

HUMAN RIGHTS

The Haneef Case and an independent reviewer of terrorism law

MARK RIX considers the creation of the Office of National Security Legislation Monitor

On 23 December last year, the Rudd Government tabled in Parliament the Honourable John Clarke's Report of the Inquiry into the Case of Dr Mohamed Haneef.¹ In fact, it tabled only Volume One, the public report. Volume Two, which contains what Mr Clarke describes as 'supplementary material' including 'sensitive or classified material', was not tabled and has not yet been made public (if it ever will be). Before briefly considering the public report's recommendations and the Government's response, a quick run down of the details of the Haneef case and setting up and conduct of the Clarke inquiry will be provided.

Mohamed Haneef, an Indian doctor then working at the Gold Coast hospital, was arrested on 2 July 2007 and held without charge for 12 days under provisions of Australia's anti-terrorism legislation (ss 23DA, 23CB *Crimes Act*). On 14 July he was charged under s 102.7(2) of the *Commonwealth Criminal Code* with the offence of recklessly providing support to a terrorist organisation on the grounds that his mobile phone Subscriber Information Module (SIM) card was connected to failed terrorist attacks in Britain. Dr Haneef was granted bail by a Brisbane magistrate two days after being charged, but within hours of the magistrate's ruling the then Immigration Minister Kevin Andrews cancelled Haneef's work visa because he failed the character test under s 501(3) of the *Migration Act 1958* (Cth), preventing his release from custody. The following day Attorney-General Philip Ruddock issued a Criminal Justice Stay Certificate under s 147 of the *Migration Act* which stopped Haneef from being deported and required him to remain in detention while the criminal proceedings against him continued.

Haneef was held in immigration detention and later home detention for nearly two weeks. On 27 July, the Commonwealth Director of Public Prosecutions withdrew the charge against Dr Haneef on the basis that there was insufficient evidence to support a conviction, and the Attorney-General cancelled the Criminal Justice Stay Certificate. He was allowed to return voluntarily to India on 28 July despite his visa remaining cancelled. Justice Spender of the Federal Court set aside the visa cancellation decision on 21 August 2007, a decision upheld by the Full Bench of the Federal Court in December 2007 dismissing an appeal by Minister Andrews.²

In March 2008 the Rudd Government announced that a judicial inquiry into the Haneef affair would be conducted by the Honourable John Clarke QC, a retired NSW Supreme Court Judge. At the top of its terms of reference, the inquiry was asked to examine and report on 'the arrest, detention, charging,

prosecution and release of Dr Haneef, the cancellation of his Australian visa and issuing of a criminal justice stay certificate.' Among its other terms of reference, the Clarke inquiry, like the AFP-initiated Street Review into the failed case of terror suspect Izhar Ul-Haque³, was to examine and report on improving co-operation, co-ordination and 'interoperability' between Commonwealth agencies including the AFP, ASIO and the Commonwealth Director of Public Prosecutions.

The Clarke inquiry was for the most part conducted in private (the opening day of the inquiry was its only public hearing), did not have the power to compel witnesses to give evidence or face cross-examination, and witnesses were not given indemnity against defamation or self-incrimination. On 31 August 2008, the AFP announced that it had formally abandoned its investigation of Dr Mohamed Haneef because there was no evidence against him. The total cost of the AFP's investigation of Haneef was around \$8 million.⁴

In all, the Clarke inquiry made 10 recommendations, the most important of these being 'that consideration be given to the appointment of an independent reviewer of Commonwealth counter-terrorism laws.' Before considering this recommendation and the Government's response to it in a little more detail, it should be noted here that the Clarke Inquiry report was not the sole counter-terrorism document tabled in the Federal Parliament on 23 December 2008. On the same day, the Government also tabled, in the words of Attorney-General Robert McClelland, 'the Rudd Government's comprehensive response to outstanding reviews of national security legislation from the term of the former Government'. Specifically, the Government responded to the Australian Law Reform Commission's 'Fighting Words: A Review of Seditious Laws in Australia' (tabled 13 September 2006), the 'Review of Security and Counter-Terrorism Legislation' by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) (tabled 4 December 2006) and the PJCIS's 'Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code' which had been tabled on 20 September 2007.

