



## CLARKE INQUIRY PUBLIC FORUM

### **‘Too Safe or Too Sorry’**

#### **A forum on the effect of the relevant laws as they applied to the case of Dr Haneef**

#### **Purpose**

1. The purpose of the Forum on Monday, 22 September 2008 in Sydney is to enable interested persons to address in public the fourth matter (d.) in the Terms of Reference whereby the Inquiry is to examine and report on:

- a. 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;
- b. the administrative and operational procedures and arrangements of the Commonwealth and its agencies relevant to these matters;
- c. the effectiveness of cooperation, coordination and interoperability between Commonwealth agencies and with state law enforcement agencies relating to these matters; and
- d. 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.**

2. The genesis for the Forum was:

- a. the Attorney-General’s media release dated 13 March 2008 announcing the Inquiry, which referred to opportunities for conducting public forums on the operation of counter-terrorism laws and arrangements; and
- b. the following passage in Mr Clarke’s opening statement dated 30 April 2008:

“If there is sufficient interest, public forums may be arranged at which interested persons may be given an opportunity to make an oral submission to the Inquiry.”

**Value**

3. The value of the Forum is expected to be:
  - a. for the Inquiry to hear the arguments from speakers about the strengths and weaknesses of the relevant aspects of Australia's counter-terrorism laws and arrangements, and develop any arguments for change;
  - b. to enable people to ask questions of the speakers (there will be a keynote speaker and four guest speakers);
  - c. to give organisations and individuals who have made written submissions an opportunity to elaborate on their submissions; and
  - d. for the Inquiry to glean further information relevant to the fourth matter in the Terms of Reference which has not been forthcoming in the normal course of the Inquiry.

**Issues**

4. Issues for consideration at the Forum are in the Schedule. These are only intended to define the broad parameters. Speakers and audience participants are not confined to the suggested issues, provided they confine themselves to the fourth matter (d.) in the Inquiry's Terms of Reference.
  5. The statements of law and the suggested issues put forward for discussion do not represent the formed views of the Inquiry.
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**Schedule  
Clarke Inquiry Public Forum**

**Police powers of arrest for terrorism offences**

1. The common law test for a lawful arrest is that the arresting officer must have been satisfied at the time of the arrest that there are reasonable grounds for suspecting that the person arrested has committed an offence, although the grounds for suspicion need not consist of admissible evidence.<sup>1</sup>
2. This common law “reasonable suspicion” threshold is lower than the statutory “reasonable belief” threshold in section 3W(1) of the *Crimes Act 1914* (Cth), under which an Australian Federal Police (AFP) officer may arrest a person without a warrant for a terrorism offence under Commonwealth law.<sup>2</sup> Section 3W(1) requires the arresting officer to believe on reasonable grounds that the person has committed or is committing the offence.
3. The common law threshold for arrest is reflected in the legislation of some States and Territories. For example, in New South Wales,<sup>3</sup> a police officer may, without warrant, arrest a person whom the officer suspects on reasonable grounds has committed a terrorism offence under NSW law.<sup>4</sup> Other jurisdictions have the reasonable belief threshold in their legislation.
4. Suspicion, belief and knowledge are different states of mind in the law relating to arrest. Suspicion is a state of conjecture or surmise where proof is lacking: ‘I suspect but I cannot prove’,<sup>5</sup> although a suspicion is more than mere idle wondering.<sup>6</sup> The facts which can reasonably ground a suspicion may be quite insufficient to ground a reasonable belief, but some factual basis for the suspicion must be shown.<sup>7</sup> There is no need for the police officer actually to have the suspicion or belief, only that there be a reasonable suspicion or reasonable belief.
5. Thus, there is a dichotomy between:
  - (a) section 3W(1) of the *Crimes Act 1914* where the AFP must have a reasonable belief before arresting a person for a terrorism offence under Commonwealth law; and
  - (b) the law in New South Wales (for example) where the NSW Police need only harbour a reasonable suspicion before arresting a person for a terrorism offence under NSW law.
6. Section 3W(2) of the *Crimes Act 1914* provides that if before the person is charged with the offence for which the person was arrested the investigating officer ceases to believe on reasonable grounds that the person committed the offence, the person must be released.

