



Policing in the Shadow of Australia's Anti-Terror Laws

Law Council Presentation to Clarke Inquiry Public Forum

Introduction

The arrest, detention, charge and subsequent release of Dr Mohamed Haneef represents the first time that a number of legislative provisions, introduced to respond to the threat of terrorism, have been relied on in practice. As such, the case offers a valuable opportunity to review the appropriateness of those provisions and to examine whether there is any disparity between their actual and intended operation.

The case also offers an opportunity to review the manner in which criminal law and migration law interact and to explore the ramifications of that interaction for a defendant's fair trial rights.

The Law Council is pleased that the terms of the Clarke Inquiry are broadly framed in order to allow for a general investigation into the adequacy of the laws, practices and procedures observed in operation in the Haneef case – and I am grateful for the opportunity to speak today.

Focus of Law Council's Presentation

The Law Council has closely monitored the case of Dr Haneef from the time of his arrest on 2 July 2007 until the present.

However, the Law Council does not purport to have access to information concerning the facts of Dr Haneef's arrest, detention, charging, prosecution, release or visa cancellation, beyond that information which has been made generally available in the public domain.

Ascertaining the facts is the job of the Clarke Inquiry itself and Dr Haneef's legal team.

The Law Council is primarily concerned with what the Haneef case has revealed about the content and operation of certain Commonwealth laws.

The Law Council has long argued that our anti-terrorism laws sanction unnecessary infringements on fundamental rights and strike the wrong balance between community safety and individual freedoms.

However, as the Haneef case demonstrates, those laws, while draconian in many respects and certainly worthy of continued opposition, are only part of the problem.

The difficulties endured by Dr Haneef have shown us that the real source of danger is not confined to what our anti-terror laws say but extends as well to what people, including law enforcement and intelligence officers, think they say.

The application of our anti-terror laws by the AFP and other agencies in the Haneef case suggests a significant misunderstanding has developed within those agencies about what they are lawfully authorised to do when protecting the community from the threat of terrorism.

In particular, the Law Council is interested in what the case has revealed about:

- the operation and application of sections 3W and 15AA and Part 1C of the *Crimes Act* ;
- the *Criminal Code* terrorist organisation offence provisions under which Dr Haneef was charged; and
- the interaction between migration law and criminal law.

In many cases, the focus of the Law Council's submission and the issues raised in the Issue Paper prepared for today's discussion intersect – and in the course of this presentation I will draw attention to these points of intersection.

Police Powers of Arrest and Detention for Terrorism Offences

As recognised in the Issues Paper, the Haneef case raises serious questions about how sections 3W and 23CA of the *Crimes Act 1914* are understood and applied by the AFP.

Public comments made by the former Attorney-General, former Prime Minister and by the AFP Commissioner at the time of Dr Haneef's arrest and detention raise concerns that the provisions of the *Crimes Act* were applied without reference to the appropriate statutory tests. Their comments suggest that a precautionary "better to be safe than sorry" approach was adopted at various stages of the case, even where such an approach was not sanctioned by the relevant legislation.

The Law Council is concerned that, throughout the Haneef case, police were operating in the general shadow of Australia's anti-terror laws, guided more by a vague notion that those laws authorised a different and extraordinary approach than by the precise content of the actual laws pursuant to which they were exercising their powers.

This can be demonstrated by considering the application of section 3W of the *Crimes Act* and the way this provision intersected with the dead time provisions in Part 1C.

Police powers of arrest under section 3W of the *Crimes Act*

Dr Haneef was arrested under section 3W of the *Crimes Act*.

Under subsection 3W(1), a person may only be arrested for an offence if the arresting officer *believes on reasonable grounds* that the person has committed the offence. The arresting officer must also *believe on reasonable grounds* that arresting the person is necessary to preserve evidence or to complete the investigation.¹

¹ Section 3W(1) provides

(1) A constable may, without warrant, arrest a person for an offence if the constable believes on reasonable grounds that:

(a) the person has committed or is committing the offence; and

(b) proceedings by summons against the person would not achieve one or more of the following purposes:

Subsection 3W(2), adds a requirement that, upon the arresting officer's state of mind dropping below that threshold requirement, the person must be immediately released.

