

Clarke Inquiry into the Case of Dr Mohamed Haneef
Submission by Russell Hogg¹

1. Introduction

This submission was prompted by the public forum established by the Inquiry – *Too Safe or Too Sorry? A public forum on the effect of the relevant laws as they applied in the case of Dr Haneef*. It relates to term of reference (d), requiring Mr Clarke to examine and report on –

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.

The elephant in the room in this case is the role of UK authorities and the relationship and interactions between the AFP and the UK authorities. If this is regarded as outside the terms of reference there is a real risk that some of the key policy issues raised by the case will be overlooked and any underlying problems perpetuated.

The terms of reference refer only to Commonwealth agencies and state law enforcement agencies and issues of effectiveness of cooperation, coordination and interoperability between and amongst these agencies. The AFP has been at pains to stress that the role of the UK authorities is out of bounds of the Clarke Inquiry. This is for at least two reasons: first, the London Metropolitan Police (LMP) control the manner in which information provided by that jurisdiction to Australian police may be used and thus its release must be authorized by them; and secondly, there is the risk of prejudicing trials and continuing investigations in the UK.² A cynic might be tempted to see this as self-serving, motivated by the desire of the AFP itself to shelter some of its conduct beneath the penumbra of immunity cast over the UK agencies. Nevertheless, it is submitted that the terms of reference permit, and, properly understood, require, the Australian end of this relationship to be examined.

Aware that other submissions have addressed issues raised by the substantive and procedural laws applied in the investigation and charging of Dr Haneef and the cancellation of his visa, this submission primarily focuses on the factual, legal and policy issues raised by the cross-border, agency-to-agency aspects of the case. These issues can be addressed without going into the actions and decisions of British authorities. It would be derelict not to address these matters issues if in fact they go to the heart of the investigation, arrest and charging of Mr Haneef. It is submitted that they do.

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² P. Maley, 'Haneef inquiry: AFP to open up', *The Australian* 6/8/08, p3.

Moreover, it is widely accepted that such cooperative arrangements between police and security agencies of different countries is essential to the prevention and control of terrorism and other trans-national crimes. The frequency and importance of such assistance is growing and will continue to do so. It poses a fundamental problem of accountability if Australian police can in effect enlarge their own power to act free from scrutiny under Australian legal and democratic institutions (and inquiries such as this one) by invoking the immunity of their foreign counterparts from such scrutiny. This would create another legal and democratic ‘black hole’ in the so-called ‘war on terror.’

There is a legislative and policy framework – relating to extradition and mutual assistance – that governs these relationships. An issue for the inquiry is whether it is adequate to address shifts in the scale and pattern of cross-border, inter-agency relationships between police agencies.

2. The Regime of Anti-terrorist Offences under the *Criminal Code*

The shifts referred to above are closely related to the distinctive architecture of Australia’s new regime of anti-terrorist offences. This is what made it possible for Australian police and prosecuting authorities to arrest and charge Dr Haneef in respect of an offence that had allegedly occurred 11 months before on British territory in circumstances where British police neither sought, nor (it is almost certain) could have effected, his extradition to face charges in the very country in which all the relevant events occurred (including, of course, the attempted bombings in London and Glasgow that prompted the investigation into Dr Haneef).

The most curious question of all from a criminal law viewpoint is why Australian police and prosecutors charged a foreign national in relation to crimes allegedly committed in another country at a time when the criminal justice authorities of that other country had ceased to show any interest in his prosecution.³

This curious outcome was made possible by the fact that Australia’s anti-terrorism regime combines three novel features. First, the offences are *extra-territorial* in their reach: creating offences that may be committed anywhere by any person without the need to establish a connection to Australia.⁴ The laws establish a form of universal jurisdiction. This is common for crimes like piracy, war crimes and crimes against humanity (genocide and the like). Many place terrorist acts in the same category. However, Australia’s anti-terrorist offences range well beyond terrorist *acts* (as the charges laid against Dr Haneef show).

³ C. Marriner, ‘Haneef of little interest in UK’, *Sydney Morning Herald*, 24/7/07.