<b>Issue 1</b>	
<p>Given the gravity of the risk of a terrorist act, the threshold in section 3W(1) is too high. It should be lowered to the reasonable suspicion threshold for terrorism offences, particularly as:</p> <ul style="list-style-type: none"> <li>• the States and Territories have shared their constitutional power to make laws with respect to counter-terrorism (CT) with the Commonwealth;<sup>8</sup> and</li> <li>• the AFP is the principal law enforcement agency for CT.</li> </ul>	<p>The reasonable belief threshold in section 3W(1) strikes an appropriate balance between civil liberties and national security, especially in view of the AFP's powers of detention of a person arrested for a terrorism offence.</p> <p>Also, the common law power of arrest may still exist alongside section 3W(1),<sup>9</sup> in which event the AFP can elect to exercise their common law power of arrest for a terrorism offence or rely on section 3W(1).</p>

<b>Issue 2</b>	
<p>Section 3W(2) should be reformed so that the arrested person need not be released if the investigating officer suspects on reasonable grounds that the person has committed a terrorism offence which is not the offence for which the person was arrested.</p>	<p>Section 3W(2) is not in need of reform. An investigating officer can arrest a person under section 3W(1) for any terrorism offence if requirements of section 3W(1) are met, and then detain the person in accordance with the powers of detention in the <i>Crimes Act 1914</i>.</p>

### **Police powers of detention for terrorism offences**

7. Since 1825 the common law has been that:<sup>10</sup>
  - (a) a person must be brought before a magistrate following arrest as soon as the arresting officer can reasonably do so; and
  - (b) an arresting officer has no authority to detain the arrested person beyond that time in order to investigate the suspected offence.
8. The High Court has consistently stated that the police have no common law power to detain arrested persons for investigation, notwithstanding any detrimental effects this may have on the proper investigation of allegations of criminal conduct.<sup>11</sup> Any statutory abrogation of this fundamental principle of personal liberty must be clear, and should contain safeguards to compensate for the loss of the liberty.
9. The *Crimes Act 1914* (Cth) abrogates this common law in the interests of efficient law enforcement.<sup>12</sup> A maximum initial investigation period of four hours is prescribed for all Commonwealth offences. This can be extended by a "judicial officer" with respect to suspected terrorism offences for a maximum total investigation period of 24 hours.<sup>13</sup>

10. Further, there are “dead time” provisions when the clock stops for the purpose of the time limits on the investigation period. No questioning of a suspect can occur during any dead time. In particular, the police may apply to a prescribed officer for dead time and there is no absolute limit on the amount of dead time the prescribed officer may specify.<sup>14</sup> A “prescribed officer” in this context can be a justice of the peace if a magistrate is not available.<sup>15</sup>
11. Before granting an application to extend of the investigation period or for dead time, the presiding officer must be satisfied that the arrested person or his/her legal representative has been given the opportunity to make representations about the application.<sup>16</sup>

<b>Issue 3</b>	
<p>The current scheme providing for oversight by a magistrate or a JP when the police apply for an extension of the investigation period or for dead time,<sup>17</sup> is a sufficient safeguard.</p> <p>Applications are usually made on an urgent basis, and a magistrate may not be available.</p>	<p>This is an insufficient safeguard and the scheme should be reformed to provide for oversight by a judicial officer, namely, a magistrate or a judge.</p> <p>In particular, an application can be made by telephone, facsimile or email, and so there is no need to provide for the possibility of an application to a JP because a magistrate or a judge will be available 24/7.</p>

<b>Issue 4</b>	
<p>There is no need for an absolute limit on the amount of dead time that a prescribed officer may specify<sup>18</sup> because there is sufficient oversight by the prescribed officer.</p>	<p>This is an insufficient safeguard. The correct balance between civil liberties and effective counter-terrorism requires an absolute limit on the amount of dead time that a prescribed officer may specify.</p>

<b>Issue 5</b>	
<p>The current scheme permits the AFP to make an application for dead time in person or in writing to a presiding officer without informing the arrested person or his/her legal representative about the application.<sup>19</sup> This is a sufficient safeguard. In particular:</p> <ul style="list-style-type: none"> <li>• the presiding officer must be satisfied that the arrested person or his/her legal representative has been given the opportunity to make representations about the application;<sup>20</sup> and</li> <li>• in practice, the AFP will be unlikely to make an application for dead time <i>ex parte</i> and without informing the arrested person or his/her legal representative.</li> </ul>	<p>This is an insufficient safeguard. The current scheme with respect to dead time only requires the presiding officer to be satisfied that the arrested person or his/her lawyer has been given the opportunity to make “representations”. The representations may be to the police and not to the presiding officer.</p> <p>The arrested person should have an unequivocal right to know about the application for dead time, to have sufficient time to prepare his/her case and to appear or be represented at the hearing.</p>