This same provision applies for all offences. There is no special arrest provision and test relating to terrorist offences.

This means that to lawfully arrest Dr Haneef under the *Crimes Act*, the AFP officers concerned needed to *believe on reasonable grounds* that Dr Haneef had committed a particular offence. To continue to lawfully hold him without charge, they needed to maintain that belief throughout his detention.

If at some stage from the time of Dr Haneef's arrest until the time he was charged, some twelve days later, the arresting officer *ceased to believe on reasonable grounds* that Dr Haneef had committed a terrorism offence, he or she was required to release Dr Haneef.

Similarly, if at some stage during the time after Dr Haneef's arrest until the time he was charged, if the arresting officer ceased to believe on reasonable grounds that Dr Haneef's detention was necessary to preserve evidence or to complete the investigation, he or she was required to release him.

The Law Council does not claim to have access to all the material and evidence that police had access to at the time of Dr Haneef's arrest and detention.

However, from the material which is publicly available, it appears that the primary basis for arresting and detaining Dr Haneef was:

- his familial relationship with brothers, Sabeel and Kafeel Ahmed, (the latter of whom was directly involved in the failed London bombings and Glasgow airport attack); and
- the fact that, upon his departure from the United Kingdom, he gave a SIM card registered in his name to Sabeel (who was not alleged to have had any involvement in the attacks but to have withheld from police information which came to his attention after the attacks).

Without more, these facts do not disclose a criminal offence of any kind.

Without more, it is difficult to comprehend how these facts might found a lawful arrest and ongoing detention of a suspect.

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- (i) ensuring the appearance of the person before a court in respect of the offence;
 - (ii) preventing a repetition or continuation of the offence or the commission of another offence;
 - (iii) preventing the concealment, loss or destruction of evidence relating to the offence;
 - (iv) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;
 - (v) preventing the fabrication of evidence in respect of the offence;
 - (vi) preserving the safety or welfare of the person.

There are provisions in other Commonwealth and state laws which allow for a period of preventative detention.² However, in Dr Haneef's case police did not rely on those laws.

Nonetheless, in the Haneef case, a strong sense emerged that because of the nature of the criminal behaviour which might be at stake, (that is some sort of facilitation of wide scale terrorist attacks in the United Kingdom) the ordinary principles of criminal procedure as set out in the *Crimes Act* were somehow suspended.

The assumption appears to have been that, having established a nexus, however remote, between Dr Haneef and the attempted London bombings and Glasgow airport attack, police were not only authorised to, but in fact obliged to, detain Dr Haneef until they had definitely ascertained that he was not involved in the attack.

This is of concern to the Law Council because it suggests that the ordinary, basic principles of criminal procedure were suspended in the Haneef case – not necessarily because of exceptional powers invested in law enforcement officers, but rather due to the 'terrorist' flavour of the investigation.

Issues 1 and 2

Issues 1 and 2 in the Issues Paper concern the appropriateness or otherwise of the reasonable belief threshold in section 3W of the *Crimes Act*.

However, for the Law Council, the issue is not the content of section 3W(1) of the *Crimes Act* - it is the way the section was understood and applied by the AFP in the Haneef case.³

The problem is that Dr Haneef was arrested and detained under the *Crimes Act*, and terrorist offence or not, that Act does not allow police to lock a person up without charge *just in case* while they work out whether he or she is up to no good.

Section 3W does not lower the threshold test in terrorism cases. There are no provisions in the *Crimes Act* which suggest that the nature of the risk in terrorism cases is such that police may arrest and detain a person in circumstances where they do not already have reasonable grounds for believing he or she committed the offence.

Dr Haneef's arrest and detention should have been governed by the ordinary, basic principles of criminal procedure.