⁴ *Criminal Code* s102.9 provides that extended geographical jurisdiction category D applies to these offences. Under s15.5, jurisdiction applies whether or not the conduct constituting the offence occurred in Australia and whether or not the result of that conduct occurred in Australia. Jurisdiction does not depend on the alleged perpetrator or the victim being an Australian citizen or resident. as Justice Bell put it in *R v Ul-Haque* (Unreported, NSW Supreme Court, 8 February 2006 at [32]) the offences ‘may be committed by a foreigner against a foreigner in a foreign country remote geographically from, and of no particular interest to, Australia.’

The second feature is that the law establishes a model of *presumptive criminality* in which liability is based on forms of association with the activities and intentions of others. It dispenses with the conventional controlling principle of the criminal law, the principle of personal culpability, which necessitates proof of both harmful conduct and blameworthy intent or knowledge. The preparatory offences and terrorist organization offences in the *Criminal Code 1995* (Cth) rest in many instances on proof of only the most amorphous and remote link with any actual, attempted or anticipated violent act.

Thirdly, political, ideological or religious *motive* assume core significance as the criteria of terrorist criminality. Focusing attention on motive the law directs attention away from any element of unambiguously criminal conduct. The conduct element in a crime under s102.7 (and many other terrorist offences) can be constituted by outwardly normal, mundane, everyday behavior (such as Dr Haneef's leaving his sim card with his cousin when he left the UK). The issue for investigators becomes one of identifying the motive for engaging in otherwise unexceptional conduct. This almost unavoidably turns the investigation to the question: 'is this the *type* of person who would be involved in terrorism'. This creates the risk that the answer will be influenced by cultural stereotypes that are dependent on judgments about the significance of a person's religion, politics, beliefs, associations and so on. Having arrived at a judgment that the person *is* probably involved in terrorist activity, everyday conduct and associations are given a sinister interpretation consistent with this judgment.

There is considerable evidence suggesting this process may have occurred in the investigation of Dr Haneef, including police refusal to accept his explanation for his apparently sudden decision to leave Australia, their overlooking of his repeated attempts to contact the UK police investigator and the cherry picking and mistranslation of his chat room conversations with his brother to cast them in a sinister light. The investigation was conducted against the backdrop of reports of a conspiracy of Indian Muslim doctors to wage violent jihad in Britain. Seven people were arrested in Britain in connection with the failed London and Glasgow bombings, most of them doctors. In the end only two doctors (and no other persons) were ultimately charged in relation to them.⁵

This immediate climate, set against the general backdrop of the global terrorist threat, no doubt influenced police judgments about Dr Haneef.⁶ He was Muslim, a doctor, had worked in British hospitals, had a family relationship with a proven terrorist and his mobile phone (an essential part of the terrorist kit, and everyone else's) was somehow involved. This is speculation, but it is even possible that Dr Haneef's apparent outward composure, dignity and cooperative attitude throughout the investigation counted against him: might this be precisely what would be expected of an intelligent, calculating agent of violent jihad?

⁵ Kafeel Ahmed (an engineer) died of his injuries received at Glasgow airport. The other arrestees were released early on in the investigation. Sabeel Ahmed was cleared of any involvement in terrorism, although prosecuted on another charge. See D. Pallister, 'Trainee doctors released in car bomb inquiry', *The Guardian*, 16/7/07.

⁶ See, for example, 'Terrorism knows no borders', *The Courier-Mail*, 4/7/07.

There is much evidence from cases involving miscarriages of justice (cf Lindy Chamberlain as a paradigm instance) of how a criminal investigation can become an 'echo chamber'. Some objectively incriminating evidence leads to an early rush to judgment and thereafter the investigation only seeks out and interprets evidence to confirm that judgment and ignores or rationalizes away any exculpatory evidence. This is an occupational hazard of the criminal investigator, but anti-terror offences carry increased risks because they place core importance on political, ideological and religious motive (and thus the character, background, beliefs, etc of a suspect) and dispense with the usual conduct elements of a crime.