<b>Issue 6</b>	
<p>In the event an application for an extension of the investigation period or for dead time is based wholly or partly on sensitive information from a national security perspective, the AFP should be unequivocally entitled under the legislation to rely on the information without disclosing it to the detained person or his/her legal representative.</p>	<p>This is an insufficient safeguard. The legislation requires the presiding officer to be satisfied that the arrested person or his/her legal representative has been given the opportunity to make representations about either type of application. Effective representations cannot be made without all the evidence upon which the AFP rely being disclosed.</p>

<b>Issue 7</b>	
<p>The current scheme requires a prescribed officer to be satisfied about specified matters<sup>21</sup> as well as “any other relevant matters”<sup>22</sup> when ruling on an application by the police for dead time. This is a sufficient safeguard.</p> <p>In particular:</p> <ul style="list-style-type: none"> <li>• “any other relevant matters” will not necessarily be inimical to the interests of the arrested person and may serve the interests of national security; and</li> <li>• the ruling must be lawful, and may be subject to judicial review to ensure that it was in accordance with procedural fairness rules.<sup>23</sup></li> </ul>	<p>This is an insufficient safeguard, given that the basic principles of the common law with respect to detention have been heavily qualified by statute.</p> <p>The current scheme should be reformed to make an application for dead time consistent with an application for an extension of the investigation period<sup>24</sup> in so far as the latter does not permit the judicial officer to take into account “any other relevant matters”.<sup>25</sup></p> <p>Even in the event of judicial review:</p> <ul style="list-style-type: none"> <li>• the process is likely to be lengthy and the arrested person is likely to remain in detention for the time being; and</li> <li>• there is still significant flexibility with respect to the merits of a ruling before it becomes unlawful (a ruling may be unfair but lawful).</li> </ul> <p>In particular, the prescribed officer as an administrative decision-maker need not be satisfied that it is appropriate to grant dead time according to the civil standard of proof on the balance of probabilities.<sup>26</sup></p>

<b>Issue 8</b>	
<p>Section 3W(2) of the <i>Crimes Act 1914</i> (the requirement for release if there is no longer a reasonable belief) and Part 1C of the <i>Crimes Act 1914</i> (which deals with applications by the police for an extension of the investigation period and for dead time), are irreconcilable.</p> <p>Under Part 1C,<sup>27</sup> the AFP can apply for an extension of the investigation period or for dead time in relation to a different terrorism offence which the AFP reasonably suspect the arrested person has committed to the terrorism offence for which the person was arrested under section 3W(1).</p>	<p>There is no tension between section 3W(2) and Part 1C.</p> <p>The <i>Crimes Act 1914</i> expressly provides that Part 1C prevails over section 3W(2) to the extent of any inconsistency, provided section 3W(2) became law before Part 1C became law.<sup>28</sup></p> <p>Further, if the AFP have a common law power of arrest and they exercise that power with respect to a terrorism offence, no inconsistency arises.</p>

<p>A solution would be to adapt section 3W of the <i>Crimes Act 1914</i> for terrorism offences so that the arresting officer's reasonable belief or suspicion should relate to terrorism offences rather than a specific crime.</p>	
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<b>Issue 9</b>	
<p>Overall, the provisions in the <i>Crimes Act 1914</i> which deal with applications for an extension of the investigation period for terrorism offences and applications for "dead time" were the subject of a Senate Committee report on 11 May 2004,<sup>29</sup> and are an appropriate balance between civil liberties and counter-terrorism law enforcement.</p>	<p>Overall, the balance is inappropriate. The balance should be redressed in favour of civil liberties. In particular, the trading of the absolute limit corresponding to the time zone difference in the original paragraph 23CA(8)(m) in the bill considered by the Senate Committee, for the open-ended "judicial officer" oversight in section 23CB in the Act was significantly inimical to the civil liberties of an arrested person.</p>

**The Executive's power to cancel a visa on the ground that the visa holder has been associated with a terrorist organisation.**

12. A person arrested and detained by the police for a suspected terrorism offence could be a non-citizen of Australia and the holder of a visa issued under the *Migration Act 1958*.<sup>30</sup> This raises the issue of the civil liberties of visa holders relative to Australian citizens.
13. The Minister for Immigration and Citizenship may cancel a person's visa if the Minister reasonably suspects that the person does not pass the "character test" in the *Migration Act 1958* and the Minister is satisfied that the cancellation is in the national interest.<sup>31</sup> The visa holder will fail the test if (among other things):<sup>32</sup>

... the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct [including the terrorist offences in the *Crimes Act 1914*]
14. If the Minister cancels a visa, the Minister must, as soon as practicable after making the decision, give the person:<sup>33</sup>
  - (a) a written notice that sets out the decision (but not necessarily a statement of reasons);
  - (b) particulars of relevant information to the decision, but not any "non-disclosable information"; and

- (c) invite the person to make representations to the Minister about revocation of the decision.
15. Non-disclosable information in this context includes confidential information communicated to an authorised migration officer by a law enforcement agency or an intelligence body on condition that it will not be divulged or communicated.<sup>34</sup> Therefore, if the Minister relies on non-disclosable information to cancel a visa in accordance with the character test, the Minister cannot disclose that information to the affected person.
16. If the person makes representations and satisfies the Minister that the person passes the character test,<sup>35</sup> the Minister may revoke the decision to cancel the person's visa.