² See the preventative detention order regime contained in Division 105 of the *Criminal Code 1995 (Cth)*; a similar regime exists under the *Terrorism (Preventative Detention) Act 2005 (Qld)*. Recent media reports suggest that one reason police did not pursue the avenue of preventative detention orders in the Haneef case was that they had "insufficient information" to satisfy the test under the preventative detention order regime that detaining Dr Haneef would substantially assist in preventing an imminent terrorist attack from occurring. See 'Weakness of Mohamed Haneef case exposed' *The Australian*, 16 May 2008.

³ In respect of Issue 2, the Law Council prefers the statement that

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 Crimes Act 1914.

That such basic principles appeared to have been abandoned in the rush to investigate a suspected terrorist offence is of considerable concern to the Law Council and should be a focus of the present Inquiry.

Police powers of detention for terrorism offences under Part 1C of the *Crimes Act*

I turn now to consider the powers of police to detain persons suspected of terrorism offences under Part 1C of the *Crimes Act*.

Once a person has been arrested for a Commonwealth offence, Part 1C of the *Crimes Act* governs the period in which they can be detained for the purposes of investigation.

Section 23C sets out the purposes for which a person arrested for an ordinary offence may be detained.

Section 23CA deals specifically with people arrested for terrorism offences. It provides that once arrested for a terrorism offence, a person may be detained for the purpose of investigating (a) whether the person committed the offence for which he or she was arrested and/or (b) whether the person committed another terrorism offence that the investigating officer reasonably suspects person to have committed.

The maximum period for which a person may be detained under section 23CA, known as the 'investigation period', is four hours.⁴ However, this can be extended any number of times, until a total of 24 hours is reached.⁵ This is considerably longer than the 12 hours maximum for non-terrorist offences.

In either case, the calculation of the investigation period does not take into account so-called 'dead time' during which the police are unable to, or choose not to, question the suspect they have in detention.

Section 23CA(8) lists all the activities which are deemed to be dead time and are thus excluded from the calculation of the investigation period in terrorism cases. These include time taken for the suspect to sleep and time taken for the suspect to talk to his or her lawyer.

The last item on the section 23CA(8) dead time list is unique to terrorism cases. It provides that the investigation period on terrorism cases does not include any 'reasonable time', approved by a magistrate or justice of the peace, during which the questioning of a person is reasonably suspended or delayed. It is this aspect of the dead time provisions, and the process for applying for dead time on this ground, that give rise to particular concern.

The Law Council's concerns with these aspects of Part 1C of were confirmed by their practical application in the Haneef case.

History of the Provisions

⁴ NB, if the person in custody is a minor or Aboriginal, Torres Strait Islander, the maximum period is 2 hours

⁵ See section 23DA.

The investigation and detention of Dr Haneef was the first time the dead time provisions in Part 1C of the *Crimes Act*, designed specifically for terrorism cases, have been utilised in practice.

It is worth noting that when first introduced into Parliament, the dead time provisions were not intended to allow for indefinite periods of detention. The provisions were said to be needed to take account of international time zone differences and their impact on conducting investigations into terrorist offences with an international reach from Australia. At first a cap was placed on the allowable period of dead time based on the time zone differences, but this was later abandoned following the Government's purported adoption of a Senate Inquiry's recommendation to introduce some level of prior judicial approval for extensions of dead time periods.

In effect, as noted at Issue 9 in the Issues Paper, the absolute limit corresponding to the time zone difference in the original bill was traded for the open-ended "judicial officer" oversight in section 23CB in the Act - at significant cost to the civil liberties of an arrested person.

Problems with the provisions in action and the Law Council's recommendations for reform

The Law Council's primary concern with the dead time provisions is that they authorise a system of indefinite detention without charge, which is inconsistent with the general principles of Australian criminal law and contrary to Australia's human rights obligations under Article 9 of the *International Covenant of Civil and Political Rights*.

As noted in the Issues Paper, the police have no common law power to detain arrested persons for the purpose of furthering their investigations, notwithstanding any detrimental effects this may have on the proper investigation of criminal conduct.⁶ Any statutory abrogation of this fundamental principle of personal liberty must be clear, and should contain safeguards to compensate for the loss of liberty.