The focus on motive in terrorist offences is controversial. My point here is that it needs to be also considered in relation to its more subtle, practical impact on the investigative process.

In sum under the conceptual boundaries of criminal liability under Australia's anti-terrorist regime are pushed well beyond the forms of antecedent conduct captured under existing law, including the laws of attempt, conspiracy and criminal complicity. Casting the net of criminality so broadly also increases the scope for criminalizing a wide range of activities and associations that transcend national borders and cultural and social differences.⁷

Investigation to uncover or establish criminal links is also facilitated by procedural laws providing for indefinite investigative detention such as those under which Dr Haneef was detained for 11 days prior to being charged.

In Dr Haneef's case the detention and his many hours of interrogation by Australian police failed to uncover incriminating evidence against him. He appears to have willingly provided innocent and plausible explanations for all relationships, actions and communications that had aroused the suspicion of Australian police, although (in keeping with the 'echo chamber' idea) they appear to have conveniently ignored many of his explanations or place their own sinister interpretation on them.

He was nevertheless charged on the basis of the only material that, however implausibly, could link him to the attempted bombings, his familial relationship to Sabeel and Kafeel Ahmed and the fact that he left his sim card behind with Sabeel when he left Britain in July 2006. This was not so much a case of finding an evidentiary foundation for a prosecution as looking to stretch any available legal device to fit it to the limited facts at hand. Having been passed through the legal filter of Australian anti-terror laws the Ahmed brothers morphed into a *terrorist organization* and Dr Haneef's sim card became a *resource* intentionally provided by him to the organization.

⁷ Those tempted to align anti-terror laws with developments in international criminal law should note that the boundaries of collective criminal liability in international criminal law jurisprudence, where doctrines of complicity and conspiracy are critical to imposing liability on leaders and other secondary participants as well as the direct perpetrators of organized atrocities, are far more restrictive: see A. Danner and J. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', (2005) 93 *California Law Review* 75-169.

However, a crucial link in the chain that might tie Dr Haneef to the attempted bombings was the evidence relating to Sabeel Ahmed's involvement. If Sabeel was not part of any terrorist organization then in leaving his sim card with Sabeel Dr Haneef could not be proved to have provided a resource to a terrorist organization and therefore could not be guilty of the offence for which he was arrested or the offence with which he was later charged.

Had it been disclosed that Kafeel Ahmed sent Sabeel an email prior to the Glasgow attack showing that Sabeel had no knowledge of, or involvement in, Kafeel's terrorist activities the case against Dr Haneef under *Criminal Code Act 1995* (Cth) s102.7 would have immediately collapsed.

Sabeel was arrested and his laptop containing the email seized on 30 June, 2007 (i.e. early on 1 July AEST). One British source reported that the text was accessed by police within 72 hours.⁸ It could hardly have taken longer. Sabeel was charged with withholding information about terrorism. Although he had not accessed the email until after Kafeel's failed assault on Glasgow airport he did not immediately reveal to police the content of the email and text message from his brother. The charge against Sabeel was reported in the British press at least as early as 16 July, 2007,⁹ within 2 days (or perhaps 3 allowing for time differences) of Dr Haneef being charged.

The information concerning the email clearing Sabeel of involvement (and thus also Dr Haneef) was never communicated by Australian police or prosecutors to an Australian court, to Dr Haneef's lawyers or to the Australian public. If a single factual question needs answering by this inquiry it is: *when* did this information come to the attention of the AFP?

A closely related question is: how could they proceed with their investigation and charging of Dr Haneef without access to the evidence relating to Sabeel Ahmed's involvement. As I understand the AFP had liaison officers in the UK for precisely such purposes and a senior London Met investigator was in Australia.

This issue goes to the key policy question with which this submission is concerned.

3. Cooperation between Australian and UK Police

If Australian and British authorities were working cooperatively on this investigation, as we are told is demanded by the novel threat posed by global terrorism, how could it be the case that at some point their paths diverged so dramatically on such a basic issue?

⁸ David Marr, 'Police ignored strong evidence showing Haneef's innocence', *Sydney Morning Herald*, 14/4/08, p3.

