



Clarke Inquiry into the case of Dr Mohamed Haneef

MJ CLARKE QC

Since I was appointed to conduct this Inquiry in March 2008 I have endeavoured to meet the desire of the Attorney-General and my own assurances to make public as much of the proceedings and material before the Inquiry as was possible without jeopardising matters of national security or pending trials in Australia or overseas. Reluctantly I have today advised the Attorney-General that it will not be feasible to make public as much information as was initially envisaged.

During the past three months I have been given a vast amount of material relevant to my Terms of Reference by Commonwealth and State departments and agencies with involvement in the matters under investigation and also by Dr Haneef's representatives. A very high proportion, however, of the material from departments and agencies carries a security classification which limits the extent to which it can be shown to other people or disclosed generally. The originating agency alone has the authority to remove the classification. While the documents have, in the main, been delivered to the Inquiry, gaining access to the documents has involved a protracted period of negotiation. The delivery of the documents has, however, been on a confidential basis and the Inquiry has not been given authority to publish those which are classified.

The Inquiry has not sought the declassification of the documents which have been produced by different Government agencies because, apart from logistical difficulties, it is clear to me that, for reasons which appear below, any attempt to secure declassification would confront a hurdle which I regard, practically speaking, as virtually insurmountable.

Some time after the Inquiry had embarked on its investigation we were apprised of serious objections which had been raised by the Metropolitan Police Service and Crown Prosecution Service of the United Kingdom. They objected to a significant proportion of the documents held by the Australian Federal Police, containing United Kingdom sourced and derived material, being provided to the Inquiry except under severely restricted conditions. Such was the concern of those authorities, who are anxious to protect the integrity of the criminal trials which are about to commence in the United Kingdom, that they declined to permit the Australian Federal Police to authorise the publication of any of those documents by the Inquiry.

In this respect it should be appreciated that the United Kingdom authorities and the Australian Federal Police have an understanding whereby they jointly cooperate towards maintaining the security of both countries. It is clear that, without the agreement of the Metropolitan Police Service, publication of those Australian Federal Police documents that the Inquiry has been given would seriously damage the international relationship between the two countries. Having regard to the fact that the maintenance of such relations is an important element of national security the prospect of securing approval to disclose the content or publish the documents appears remote.

Faced with the need to advance the investigation, which has already been significantly delayed, I felt that I had no choice but to advise the Attorney-General that the Inquiry will be unable to proceed effectively unless it is able to withhold publication of a large part of the proceedings. To

do otherwise could, not only lead to protracted negotiations and most probably lengthy court proceedings, but would represent a failure to acknowledge the reality that the Inquiry is faced with an absence of authority to publish the material to which I have referred. The Attorney-General, recognising the difficulties facing the Inquiry has accepted my advice. This means that I will continue my Inquiry in the way I have previously outlined but statements, transcript of interviews and related documents will not be posted on the Inquiry's website and not all submissions will be published. I will, however, endeavour to treat all parties with fairness and will make arrangements to bring the substance of any material and information placed before me which may have an adverse effect on another party to their attention and provide an opportunity for them to respond. I will also continue to issue a public statement from time to time to report on progress with the Inquiry.

There has been discussion about the constitution of the Inquiry and the view has been expressed that it should have been established under the *Royal Commissions Act 1902*. For this reason I indicated in my Opening Statement on 30 April that if circumstances arose where I considered I needed statutory powers I would approach the Attorney-General to request that he reconstitute the Inquiry under that Act. While such powers could have provided greater procedural rigour, I do not believe, having considered independent legal opinion on the issue, that the limitations on the public disclosure of sensitive material could be overcome or would be significantly different were I acting under a Royal Commission. My decision, therefore, is not to seek such powers at this time.

I understand that this will cause a great deal of dissatisfaction, not least on the part of Dr Haneef and his legal representatives, but my fundamental duty is to examine fully the matters covered by my Terms of Reference and to provide the Government with a comprehensive report. This I intend to do – it will then be for Government to decide how and in what timeframe to make its contents public and to act on my recommendations.

25 July 2008