As illustrated by the Haneef case, the terrorism provisions of Part 1C of the *Crimes Act* abrogate this common law principle in the interests of efficient law enforcement, by permitting the detention of persons for prolonged – even indefinite – periods when investigating an offence.

The Haneef case confirmed the following concerns about the operation of the terrorism dead time provisions in Part 1C:

1. *Part 1C can authorise indefinite detention*

A person arrested for a terrorism-related offence can be held without charge for an indefinite amount of time. The 24 hour cap on the investigation period does not operate as a safeguard against prolonged detention without charge because allowance for reasonable 'dead time' means that questioning may be spread out over a period of weeks.

Further, there is no clear limit on how many times police can approach a judicial officer to specify certain time periods as dead time. In the Haneef case, the result was that even after the magistrate, upon each application, declared a finite period of allowable 'dead-time', the maximum

⁶ See *R v Iorlano* (1983) 151 CLR 678; *Williams v The Queen* (1986) 161 CLR 278. See also Issues Paper p. 4.

period of Dr Haneef's detention without charge remained unknown. This was because the possibility of further successful applications was never foreclosed.

2. Involvement of Judicial Officer no Safeguard to Indefinite Detention

The involvement of a judicial officer in determining what is "reasonable" dead time can not substitute for a finite limit on how long a person can be held without charge.

This is due in part to the difficulty a detained suspect faces in attempting to properly challenge assertions made by police due to their limited ability to obtain information and also to the low threshold test required to establish that the period of dead time sought is reasonable. For example, under subsection 23CB(5), in their application for a 'dead time' declaration police are able to cite routine investigative activities as supporting a need for 'dead time'.

Low threshold aside, it must nonetheless be noted that section 23CB still requires that in order to grant a dead time extension a judicial officer must be satisfied that the detention of the person is necessary to preserve or obtain evidence or to complete the investigation.

In the Haneef case this threshold was met on at least two occasions when dead time applications were granted. This can be contrasted to the findings of the magistrate, some two weeks later, on the bail application that Dr Haneef did not pose any significant risk or threat.

The Law Council considers the safeguard provided by the involvement of a judicial officer to be inadequate. We recommend that a maximum cap on the amount of dead time allowed to be taken into account should be imposed. As originally proposed, this should be limited to a period necessary to conduct inquiries across time zones. This recommendation is in line with the option presented at Issue 4 in the Issues Paper.

3. Determining a dead time application counts as dead time

The time taken to make and dispose of a dead time application automatically further extends the "dead time". Therefore, if the judicial officer hearing a 'dead time' application fails to make a decision on the spot, and instead adjourns the matter, even for a period of days, then this time itself counts as 'dead time'. This is what occurred in the Haneef case between 11 July and 13 July 2007.

This creates the real risk that detained suspects or their legal representatives may be deterred from raising points of law or challenging evidence on the basis that it may delay the presiding judicial officer's pronouncement on the application.

In light of this concern, the Law Council recommends that section 23CB be amended to preclude a judicial officer from adjourning an application made under section 23CB for more than a specified number of hours.

Alternatively, sub-paragraph 23CA(8)(h) should be amended to provide that any period of adjournment in excess of a certain number of hours is not dead time and therefore must be included in the calculation of the investigation period.

4. *The dead time provisions allow delay in charging a suspect*

Given the absence of a limit on the maximum period of detention without charge, police may significantly delay charging a suspect, even if at the time of arrest or after initial questioning they form an opinion that they have sufficient information to warrant a terror-related charge.

This can have serious consequences for a person's liberty because while a person is detained under section 23CA they have no opportunity to apply for and be released on conditional bail.

In Dr Haneef's case it appears that police charged Dr Haneef on the basis of information they had on the first day of his arrest, but delayed charging him for some 12 days. Therefore section 23CA was, in effect, primarily used to deny Dr Haneef a timely bail hearing.