⁹ D. Pallister, 'Trainee doctors released in car bomb inquiry', *The Guardian*, 16/7/07.

From the UK standpoint, reflected in the charge laid against Sabeel Ahmed when he appeared at City of Westminster court in London on 16 July 2007, there was no evidence to support the charge that the AFP had laid against Dr Haneef two days before.

If cooperative arrangements between Australian and British police cannot be relied upon to get such a basic evidentiary issue correct we are entitled to wonder whether they could ever work effectively to prevent and combat trans-national terrorist attacks. I do not accept that British and Australian police are that incompetent.

A further related question is why Australian police and prosecutors laid charges at all under Australian law in respect of crimes committed on British soil and lacking any particular nexus to Australia, beyond the fact that the person charged happened to be temporarily resident in Australia. If British police (aided or unaided by Australian police inquiries on their behalf) had the evidence against Dr Haneef his extradition should have been sought to face charges in the jurisdiction where the alleged crimes were committed.

The immediate indications at the time of Dr Haneef's arrest were that British police wanted his speedy extradition from Australia.¹⁰ On July 3 the Australian Federal Police Commissioner stated 'that this is an investigation by the counter-terrorism command in the United Kingdom and what we are doing here in Australia is assisting that investigation.'¹¹ There were reports, citing the Australian Prime Minister, that a senior British police officer (of Chief Inspector rank) was flying to Australia to assist with the questioning.¹² Interestingly, on July 4 the Australian Prime Minister refused to confirm that Dr Haneef's extradition was being sought.¹³

The initial focus on the possible extradition of Dr Haneef's was entirely in keeping with the constitutional, criminal law and governmental traditions of both Australia and Britain. Extradition reflects the idea that the administration of criminal law is an incident of the territorial sovereignty of nation states.¹⁴ Australian governments continue to adhere to the principle, even where Australian nationals are concerned, that 'generally, persons who have committed a crime should be tried and punished by the criminal justice system of the country in which they committed the crime, regardless of their citizenship.'¹⁵ The principle is supported by a well developed body of extradition law and practice contained in treaties, domestic legislation and case law. It includes safeguards and assigns a role to national courts in extradition processes. Thus whilst it is recognized that extradition is

¹⁰ Belinda Tasker, 'Brit police want doctor extradited from Australia' AAP, 4/7/07. The story repeated news stories from Britain indicating that police wanted Dr Haneef extradited as soon as possible.

¹¹ Ali Moore, 'Police Commissioner discusses alleged terrorism arrests', ABC, 3/7/07.

¹² 'Howard: Brit police on way to Australia to question doctor', AAP, 4/7/07.

¹³ Mark Metherell and Ben Cubby, 'Silence on length of men's detention', SMH 4/7/08.

¹⁴ At the time the Australian Constitution came into effect extradition was defined as - 'the surrender or delivery of fugitives from justice by one sovereign State to another. It is justified by the principle that all civilized communities have a common interest in the administration of the criminal law and in the punishment of wrongdoers.' (Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 635.

¹⁵ A better mutual assistance system – a review of Australia's mutual assistance law and practice, Australian Government, Attorney-General's Department, 2006. p20

ultimately an executive function, it is one that can only be conducted under legislative authority and in which courts make a determination that a person whose extradition is sought is eligible for surrender. This reflects recognition of the implications of extradition for human rights, and in particular the right to liberty.¹⁶

There was no credible evidence or any serious suggestion that Dr Haneef was involved in plotting terrorist activities in Australia. He was not an Australian national and had been in the country for less than 12 months. Given the attempted attacks occurred on British territory the British authorities and the British people had a vital interest in seeing him face justice there rather than in Australia. For most serious crimes, other than terrorist offences, Australian courts would have lacked jurisdiction to try a charge if the offence was alleged to have been committed elsewhere by a foreign national.

