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The Secretary
Clarke Inquiry
By email: clarkeinquiry@ag.gov.au

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Dear Secretary

Re: Clarke Inquiry into the Case of Dr Mohamed Haneef

Thank you for the opportunity to make a submission to this Inquiry. This submission raises several matters within the Inquiry's terms of reference, particularly in regards to the role of 'deficiencies in the relevant laws.'

1. The extended police detention powers for terrorist suspects infringe freedom from arbitrary detention as provided for under international law.

Under ss 23CA(4) and 23DA of the *Crimes Act 1914 (Cth)*, the maximum 'investigation period', or period during which a person may be detained without charge, is 24 hours in terrorist cases. As the case of Dr Haneef illustrated, however, allowances for 'dead time' mean that these 24 hours of questioning may be spread over many weeks, so that in practice suspects may for much longer periods than is apparent from the nominal maximum period specified on the face of the legislation. There is no maximum allowable period of dead time.¹

Dr Haneef was detained for 12 days of pre-charge investigative detention pursuant to s 23CA of the *Crimes Act*, during which he was interrogated for approximately 12 hours. During that time the police made at least one successful application under s 23DA to extend the investigation period. On three occasions police successfully applied to have two 48 hour periods and one 96 hour period declared 'dead time,' and were granted a two-day adjournment on a fourth application.

¹ Along with a broad list of activities to be considered 'dead time' in ordinary criminal cases, subsection 23CA(8)(m) states that, in terrorist cases alone, dead time may include 'any reasonable time during which the questioning of the person is reasonably suspended or delayed and is approved by a magistrate' when the magistrate is satisfied of certain conditions. The time taken to make or dispose of the necessary application to a magistrate, including adjournment periods, is also 'dead time' under the act.

The ‘dead time’ provisions in sections 23CA and 23CB may infringe the right to *freedom from arbitrary detention* recognised in international human rights law. This right is articulated in a number of international conventions, including article 9 of the International Covenant on Civil and Political Rights (ICCPR). It has been clearly established in the international and European jurisprudence that detention is arbitrary if, inter alia, it is *unpredictable* its duration. The European Court of Human Rights has found that national laws must clearly define the conditions for deprivation of liberty and be foreseeable in their application in order to satisfy this right.

Sections 23CA and 23CB of the *Crimes Act 1914* (Cth) do not meet this test. The lack of an *maximum* limit on the allowable period of dead time, and the fact that the grounds for dead time applications are so numerous, variable and unpredictable in their duration in effect provides for an indefinite period of arbitrary detention without charge for suspects in terrorism cases. In Dr Haneef’s case, 12 days of detention still used only half of the allowable 24 hour period of active questioning time, indicating that the authorities are able to extend the investigation period over a number of weeks through ‘dead time’ provisions. Suspects are thus unable to know with any certainty the length of their detention, an outcome clearly inconsistent with article 9 of the ICCPR, as well as the fundamental general principles of legal certainty and protection from arbitrary executive power central to the common law. Freedom from arbitrary detention assumes particular importance in any police investigative phase prior to a full criminal hearing and adjudication of guilt leading to imprisonment.

The role of a judicial officer under s 23D in determining what ‘reasonable’ dead time is does not remove the arbitrariness of the provisions. This is in part due to the difficulties suspects face in seeking to be heard fully before a court. For example, the fact that the time taken to make and dispose of a dead time application automatically extends that dead time may deter suspects from challenging evidence or raising points of law for fear of delaying the judicial officer’s verdict on the application.

Furthermore, the suspect may not be able to fully defend themselves in the application process on a practical level; for instance in Dr Haneef’s case his legal representative was not permitted to hear evidence presented by police in support of their s 23CB application, prohibiting an effective response on his behalf. The judicial supervision provisions are also ineffective in removing the arbitrariness of the proceedings because of the low threshold test required to establish the reasonableness of the period of dead time sought, which under s 23CB(5) enables police to cite even routine investigation activities as supporting a need for dead time.

- *It is strongly recommended that s 23CA be amended to impose a maximum cap on the allowable amount of dead time, either for all dead time activities or specifically for activities under s 23CA(8)(m).*
- *Alternatively, recommend that an absolute maximum period of detention be provided for in the legislation, which encompasses both any questioning time and any time out periods which may be granted.*

To determine this maximum cap, the Parliament could have regard to its own earlier proposal to limit the time to a period necessary to conduct inquiries across time zones, or examine the maximum periods imposed in overseas jurisdictions. For instance in Britain there has been a limit of 28 days detention, which has been recently increased by the Brown Government.

However, that period must be viewed in the context of the declared public emergency facing Britain, due to the threat of Al Qaeda attacks, and which has been officially proclaimed by Britain. In contrast, Australia has not declared a public emergency under the ICCPR (which, for instance, might enable it to suspend certain human rights temporarily), and indeed Australia's alert level remains at "medium, casting doubt on the necessity of any similarly lengthy period of detention as in Britain.

Whilst Australia does not require such a long allowable period, some maximum cap – perhaps two days – is necessary to render the legislation sufficiently certain to comply with Australia's international human rights law obligations.

As well as a maximum cap, other amendments may be necessary to render the legislation sufficiently certain. These may include allowing police only one opportunity to apply to a judicial officer for a declaration of specified period as reasonable dead time, requiring advance judicial certification of any period of dead time claimed under s 23CA(8)(m), and precluding a judicial officer from adjourning a dead time application for longer than a specified period.

2. The 'character grounds' under s 501 of the Migration Act 1958 (Cth) are too broad, encourage the arbitrary exercise of executive power, permit interference in the independent judicial administration of criminal justice, and affect fair trial rights.