In light of this concern, the Law Council recommends that section 23CB be amended to ensure that police are not able to extend the period of a suspect's detention without charge if they are already satisfied that sufficient information is available to support a terrorism charge against that suspect.

5. *The suspect's right to be heard can be circumvented in practice.*

In the period before Dr Haneef was legally represented it appears that the police may have appeared before the magistrate and that a dead time extension may have been granted without Dr Haneef being heard from.

It also appears that, even after Dr Haneef was legally represented, his lawyer, Mr Peter Russo, was not permitted to hear the evidence presented by police in support of their application for a declaration of dead time. Therefore, Mr Russo could not possibly effectively respond to that evidence.

If this is the case, it runs contrary to and undermines the effectiveness of sub-paragraph 23CB(7)(c) which is designed to give the suspect a right to be heard on the application.

To address these concerns, the Law Council recommends that section 23CB be amended to require that if a suspect is not legally represented when an application is made to extend the period of dead time, police should be required to produce the suspect in person so that the judicial officer determining the application can satisfy him or herself that that the suspect understands the nature of the application and has been given his or her opportunity to be heard on the application.

In this respect the Law Council supports the statement at Issue 5 that:

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

In light of the apparent failure to provide Dr Haneef's lawyer with the relevant evidence in at least once instance, the Law Council also supports the statement at Issue 6 that:

Effective representations cannot be made without all the evidence upon which the AFP rely being disclosed

6. Applications for dead time extensions should be made before a judge

Part 1C currently allows an application for the extension of a dead time period to be heard by a magistrate or JP. Given the significant impact the dead time provisions have on the liberty of the suspect, the Law Council believes consideration should be given as to whether the provisions should be amended to require that applications must be made to a Supreme Court Judge. This recommendation is in line with the statement at Issue 3 in the Issues Paper that:

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 is an insufficient safeguard and the scheme should be reformed to provide for oversight by a judicial officer, namely, a magistrate or a judge.

Issues 7 and 8

The Law Council's written submission to the Inquiry does not specifically address the matters raised in Issues 7 and 8 of the Issues Paper. These Issues concern the difference between the application process for an extension of the investigation period under section 23DA and the application for an extension of 'dead time' under section 23CB of the *Crimes Act*, and the tension, if any, between sections 3W and Part 1C of the *Crimes Act*.

While I don't intend to address these Issues in detail in this presentation, both these Issues highlight the exceptional nature of the terrorism provisions in Part 1C of the *Crimes Act*.

The terrorism provisions in Part 1C depart markedly from common law principles and from the other provisions of the *Crimes Act* by significantly extending the grounds on which a person can be detained and the length of that detention.

For this reason, it is critical that appropriate safeguards are provided in the legislation – and, perhaps most importantly - that when prescribed, such safeguards are actually adhered to in practice.

Executive Power to Cancel a Visa – Interaction between Migration and Criminal Law

For the Law Council, the Haneef case presents a critical opportunity to examine and review the interaction between migration law and criminal law and the impact this can have on the fundamental rights of individuals, particularly non-citizens of Australia.

Section 501 and the Character Test

You will recall that immediately after Dr Haneef was granted bail on 16 July 2007 in relation to the terrorist organisation offence with which he was charged, former Immigration Minister, the Hon. Kevin Andrews MP, cancelled Dr Haneef's 457 work visa under subsection 501(3) of the *Migration Act*.⁷

⁷ Sub-section 501(3) of the *Migration Act* gives the Minister the power to cancel a person's visa 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.

The revocation of Dr Haneef's visa exposed him to the risk of removal from Australia. However, this did not occur because a Criminal Justice Stay Certificate was subsequently issued by the Attorney-General to stay Dr Haneef's removal until the charges against him were disposed of.⁸

The Minister said he had revoked Dr Haneef's visa on the grounds that he "reasonably suspected" that Dr Haneef had an association with people involved in terrorism and for that reason failed to satisfy the character test in section 501 of the *Migration Act 1958 (Cth)*. Specifically, the Minister cancelled Dr Haneef's visa because he reasonably suspected that Dr Haneef had an association with others, namely Sabeel and Kafeel Ahmed, whom the Minister reasonably suspected had been involved in criminal conduct.