Yet all references to extradition abruptly ceased less than 48 hours after Dr Haneef's arrest, never to resurface. The senior British police officer who apparently flew to Australia was not referred to again and seems to have played no direct part in the Australian investigation of Dr Haneef. S/he did not question Dr Haneef. When the charge against him was dropped there was no reference to British interest in his extradition to Britain, despite the fact that in virtually all essential respects (the primary offence and any connection Haneef might have to it) it was a matter of vital concern to British authorities and they held the relevant evidence.

What had begun as a British investigation into crimes in Britain transformed into an entirely Australian exercise without this fundamental change in status in the investigation being registered or without any one asking the obvious questions at the time: why? And whether, if the British interest in Dr Haneef had abated, this might suggest a lack of evidence?¹⁷

When criticized over the misleading evidence that the sim card had been found in the burnt out jeep at Glasgow airport the AFP blamed the British police, saying they were initially sent the wrong information.¹⁸ The former Immigration Minister more recently claimed that he was misled at the time he cancelled Dr Haneef's visa, in particular that he was not told of evidence that cleared Sabeel Ahmed of participation in the terrorist activities involving his brother, which also undermined any suggestion of Dr Haneef's link to the crimes.¹⁹ British police refrained from commenting.

¹⁶ *Vasiljkovic v Commonwealth* [2006] HCA 40; 228 ALR 447. As this High Court decision, however, shows, some of the traditional safeguards embodied in Australia's extradition law (notably the requirement to satisfy an Australian court that there is a prima facie case against the party whose extradition is being sought) are being weakened. That case upheld the constitutionality of a legislative, 'no evidence' scheme of extradition (Kirby J dissenting). The justification for these and other changes refer to increases in transnational crime and the threat of terrorism.

¹⁷ Cosima Marriner, 'Haneef of little interest in the UK' *SMH* 24/7/07.

¹⁸ Vikram Dodd and Barbara McMahon, 'Australian police hit back over arrest of bomb plot suspect', *Guardian*, 30/7/07.

¹⁹ Michael McKenna, 'Haneef evidence withheld' *The Australian*, 30/4/08.

Behind the finger pointing lie more fundamental issues concerning the character of new forms of cross-border executive cooperation that are developing under the rubric of counter-terrorist policing. Aside from traditional extradition arrangements two forms of cross border cooperation have evolved more recently, known as *mutual assistance* and *agency-to-agency assistance*.²⁰ Use of both has risen dramatically in recent years.²¹

Mutual assistance is a formal government-to-government process. It is dependent on Australia's participation in bi-lateral and multi-lateral treaties and is regulated by legislation that specifies the matters for which assistance requests must be made to or by the Attorney-General, the criteria governing Ministerial approval or refusal and the limits on the forms of assistance that can be provided.²²

Agency-to-agency assistance lies outside the framework of the legislation. It involves informal cooperation and information sharing between executive agencies in different countries. It is subject to no systematic mechanisms of legal or ministerial scrutiny or accountability, thus granting Australian government agencies (notably the AFP) enormous autonomy in relation to their dealings with the executive agencies of foreign governments. Such informal exchanges of information will commonly present few difficulties or objections, but this is not always the case.

In the Bali 9 case Australian police provided information to Indonesian police that led to nine young Australians being arrested and charged for drug trafficking, an offence that carries the death penalty in Indonesia. The death penalty was in fact imposed on several of the nine, although is yet to be carried out.²³

The Haneef case highlights other problematic aspects of agency-to-agency assistance specific to the administration of Australian anti-terror laws. These relate to accountability deficits and the manipulability of jurisdictional claims. International law and constitutional traditions of nation states dictate that the executive branch of government controls foreign relations and external policy. Cross-border cooperation between executive agencies of different states involves mechanisms that remove or lower jurisdictional obstacles for certain purposes relating to policing and intelligence gathering and sharing, but keep them in place for other purposes, like precluding judicial and

²⁰ The discussion here does not encompass the deployment of Australian police in other countries in operational roles, as peacekeepers and the like.

²¹ *A better mutual assistance system – a review of Australia's mutual assistance law and practice*, Australian Government, Attorney-General's Department, 2006.

²² *Ibid*; Mutual Assistance in Criminal Matters Act 1987 (Cth) pps 8, 9, 34.