<b>Issue 10</b>	
<p>Given the gravity of the risk of a terrorist act, the “association” aspect of the character test should only require a familial, social, commercial, professional or other innocent association to enliven the requisite association. Then, the Minister can exercise his or her discretion as to whether the association reflects adversely on the character of the visa holder. If it does, the Minister will cancel the visa.</p>	<p>This is not an appropriate balance between civil liberties and the national interest. Such a low threshold for the requisite threshold has been rejected by the Federal Court.<sup>36</sup> For one thing, it unfairly discriminates against non-citizens. They are tainted with having failed the association test simply because of a familial, social, commercial, professional or other innocent association. This cannot occur to a citizen of Australia.</p>

<b>Issue 11</b>	
<p>The current scheme with respect to the “association” aspect of the character test, as interpreted by the Federal Court,<sup>37</sup> is fair and an appropriate balance between civil liberties and the national interest, because a mere familial, social, commercial, professional or other innocent association does not enliven the requisite association.</p> <p>Rather, the association must reflect adversely on the character of the visa holder. It would not be enough for the visa holder merely to be a “person of interest” to the police with respect to a terrorist offence.</p>	<p>This is neither fair nor an appropriate balance, because the Minister need only be satisfied that:</p> <ul style="list-style-type: none"> <li>• the visa holder is a person of interest to a law enforcement or intelligence body in Australia or overseas with respect to a terrorist offence; and</li> <li>• has been arrested by the police for a terrorism offence.</li> </ul> <p>The police need only have a reasonable suspicion to arrest whereas they must have reasonable and probable cause to lay a charge. A reasonable suspicion is a lower threshold than a reasonable belief. A reasonable suspicion is too low to invoke the association test.</p>

### Charging a person for a terrorism offence

17. The AFP must have reasonable and probable cause for lawfully charging a person with any offence.<sup>38</sup> This involves a subjective element (what the prosecutor made of the available material) and an objective element (what the prosecutor should have made of that material).
18. Again, suspicion and belief are different states of mind in the law relating to arrest, laying charges and prosecuting offences.<sup>39</sup> Certainly, the common law reasonable suspicion threshold for arresting a person is lower than the threshold for charging a person.
19. If the AFP officer laying a charge (the charging officer) for a terrorism offence acts on the statements of others (such as investigating officers), the charging officer need not have a positive belief that the accused person is, or probably is, guilty.<sup>40</sup> That is, the subjective element of reasonable and probable cause can be satisfied even though the charging officer does not have a positive belief in the guilt of the accused.
20. The objective element of reasonable and probable cause will ultimately depend on the facts in any particular case.<sup>41</sup> However, an absence of reasonable and probable cause is not demonstrated by showing only that there were further inquiries that could have been made before a charge was laid. The High Court has observed that:<sup>42</sup>

Where a prosecutor acts on information given by others it will very often be the case that some further inquiry *could* be made ...

<b>Issue 12</b>	
<p>The common law with respect to the AFP charging a person for a terrorist offence represents an appropriate balance between civil liberties and the national interest. The charging officer must still believe that the information in his/her possession is true.</p>	<p>This is not an appropriate balance between civil liberties and the national interest. A higher threshold is needed, namely, that the charging officer must personally believe that the accused is probably guilty of the terrorism offence. Further, the charging officer should charge on the information to hand.</p>