In reaching his decision, the Minister acted on a belief that it was sufficient for him to be satisfied that Dr Haneef had had some form of association with his second cousins who were implicated in the UK terrorist plot, even if that association was long past, or fleeting, or entirely innocent, or based merely on family ties.

Dr Haneef successfully appealed the decision to the Federal Court.⁹

Justice Spender found that the Minister had misconstrued the association limb of the character test and therefore failed to apply it correctly. Justice Spender found that the test in section 501(6)(b) required that there be some nexus between the visa holder and the criminal conduct suspected of the person or group with whom the visa holder has an association. In effect, the Federal Court found that to fail the character test, association must reflect critically on the character of the person.

The Minister appealed the decision to the Full Bench of the Federal Court. The appeal was rejected and Dr Haneef's visa reinstated.

The Issues Paper prepared for today considers the Minister's power to cancel a visa on the ground that the visa holder has been associated with a terrorist organisation. At Issue 10 it is suggested as an option that

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 request association. Then the Minister can exercise his or her discretion as

Under section 501(6), a person is taken *not* pass the character test if, among other grounds,:

- 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;

⁸ On 27 July 2007, the CDPP came to a view that there was no prospect of making out any offence against Dr Haneef in respect of what was alleged against him, either on the available information or the information likely to be produced from pending investigations.

The Minister stated that these developments made no difference to his previous decision to cancel Dr Haneef's visa, but upon his release from detention in the criminal justice system the Minister allowed Dr Haneef to be transfer to residential detention. Twenty- four hours later, Dr Haneef returned to India.

⁹ *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273

to whether the association reflects adversely on the character of the visa holder. If it does, the Minister will cancel the visa.¹⁰

The Law Council agrees with the alternative option posed in the paper that this does not represent an appropriate balance between civil liberties and the national interests and is at odds with the findings of the Federal Court.

For the Law Council, the decision of the Federal Court in the Haneef case that the Immigration Minister does not have the power to cancel a person's visa on the basis of an innocent association is an important one.

Nonetheless, the decision of the Federal Court in the Haneef case has far from remedied all the problems with the operation of section 501 of the Migration Act.

Perception of Impropriety

Importantly, the decision did not remove the perception of impropriety that surrounded the Minister's decision to cancel Dr Haneef's visa.

The timing and effect of the Minister's visa cancellation decision in the Haneef case, together with his many partial and political public comments, created an appearance of interference in the judicial process.

The public's faith in the integrity of our judicial system is undermined when a Minister appears to interfere in, or arbitrarily override, the outcome of judicial proceedings in a manner inconsistent with the separation of powers.

When an accused person's visa is cancelled because he or she is deemed to have failed the "character test" this has obvious implications for the presumption of innocence. This is particularly so where the Minister responsible for the visa decision makes it publicly known that his decision was based, in part, on secret information not otherwise available to the court or the defendant's lawyers. Had the charge against Dr Haneef been pursued, the Law Council is of the view that the interaction between migration law and criminal law in this case would have created a real risk that Dr Haneef would not have received a fair trial.

For that reason, the Law Council recommends that when there are criminal charges pending against a non-citizen, the Minister should be specifically required to consider the impact that any decision to cancel that person's visa will have on his or her ability to obtain a fair trial, before making a final decision.

Problems with the Terrorist Association Offences

I would now like to turn to consider what the Haneef case has told us about the content and application of the offence with which Dr Haneef was charged – namely providing support to a terrorist organisation.¹¹

¹⁰ Issue 10 at p. 9.

¹¹ The details of the charge were as follows:

Although the Issues Paper does not directly consider the content and application of this offence, it does consider more broadly the issue of charging a person for a terrorism offence.