²³ Some of the nine sought to challenge the legality of the AFP's actions in the case on a number of grounds, including non-compliance with the *Mutual Assistance in Criminal Matters Act 1987* (Cth). Under the Act there is a rebuttable presumption against Ministerial approval of a request for assistance relating to a prosecution involving a death penalty offence. The legislation did not apply because the assistance in question was not of a kind that was covered by the legislation. The AFP were therefore free to assist and seek assistance from Indonesian police without reference to the legislation or any form of legal or ministerial oversight although it was clear that the information provided would expose Australian citizens to the risk of the death penalty, a penalty not available in Australia and whose general abolition is supported by Australian governments from both sides of politics. See *Rush v Commissioner of Police* [2006] FCA 12 (23 January 2006).

democratic scrutiny under the laws of one state of the executive conduct of another. The scope and means of executive power are enlarged but without any corresponding extension of the means of legal and democratic accountability. Executive agencies of foreign states are not subject to legal, parliamentary or other forms of oversight. Those of the home state can to a degree deflect accountability by claiming they were acting at the instigation and on the basis of information provided by their counterparts in other countries. Working in conjunction with a regime of broadly defined terrorist offences with no jurisdictional limits executive power is greatly expanded and legal and political accountability correspondingly attenuated.

It is this permissive framework that allowed what began as a joint investigation by British and Australian police to at some point take divergent (even contradictory) directions, for the AFP to strategically seal off its investigation of Dr Haneef from developments in the UK investigation and for it to circumvent conventional principles of both criminal law and extradition law.

It remains to consider why this peculiar course of action may have been adopted by the AFP.

4. Law Enforcement and Intelligence Gathering

The conduct of the Haneef investigation by the AFP may make more sense if seen as an exercise in intelligence gathering rather than criminal law enforcement.

In a speech in 2005 the then Director-General of the Australia Security Intelligence Organisation (ASIO) raised two important issues concerning the most effective response to terrorism.²⁴

First, he called for ‘a seamlessness in our intelligence and law enforcement counter-terrorism efforts.’ Of course, this begs the question of what ‘seamlessness’ might mean given that intelligence and law enforcement agencies have very different powers, mandates and objectives. How are these to be reconciled? In a related vein he then posed the question –

When those known to be involved in terrorism are taken into custody, is the community best served by an immediate application of law enforcement processes, or is it best served through seeking to obtain, through lawful means, information concerning current plans and intentions, and the location of others involved in terrorism?

He gave the example of the alleged 9/11 mastermind, Khalid Shaikh Mohammed, who was captured in Pakistan in 2003 and asked (rhetorically) whether our interests would have been served by his arrest and prosecution. The comments reflect an acceptance of the need for extended powers of detention for purposes of intelligence gathering in order

²⁴ Director-General’s Address, LawAsia Conference 2005, Gold Coast, 23 March, 2005. Available: http://www.asio.gov.au/Media/Contents/lawasia_conference.htm Accessed 3/11/05.

to identify and combat terrorist groups and activities. It also assumes that law enforcement powers are to be placed at the service of the intelligence effort. He also referred to the importance of cross-border cooperation amongst police and security agencies.

He nevertheless stressed the need for these strategies to be undertaken lawfully, 'within a proper legal framework', although he provided no indication of what this framework might look like. The reference to known terrorist figures like Khalid Shaikh Mohammed here also ignores the fact that more often it will be individuals like Dr Haneef who will be caught up in the intelligence gathering dragnet.²⁵

The investigation of Dr Haneef may reveal some of the lamentable consequences of attempts by police to reconcile, on the run, different counter-terrorist mandates without the benefit of an appropriate and effective legal and organizational framework to guide and check their powers. These matters are too important to be left to the executive branch of government to work out for themselves behind closed doors.