The Government accepted the Clarke inquiry's recommendation to give consideration to the appointment of an independent reviewer of Commonwealth counter-terrorism laws, but gave its reasons for doing so in its Response to the PJCIS's 'Review of Security and Counter-Terrorism Legislation'.⁵

The PJCIS review called for the 'Government to appoint an independent person of high standing as an Independent Reviewer of terrorism law in Australia', and recommended that the Independent Reviewer

REFERENCES

1. The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef is available at <haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Report> at 9 February 2009.
2. *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273; *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203.
3. The Street Review: A Review of Interoperability between the AFP and its National Security Partners, available at <afp.gov.au/_data/assets/pdf_file/71833/The_Street_Review.pdf> at 9 February 2009.
4. ABC Radio, 'Ruddock defends AFP in Haneef inquiry', PM, 1 September 2008, <abc.net.au/pm/content/2008/s2352290.htm> at 9 February 2009.
5. Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (2006) <aph.gov.au/house/committee/pjcis/securityleg/report.htm> at 9 February 2009.



be able to set his or her own priorities and be given access to all 'necessary information'. The Independent Reviewer would be required to provide an annual report to Parliament. In a related recommendation, the PJCIS called for an amendment to the *Intelligence Services Act 2001* (Cth) requiring the PJCIS to examine the reports tabled in Parliament by the Independent Reviewer.

In its response, the Government stated that a new statutory office in the Prime Minister's Portfolio would be established to be known as the 'National Security Legislation Monitor' who would be required to report regularly to Parliament. The Monitor would enable ongoing review of national security laws to be conducted in a more comprehensive, and less *ad hoc* and piecemeal, fashion than had been possible in the past. This would in turn permit 'ongoing improvement' of the laws.

The Government's acceptance of this recommendation is to be commended. Appointment of an *independent* Monitor by statute, and the requirement that they report to Parliament on a regular basis, will be a small but hopefully significant first step towards removal of the ambiguities, sloppy definitions and catch-all offences that are contained in Australia's counter-terrorism laws and which made possible the whole, sorry Haneef 'affair'. To be sure, a number of these issues are dealt with on a largely *ad hoc* basis in the Government's responses to the PJCIS and Australian Law Reform Commission inquiries and reviews that were tabled on the same day as the Clarke inquiry report and the Government's response to it. However, as the Government acknowledged, a much more wholesale and holistic approach to the reform and improvement of Australia's counter-terrorism legislation is required than could be adopted by these inquiries and reviews. This is why a truly independent Monitor of national security legislation is needed.

The Monitor cannot simply be asked to wait for referrals by parliamentary committees or the like before setting about the task of reviewing the legislation and recommending improvements to bring it more into line with human rights, due process and criminal justice standards. Unfortunately, the Monitor is no substitute for the political will required to put her/his recommendations and improvements into effect. But that said, the creation of the office should at least provide a reliable rear defence when political will has to be demonstrated by the Government in Parliament and in public debate.

Beyond the Clarke inquiry report and the Government's response to its recommendations, the Haneef case is important in other key respects. It demonstrates how the making of a crude association between Islam, Muslims and terrorism — an important element of the political climate created by the Howard Government's counter-terrorism legislation — permitted the AFP to perpetrate abuses of human rights and due process. And it shows how, at the very time when social cohesion and inclusiveness — Australia's best defence against home-grown terrorist violence — is most required, the political climate and the abuses that it allowed to occur, threatened to sow the seeds of division, suspicion and cynicism through the Australian community.

For these reasons, Australia can ill afford to have a repeat of the Haneef affair. The appointment of an independent National Security Legislation Monitor hopefully will not only bring about significant and much-needed improvements to Australia's counter-terrorism legislation, it may also avert the recurrence of such a debacle in future.

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