The Law Council acknowledges that the Haneef case may well have highlighted issues regarding the differing responsibilities between the AFP and the Commonwealth DDP when charging and prosecuting persons for terrorism offences and is pleased to see these issues are receiving the attention of the Inquiry.

However, for the Law Council, the primary concern is the nature of the offence with which Dr Haneef was charged, and the implications such an offence has for the use of the exceptional investigation and detention powers in the *Crimes Act* and the *Criminal Code*.

The concerns previously expressed by the Law Council and others about the terrorist organisation offences in Division 102 of the *Criminal Code* were proven to be well founded in the Haneef case.

In particular, the case confirmed that because the terrorist organisation offences do not focus on individual conduct, they potentially afford police very wide latitude to intrude upon people's liberty, based purely on who they know and interact with.

The case also demonstrated that while the intent element of the offences may operate to limit the risk that entirely innocent interaction will be subject to criminal sanction, this element is easily overlooked by police when deciding whether to arrest, question, search and detain.

For example, the publicly available information indicates that Dr Haneef was arrested, questioned at length and detained for just over three weeks on the basis of the following evidence:

- On leaving the United Kingdom Dr Haneef gave a mobile phone SIM card to his second cousin, Sabeel Ahmed, so that he could utilise the unused credit.
- Approximately one year later, Sabeel's brother, Kafeel Ahmed, who Dr Haneef had also met on occasion in the United Kingdom, was involved in a failed London car bombing and later drove a burning jeep with explosives into the Glasgow airport.
- Sabeel himself was not alleged to have played any role in the planning or execution of the failed London bombing or the Glasgow attack, nor was he alleged to have any prior knowledge of either incident. He was, however charged (and later convicted) with failing to

On or about the 25th of July 2006 in the United Kingdom, Mohamed Haneef did, contrary to section 102.7 (2) of the Criminal Code (Cth) intentionally provide resources, namely a Subscriber Information Module (SIM) card, to a terrorist organisation consisting of a group of persons including Sabeel AHMED and Kafeel AHMED, being reckless as to whether the organisation was a terrorist organisation, and as to whether that resource would help the organisation engage in an activity described in paragraph (a) of the definition of terrorist organisation in Division 102 of the Criminal Code (Cth).

In order to secure a conviction under subsection 102.7(2) the prosecution must prove beyond reasonable doubt that:

1. the defendant intentionally provided resources to an organisation,
2. the resources would help the organisation engage in preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs) and the defendant was reckless as to that;
3. the organisation is a terrorist organisation ; and

the defendant is reckless as to whether the organisation is a terrorist organisation.

pass on to police information about the attacks which he received in an email from his brother sent before, but received *after*, the Glasgow attack.

- Dr Haneef was not alleged to have played any role in the planning or execution of the failed London bombing or the Glasgow attack, nor was he alleged to have any prior knowledge of either incident.
- There is no evidence in the public domain to suggest that the SIM card was used in connection with the London or Glasgow incidents.

When this publicly available information is compared with the elements of the offence with which Dr Haneef was charged, questions immediately arise:

- Where is the evidence that Sabeel Ahmed was part of an organisation that was directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act?
- Where is the evidence that Dr Haneef knew that in providing the SIM card to Sabeel he was in fact providing it to an organisation of which Sabeel was a part?
- Where is the evidence that Dr Haneef was aware of the substantial risk that this organisation was directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act?
- Where is the evidence that Dr Haneef was aware, when he handed over the SIM card, of the substantial risk that it would help this organisation to directly or indirectly engage in, prepare, plan, assist or foster the doing of a terrorist act?

On the basis of the publicly available information, it appears that Dr Haneef spent three weeks in custody as a consequence of very ordinary, unremarkable familial interaction.

This would have been much less likely to occur if the offence provisions that police had to rely upon to arrest and continue to detain Dr Haneef had demanded a more substantive nexus between Dr Haneef's conduct and the commission of a terrorist act.

The Law Council has always argued that the terrorist organisation offences in Division 102 should be repealed.