Conclusion and Recommendations

Few would deny that the investigation of contemporary terrorist activity presents particular challenges and justifies special measures, especially given the potentially grave consequences of a terrorist act. There is a widely recognized need for –

- cross-border cooperation between police and security agencies
- powers of compulsion (including power to detain for investigation) that recognize the potential scale, complexity and time-consuming nature of investigating terrorist links
- provision to safeguard security-sensitive information

²⁵ We should not forget here that the majority of detainees in the so-called 'global war on terror' - those who ended up in Guantanamo Bay, Abu Ghraib and other prisons – were foot soldiers, fellow travelers or passive by-standers in the wars in Afghanistan and Iraq (and many were innocent of any association with al-Qaeda or other terrorist groups); only a handful were masterminds or organizers. The Seton Hall Law School studies of 517 Guantanamo detainees, based entirely on US Defence Department documents hardly confirms the 'worst of the worst' claims made by US Officials. Of the detainees –

- 55% were not accused of committing a hostile act against the US or its allies
- 8% only were determined to be al Qaeda fighters
- 60% were claimed to have no more than an 'association with' a group alleged by the US to be a terrorist organization
- 37% had no definitive connection with al Qaeda and 17% no definitive connection with the Taliban
- only 1 detainee was captured by the US forces on a battlefield
- only 21 (4%) were alleged to ever have been on a battlefield
- only 5% were captured by the US forces; 86% were captured by Pakistan or Northern Alliance forces and handed over to the US, mostly for bounties offered and paid by the latter

Mark Denbeaux, et.al. *Report on Guantanamo Detainees – a Profile of 517 Detainees through Analysis of Department of Defence Data*; Denbeaux, et.al. *The Meaning of 'Battlefield'*, http://law.shu.edu/news/guantanamo_report_final_2_06.pdf. Consulted 3/6/08.

The problem is that such measures are equally open to misuse to mask excessive zeal, incompetence, flawed judgment, impropriety and prejudice in the conduct of an investigation and/or the use of an investigation as little more than a fishing expedition driven by the hope that evidence of terrorist activity will be uncovered.

Those who say ‘when it comes to terrorism better safe than sorry’ are not the people who pay the cost - in lost liberty, damaged reputation and other massive practical and psychological disruption to innocent lives – that is caused by recourse to exceptional powers to prevent and combat terrorist activity. The people who pay are people like Dr Haneef. Such people are unlikely to be so sanguine about such powers, having themselves suffered a certain degree of terror in the name of fighting terror. It is appropriate to ask what of their safety and security?

This submission generally concurs with other submissions that criticize the excessive breadth and uncertain reach of current anti-terror offences and which recommend amendments to ensure they target terrorist activity with precision and clarity. Liability to punishment for serious crimes should be closely tied to the principle of personal culpability. A sound starting point for such a revision of the law is provided by the report of the Security Legislation Review Committee (2006). If criminal liability is to be pushed beyond what is captured by offences of conspiracy and incitement and the principles of criminal complicity the need should be clearly demonstrated.

This submission also supports recommendations that *Crimes Act 1914* (Cth) s23CA be amended to impose a finite limit on pre-charge detention (including ‘dead time’). There is likely to be disagreement over what that limit should be. A 72 hour limit does not seem unreasonable. Judicial oversight needs to be genuine, not, as it appears from the Haneef case, little more than a pro forma exercise.

Without the benefit of access to the AFP submission it is difficult to fairly assess the possible reasons for Dr Haneef’s prolonged detention but the available evidence suggests seriously improper use was made of these provisions. Despite his full cooperation with police inquiries at all times, no thought appears to have been given to any alternative to detention, for example, releasing him on bail and requiring that he surrender his passport. At the same time there is little to suggest that the extensive investigations yielded material information or that police had even sought to verify information provided by Dr Haneef, like that concerning the reasons for his apparently sudden decision to return to India.

Rather police actions appear to reflect a determination to simply keep him in detention for as long as possible in the hope that something incriminating would turn up. Justifications were not linked to the offence for which he had been arrested and various options appear to have been canvassed that were irrelevant to the situation, like control orders and preventive detention orders.²⁶ When it became clear that the only public airing

²⁶ A sense of the general attitude and approach can be gathered from the Statutory Declaration of AFP officer, Adam Simms, that accompanied the application for ‘dead time’ in relation to the investigative detention of Dr Haneef made on 11 July 2007. At paragraph 19 he refers to inquiries being undertaken by

of the evidence in a court would likely result in his release on bail the AFP turned their attention to immigration laws to prolong his detention.

