa has serious consequences. Its immediate effect, in the absence of any grant of another type of visa, is to require that the person be taken into immigration detention as an ‘unlawful non-citizen’.<sup>23</sup> HREOC has consistently opposed mandatory immigration detention as resulting in arbitrary detention in contravention of Article 9(1) of the ICCPR.<sup>24</sup>
30. Removal from Australia as a result of visa cancellation may also have a significant impact upon the human rights of a person and their family, including the rights of their children.<sup>25</sup>
31. Given the significant consequences of a decision to cancel a visa under s 501(3), HREOC considers it is appropriate that the Minister is required to comply with the rules of natural justice and the Direction issued under s 499 of the Migration Act in making this decision.

**Recommendation 3:** That the Clarke Inquiry recommends that s 501(3) of the Migration Act is amended to increase ministerial accountability for the cancellation of a visa, including requiring the Minister to comply with the rules of natural justice and the s 499 Direction.

## **E. THE NEED FOR AN INDEPENDENT REVIEWER OF AUSTRALIA’S TERRORISM LAW REGIME**

32. HREOC has previously called for the establishment of an Independent Reviewer of counter terrorism laws,<sup>26</sup> and considers that the case of Dr Haneef illustrates how an Independent Reviewer could contribute to effective oversight of the operation of counter-terrorism measures.
33. As indicated in the broad terms of reference of the Clarke Inquiry, the case of Dr Haneef touches upon a range of legislative provisions and operational arrangements within the terrorism law regime, including the Crimes Act, the Criminal Code and the Migration Act. The need for the Clarke Inquiry reflects the recommendation of the PJCIS for the establishment of an Independent Reviewer. In the PJCIS’s view:

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<sup>22</sup> Migration Act 1958 Direction under section 499, Direction No. 21.

<sup>23</sup> s 189(1) of the Migration Act

<sup>24</sup> See, for example, Human Rights and Equal Opportunity Commission, *A Last Resort? The National Inquiry into Children in Immigration Detention* (2004) [http://www.humanrights.gov.au/human\\_rights/children\\_detention/index.html](http://www.humanrights.gov.au/human_rights/children_detention/index.html).

<sup>25</sup> See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, in which the High Court of Australia held that the decision-maker was required to have regard to hardship to the applicant’s wife and children.

<sup>26</sup> See, for example, Human Rights and Equal Opportunity Commission, Submission to the Security Legislation Review Committee, January 2006 [http://www.humanrights.gov.au/legal/submissions/security\\_legislation\\_review.html](http://www.humanrights.gov.au/legal/submissions/security_legislation_review.html).

To date, post enactment review has been sporadic and fragmented with a focus on specific pieces of legislation rather than the terrorism law regime as a whole. This has limited the opportunity for comprehensive evaluation and highlights the need for an integrated approach to ensure ongoing monitoring and refinement of the law, where necessary.<sup>27</sup>

34. In HREOC's view, commissioning of independent reviews of individual cases such as that of Dr Haneef are critically important for assessing how the terrorism law regime is operating as a whole. This system of review, however, is reactive to events and is also dependent upon the political will for commissioning such a review. The establishment of an Independent Reviewer with a statutory mandate for regular, comprehensive reporting would overcome these obstacles, ensuring a proactive approach is adopted.
35. HREOC notes that while the Council of Australian Governments (COAG) is due to report on Australia's counter-terrorism laws in 2010, there is a need for a more regular mechanism of review, and one which has entrenched independence from government. HREOC considers there is substantial value in one identifiable individual who is independent of government, to conduct such reviews.<sup>28</sup> As noted by the PJCIS, a single appointee would provide a consistent and identifiable focal point for the community and executive agencies, and should be someone of high standing who commands respect and is trusted as an impartial and informed source of information and analysis. In addition, the appointee could work cooperatively with agencies and other stakeholders on an ongoing basis, as issues arise.

**Recommendation 4:** That the Clarke Inquiry recommends that an Independent Reviewer is established, in order to provide an independent and comprehensive review mechanism for Australia's terrorism law regime. HREOC believes an Independent Reviewer should:

- (a) have the power to obtain information from any agency or person that he or she considers is relevant to the review, including intelligence agencies; and
- (b) be required to consider the human rights impact of counter terrorism laws.

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<sup>27</sup> Note 11, PJCIS Report, p. 21.

<sup>28</sup> Ibid, p. 20.