However, if the terrorist organisation offences provisions are not repealed, the Law Council recommends that the elements of the terrorism association offences be more tightly defined. One way to achieve this would be to amend the definition of a terrorist organisation in 102.1 so that only listed, proscribed organisations are included within the definition.

If the terrorist organisation offences are not repealed, section 23CB of the *Crimes Act* should be amended to specifically require that the judicial officer hearing the dead time or extension application must be satisfied that the investigating officer has a belief on reasonable grounds that a terrorist offence has been committed and that in forming that belief the investigating officer has turned his or her mind to both the conduct and intent elements of the offence.

The Law Council is of the view that there is a need to clarify the elements and limits of the terrorist organisation offence – which would in turn assist in ensuring investigating officers’ correctly understand whether and when to invoke their exceptional investigation and detention powers under the *Crimes Act* and the *Criminal Code*.

Conclusion

The Haneef case had three important implications for the Law Council:

First, it confirmed our fears that the provisions inserted into the *Crimes Act* and the *Criminal Code* to broaden the detention powers of law enforcement officers and to widen the type of activity classed as terrorist *do in fact* operate to severely restrict individual rights. It confirmed that the existing provisions require further safeguards in order to prevent unduly harsh results.

Second, the Haneef case demonstrated that it is not just the content of the laws that we should be worried about, but the way these laws are understood and applied by the officers responsible for their implementation. Even where the provisions are not exceptional (such as section 3W), when applied in the shadow of Australia’s terrorism laws they can take on an exceptional character and lead to an erosion of individual rights.

Finally, the Haneef case demonstrates that concerns about the operation and application of Australia’s terrorism do not go unnoticed by the Australian community - as evidenced by this Inquiry and your attendance today.

The Law Council believes that robust public scrutiny is the key to ensuring Australia’s terrorism laws strike the right balance between community protection and respect for individual rights.

Without such scrutiny, the hopeless case against Dr Haneef would, almost certainly, have been abandoned or dismissed by a court at some point – but perhaps not for weeks, months or even years.

Some have lamented the nature and timing of the public scrutiny bought to bear on law enforcement and intelligence agencies in the course of the Haneef case and this Inquiry.

However the Law Council believes that no government authority, particularly those that exercise coercive and intrusive powers, is above scrutiny.

If this places pressure and unease for those in power, then it ought to be welcomed. It can only result in stricter adherence to the letter of the law and an ongoing commitment to improved professional standards – things on which our community safety depends.

In the face of the threat of terrorism, the community has been forced to accept increased powers and the loss of certain freedoms. That is the price we have been asked to pay. The price the government agencies must pay for assuming greater powers is an increased level of public scrutiny of their actions.

The Haneef case also demonstrates the need for comprehensive independent review of all of Australia’s terrorism laws. The Law Council has recently been involved in a Senate Inquiry into a Bill that would establish the position of an Independent Reviewer of terrorism laws, and is of the view that regular, comprehensive evaluation of the operation and effectiveness of Australia’s terrorism laws is necessary to protect against unjustified executive intrusion into individual rights.

Law Council Concerns with the lack of a statutory framework for the Clarke Inquiry

The Law Council has every faith that this Inquiry will deliver a thorough and independent report on the conduct of the Haneef case.

However, in recent months, the Law Council has been concerned that not all information requested of Government agencies was being provided to the Inquiry and that a large part of the information gathered cannot be made public.

The reality is that under the current arrangements, what information is provided to the Inquiry and on what terms is a matter entirely within the control of the agencies involved.

For this reason, on 31 July 2008 the Law Council wrote to the Commonwealth Attorney-General urging him provide the Inquiry with the necessary powers to ensure that it is able to access all relevant information on terms which are provided for by law, rather than on terms which are dictated by the parties involved.

The Attorney General responded to this letter, indicating that the Government considered the current form of Inquiry to be appropriate, and unless greater powers were requested, he would not be providing the Inquiry with a statutory framework.

The Law Council maintains its concerns and will continue to monitor this situation.