Under s 501(3) of the *Migration Act 1958 (Cth)* ('*Migration Act*') the Minister may cancel a person's visa independently of the rules of natural justice if the Minister 'reasonably suspects that the person does not pass the character test; and is satisfied that the cancellation is in the national interest.' Section 501(6) provides a broad list of circumstances under which a person will not pass the character test. If a person wishes to challenge a s 501(3) cancellation they must request that the Minister reconsider or apply to the Federal Court on the limited ground of jurisdictional error. Furthermore under s 503A the Minister is under no obligation to disclose to the applicant confidential information provided by law enforcement agencies during their appeal.

Immediately after Dr Haneef was granted bail on 16 July 2007, the former Minister for Immigration cancelled his s 457 work visa under s 501(3) on the grounds that he 'reasonably suspected' that Dr Haneef had an association with people involved in terrorism and therefore failed the character test. The revocation exposed Dr Haneef to the risk of immigration detention if he posted bail, which he elected not to do. When the charge against Dr Haneef was dropped on 27 July 2007, the revocation remained in place, although Dr Haneef was allowed to enter residential detention before returning to India.

On the face of the legislation, the subjective character grounds, as interpreted by the Minister during the cancellation of Dr Haneef's visa, are too broad and uncertain in scope, and thus permit a potentially arbitrary exercise of the executive power to refuse or cancel a visa. Fortunately the Federal Court held that that the Minister had misconstrued the legislation and Dr Haneef's visa was reinstated. The Federal Court found that a person who associates with a suspected criminal is only of bad character if the association involves some complicity in the criminal conduct of another; that is, something more than innocent association among family or friends. The decision is a welcome interpretation of immigration law, consistent with the Australian law's foundation in *personal responsibility* rather than *collective liability*.

- *It is, however, recommended that s 501(3) of the Migration Act should be formally amended to expressly require that suspected criminal association is required, to clarify that mere innocent association with others suspected of crime is not an adequate basis for refusing or cancelling a visa.*

The impact that immigration law did have and, had charges been pursued, could foreseeably have had on the criminal proceedings involving Dr Haneef case also raises questions about the extent to which the *Migration Act* permits undesirable interference in the criminal justice process, judicial independence, and the right to a fair trial under human rights law.

Of primary concern is the possibility that the cancellation of an accused's visa on character grounds may detract from the presumption of innocence to which they are entitled during a criminal trial, especially if the Minister, as occurred in Dr Haneef's case, makes public that his decision was made based partly on 'secret information' not available to the court. This damaging secrecy also risks rendering the criminal process arbitrary if the trial is haunted by the possibility of unseen evidence.

Furthermore, in Dr Haneef's case the cancellation of his visa accompanied by the issuance of a Criminal Justice Stay Certificate effectively meant that, were charges not dropped, Dr Haneef would have been required to await trial in detention despite a finding in the criminal law jurisdiction that he should be awarded bail. Additionally, if the cancellation were to result in the accused being transferred to inter-state immigration detention, their access to their chosen legal representative may be severely impacted.

Whilst the Federal Court did not find that the Minister acted for an 'improper purpose' during the visa cancellation, the timing of the cancellation and the Minister's many political comments created a public perception of arbitrary executive interference with the judicial process, undermining confidence in the justice system.

- *It is recommended that the Migration Act be amended to allow a merits review of any visa cancellation on s 501(3) grounds. In conjunction with a repeal of s 503A this would prevent those affected by an adverse decision from being arbitrarily denied access to the information on which that decision was made.*
- *It is recommended that s 501 should be amended to provide that, if a visa is cancelled but a criminal justice stay certificate issued, the person must be granted a bridging visa, enabling a court to decide whether the person remains in detention pending trial.*
- *It is recommended that where criminal charges are pending against a non-citizen, the Minister should be required under s 501(3) to consider the impact of any cancellation of that person's visa on their ability to receive a fair trial.*

3. *The s 102.7(2) of the Criminal Code (Cth) 'terrorist organisation' offence is too wide and is unnecessary in combating modern terrorist threats.*

Under s 102.7(2) of the *Criminal Code (Cth)* it is an offence to intentionally provide support or resources to a terrorist organisation which would help the organisation directly or indirectly engage in 'preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs)' when the person is reckless 'as to whether the organisation is a terrorist organisation.' It was under this section that Dr Haneef was briefly charged with providing support to a terrorist organisation.

The vagueness and breadth of the Division 102 terrorist organisation offences, including the wide definition of ‘terrorist organisation’ as encompassing even ‘informal’ members of an organisation ‘indirectly’ involved in terrorist activities, endow police with extremely wide powers to arrest and charge ‘suspects’ based on genuinely innocent interactions with others.

Whilst the intent element of the offence was intended to limit the scope of the offence, in Dr Haneef’s case this requirement was interpreted very broadly, enabling the offence to encompass his ordinary family interactions. The offences as a whole, including s 102.7(2), criminalise a person’s associations rather than their individual conduct, expanding criminal liability in an unsound and unnecessary manner, given existing principles of accessorial liability. Even if the requirements of intent and recklessness ensure that successful prosecutions are rare, the generality of the offences means that they can serve as proxies for intelligence gathering activities rather than legitimate charges based on genuine evidence.

- *It is recommended that the definition of a terrorist organisation in s 102.1 is amended to ensure that only listed organisations are included.*
- *It is recommended that the terrorist organisation offences in s 102.7(2) are amended to include a more substantial focus on individual conduct rather than guilt by association.*

Please be in touch if you require any further information.

Yours sincerely

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