In other words, the broad powers available under criminal and immigration laws were exercised to the full and without reference to the purposes for which they were bestowed or relevant facts of the case which would justify (or not) the use of coercive powers against Dr Haneef at each phase of the investigation.

The relationship between the AFP and the Commonwealth DPP over the decision to charge Dr Haneef appears not to have been functional. Judicial officers, and, it appears, the Immigration Minister were misled and critical exculpatory information was withheld. Many of those party to the decision to charge Dr Haneef (notably senior Queensland police) did not believe that the evidence supported the charge. And the likelihood is that the charges would not have been dropped when they were but for Dr Haneef's counsel releasing transcripts of police interviews with his client that demonstrated the paucity of evidence against him. Even after that, and until a few weeks ago, the AFP continued to publicly state that Dr Haneef was a 'person of interest' and that substantial public resources were being devoted to further investigations. Yet they had not made any further inquiries of him after his departure from Australia.

It appears the case took a direction and acquired a momentum only remotely related to any evidence of criminal wrongdoing on Dr Haneef's part.

This brings me to a reiteration of the central point of this submission.

It needs to be considered whether the investigation and treatment of Dr Haneef was confounded by a confusion of mandates, law enforcement giving away at some point to intelligence gathering.²⁷ The driving concern may have become obtaining information that might expose terrorist networks and prevent terrorist crimes. The purpose can hardly be faulted, but the criminal law and criminal charges are ill-adapted to it and using them can pervert the legal values and principles that underpin the criminal justice system. The same may be said when our system of immigration law is drawn into this endeavour.

This state of affairs is hardly all the fault of agencies like the AFP. It is a result of lazy policy and lazy law-making, the simplistic idea that the main thing needed to combat terrorism is the extension of criminal law and criminal justice powers. Australia has introduced a battery of new and far-reaching anti-terror laws, often imitating what Britain or some other country has done, but little attention has been given to careful institutional design and innovation. There is rhetoric concerning the importance of a 'seamless' relationship between criminal justice and security agencies but what this means or how it should be operationalized is unclear. It is simply left to the agencies themselves to work

Indian authorities, observing that 'This may redirect Australian authorities to a new set of inquiries and evidence collection in relation to Mr Haneef.' (Appendix 1 in the Submission made on behalf of Dr Haneef).

²⁷ This is also true of other terrorist cases in Australia that have attracted criticism, including the Izhar Ul-Haque and Jack Thomas cases.

out relevant administrative arrangements. But if new powers and institutional arrangements are needed to police and prevent new cross-border terrorist threats their design should not be seen a merely an administrative responsibility; it is the democratic political responsibility of governments and parliaments.

If, as some argue²⁸, we are witnessing the erosion of longstanding boundaries – between law and strategy, crime and war, national security and criminal justice – this may require new institutional architecture to ensure this new organization of powers is both effective and accountable to legal and democratic institutions.

There are no off-the-shelf measures that can be adopted, but a debate is needed that goes beyond merely relying on ad hoc, unprincipled and ill-conceived extensions to our criminal laws. This debate should also include consideration of the following options -

- bringing cross-border, agency-to-agency cooperation under some form of legislative control and scrutiny to ensure integrity and accountability in the conduct of investigations
- introduction of active judicial supervision of national security investigations, including over preventive and investigative detention and the interrogation of detainees (perhaps through an inquisitorial mechanism like an examining magistrate)²⁹

If able and requested to do so I would be pleased to provide further assistance to the Inquiry.

Russell Hogg
21/9/08

²⁸ See, for example, Philip Bobbitt, *Terror and Consent – the Wars for the Twenty First Century*, Allen and Unwin, 2008.

²⁹ More than 30 years ago Lord Devlin made such a proposal in respect of the investigation of serious crime: Patrick Devlin, *The Judge*, Oxford University Press, 1981, ch 3, The Judge in the Adversary System.