Clarke Inquiry  
5 September 2008

## Endnotes

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- <sup>1</sup> See *Williams v R* (1986) 161 CLR 278.
- <sup>2</sup> The terrorism offences under Commonwealth law are in Part 5.3 of the *Criminal Code Act 1995*.
- <sup>3</sup> Section 99(2), *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). Section 99(2) of this Act (formerly section 352 (2) of the *Crimes Act 1900*) is the NSW equivalent of section 3W(1) of the *Crimes Act 1914* (Cth) apart from the different threshold.
- <sup>4</sup> For example, the terrorism offence in section 310J, *Crimes Act 1900* (NSW).
- <sup>5</sup> *Hussien v Chong Fook Kam* (1970) AC 942, 948.
- <sup>6</sup> *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266.
- <sup>7</sup> *George v Rockett* (1990) 170 CLR 104.
- <sup>8</sup> For example, the *Terrorism (Commonwealth Powers) Act 2002* (NSW).
- <sup>9</sup> Section 3D(1)(b) of the *Crimes Act 1914* (Cth) effectively provides that section 3W(1) is not intended to limit or exclude the operation of another law of the Commonwealth relating to arrest. Section 8(1)(b)(i) of the *Australian Police Act 1979* (AFP Act) provides that the AFP are to provide police services in relation to laws of the Commonwealth, and “police services” as defined in section 4 of the AFP Act may include the power of arrest.
- <sup>10</sup> *Wright v Court* (1825) 107 ER 1182.
- <sup>11</sup> *R v Iorlano* (1983) 151 CLR 678, *Williams v The Queen* (1986) 161 CLR 278.
- <sup>12</sup> Part 1C of the *Crimes Act 1914* was added on 9 May 1991 in response to *Williams v The Queen* (1986) 161 CLR 278.
- <sup>13</sup> Section 23DA(7), *Crimes Act 1914*, added by the *Anti-Terrorism Act 2004* on 1 July 2004.
- <sup>14</sup> Sections 23CA(8)(m) and 23CB(2), *Crimes Act 1914*.
- <sup>15</sup> Section 23DA(7), *Crimes Act 1914*.
- <sup>16</sup> Sections 23CB(7)(e) and 23DA(4)(d), *Crimes Act 1914*.
- <sup>17</sup> An application under section 23CB(2), *Crimes Act 1914*.
- <sup>18</sup> Under section 23CB(7), *Crimes Act 1914*.
- <sup>19</sup> Section 23CB(4), *Crimes Act 1914*.
- <sup>20</sup> Section 23CB(7)(e), *Crimes Act 1914*.
- <sup>21</sup> Section 23CB(7), *Crimes Act 1914* generally.
- <sup>22</sup> Section 23CB(7)(a)(iii), *Crimes Act 1914*.
- <sup>23</sup> See *Smiles v Commissioner of Taxation* [1992] FCA 208.
- <sup>24</sup> Under section 23DA(1), *Crimes Act 1914*.
- <sup>25</sup> Section 23DA(4), *Crimes Act 1914*.
- <sup>26</sup> *MIEA v Liang* (1996) 185 CLR 259 per Brennan CJ Toohey, McHugh and Gummow JJ, commenting on the nature of the administrative decision-making process.
- <sup>27</sup> Section 23CA(4), *Crimes Act 1914*.
- <sup>28</sup> Section 23A(1), *Crimes Act 1914*. Section 3W appears to have become law in 1994 (No. 65, 1994) and Part 1C appears to have become law in 1991 (No. 59, 1991), although the relevant provisions of Part 1C, sections 23CA, 23CB and 23DA, became law in 2004 (No. 104, 2004).
- <sup>29</sup> *Inquiry into the provisions of the Anti-Terrorism Bill 2004*:  
[http://www.aph.gov.au/Senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/anti\\_terrorism04/index.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/anti_terrorism04/index.htm)
- <sup>30</sup> As was Dr Mohamed Haneef.
- <sup>31</sup> Section 501(3)(b), *Migration Act 1958*.
- <sup>32</sup> Section 501(6)(b), *Migration Act 1958*.
- <sup>33</sup> Section 501C(3), *Migration Act 1958*.
- <sup>34</sup> Section 503A(1), *Migration Act 1958*.
- <sup>35</sup> Section 501C(4), *Migration Act 1958*.
- <sup>36</sup> *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273.
- <sup>37</sup> *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273.
- <sup>38</sup> The Commonwealth Director of Public Prosecutions’ prosecution guidelines are at:  
<http://www.cdpp.gov.au/Publications/ProsecutionPolicy/>
- <sup>39</sup> *Ruddock v Taylor* [2005] HCA 48.
- <sup>40</sup> *A v State of New South Wales* (2007) 230 CLR 500, reconciling *Commonwealth Life Assurance Society Ltd v Brain* (1935) 53 CLR 343, 382 with *Mitchell v John Heine & Son Ltd* (1938) 38 SR (NSW) 466, 469.
- <sup>41</sup> The statement of Hawkins J from *Hicks v Faulkner* (1878) 8 QBD 167 at 171 is often cited as defining reasonable and probable cause:

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“... the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily cautious and prudent man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”

<sup>42</sup> *A v State of New South Wales* (2007) 230 CLR 500 at 529.