

# OLD DOGS, NEW TRICKS

## Public interest lawyering in an 'Age of Terror'

ALYSIA DEBOWSKI

Since 11 September 2001, national security and terrorism have been at the forefront of Australian domestic politics. Laws regulating crime, policing, and the collection of intelligence have been repeatedly amended to address the threat of terrorism. These changes have severely limited the legal avenues available to terror suspects. This article will argue that the role of public interest lawyers must change to respond to these developments. It contends that public interest lawyers must now do more than use the law to pursue their client's interests. Public interest lawyers must now seek alternative means of securing a positive outcome for their client. The case of Mohamed Haneef will be used to illustrate these developments and emphasise the growing importance of the media and unconventional tactics to public interest lawyers.

### Public interest lawyering

'Public interest lawyering' is a contested concept. 'Cause lawyers' have been described as those who use their legal training and skills to 'challenge prevailing conditions'<sup>1</sup> or build a 'good society'.<sup>2</sup> Similarly, public interest lawyers generally choose their clients and legal work with the intention of pursuing broader societal change.<sup>3</sup> The prevailing conception of a public interest lawyer is someone who advocates for social change and is committed to a cause rather than seeking material reward.<sup>4</sup>

Criminal lawyers are rarely included in studies of public interest lawyering. However, many criminal lawyers are driven by ideological motives, seeking to use their work to achieve change and protect individuals from governments that overstep their legitimate powers. These motivations reflect the principles of public interest lawyering.

Criminal lawyers defending those accused of terrorist offences are often associated with public interest lawyering. Fear of terrorism has led to governments being granted increasing discretion to detain, question and charge terror suspects. Lawyers defending terror suspects may be motivated by a concern to ensure that governments do not overstep their powers in implementing these laws. Further, these lawyers often seek a better society, where individuals are not suspected of terror offences predominantly on the basis of their religion or ethnicity. Like criminal lawyers more broadly, the motivations of criminal lawyers defending terror suspects can reflect the principles of public interest lawyering.

### The restriction of traditional legal avenues

Recent legislative changes have created a challenging environment for public interest lawyers. As a liberal democratic nation, Australia has generally aspired to uphold the rule of law and other civil and political rights. Australian citizens have traditionally been protected from the government by the right to silence, freedom from arbitrary detention and the right to a fair hearing in a court of law. However, these principles are not explicitly protected by the *Australian Constitution* or an Australian Bill of Rights. Rather, they are subject to amendment or abrogation by Parliament.

By 2004, the Australian Federal Parliament had already passed 17 security-related Acts to combat terrorism.<sup>5</sup> These reforms have significantly encroached upon individual rights and freedoms. Further, they have dramatically increased the discretionary power of the executive. It is beyond the scope of this article to canvass legislative changes made in response to terrorism.<sup>6</sup> However, overall these reforms have severely limited the capacity of public interest lawyers to use legal avenues to protect their clients' rights. As a result, traditional legal avenues may be an unsatisfactory and frustrating means of pursuing a client's interests. The limitations experienced by public interest lawyers as a result of these reforms are illustrated by the Haneef case.

### The Haneef Case

#### Factual background

On 2 July 2007, Dr Mohamed Haneef was arrested by the Australian Federal Police (AFP) in connection with the attempted bombing of Glasgow Airport. Haneef had allegedly provided a mobile phone SIM card to his second cousin who was suspected of involvement in the bombing. Haneef was detained without charge for 12 days.

On 14 July 2007, Haneef was charged with intentionally providing resources to a terrorist organisation and being reckless as to whether the organisation was a criminal organisation. Haneef was granted bail on 16 July 2007. However, the Minister for Immigration and Citizenship revoked his working visa that afternoon on the basis that he reasonably suspected that Haneef had failed the character test. A Criminal Justice Stay Certificate was issued by the Attorney-General on 17 July 2007 to prevent Haneef from being deported in the interests of the administration of criminal justice. This effectively prevented Haneef from being released

#### REFERENCES

1. Austin Sarat and Stuart Scheingold, 'State Transformation, Globalization, and the Possibilities of Cause Lawyering: An Introduction' in Austin Sarat (ed), *Cause Lawyering and the State in a Global Era* (2001) 3, 8. See also Margareth Etienne, 'The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defence Lawyers as Cause Lawyers' (2005) 95 *The Journal of Criminal Law and Criminology* 1195, 1196.
2. Etienne, above n 1, 1225.
3. Sarat and Scheingold, above n 1, 8; Joel Handler, Ellen Hollingsworth and Howard Erlanger, *Lawyers and the Pursuit of Legal Rights* (1978) 82.
4. Howard M. Erichson, 'Doing Good, Doing Well' (2004) 57 *Vanderbilt Law Review* 2087, 2088.
5. Jenny Hocking, 'Protecting Democracy by Preserving Justice: Even for the Feared and the Hated' (2004) 27 *University of New South Wales Law Journal* 319, 321.
6. For a concise (albeit political) description of these amendments, see Philip Ruddock, 'Australia's Legislative Response to the Ongoing Threat of Terrorism' (2004) 27 *University of New South Wales Law Journal* 254.

until he was deported. Haneef's deportation was stayed awaiting trial.

The charges against Haneef were dismissed by the Brisbane Magistrates Court on 27 July 2007 due to a lack of evidence. The Criminal Justice Stay Certificate was cancelled on 27 or 28 July 2007. Haneef's passport was returned and he flew to India on 28 July 2007. In all, Dr Haneef spent 25 days in custody.

On 13 March 2008 the newly elected Federal Labor government announced an inquiry into the Haneef case to be led by John Clarke QC. The inquiry's report was tabled in Parliament on 23 December 2008.

### Legal strategies

Haneef's legal team pursued numerous legal avenues to secure his release from custody. However, these legal strategies were of limited usefulness in securing Haneef's interests in a timely fashion.

While being held without charge, Haneef's lawyers challenged the AFP's motion to extend the period of Haneef's detention. However, Haneef's lawyers were removed from the hearing of the motion while the presiding judge heard confidential information.<sup>7</sup> Upon their reentry to the court room, an order was made allowing the period of detention to be extended.<sup>8</sup> Haneef's lawyers were not informed of the evidence against their client. This clearly inhibited the use of traditional court procedures to pursue a client's interests.

Once charges were laid, Haneef's lawyers challenged the charge as being invalid for not constituting an 'offence in law'. An application was filed in the Brisbane Magistrates Court for the charge to be dismissed. However, the AFP was unwilling to change the charges before their scheduled court appearance date. In response to this resistance, Haneef's lawyers resorted to using public pressure through the media to reinforce their legal challenge.<sup>9</sup>

Haneef's legal team applied for and obtained bail for Haneef, despite not having access to confidential information supporting the charges against him. However, this success was undermined by the Minister revoking Haneef's visa on character grounds. As a result, Haneef's detention continued despite bail being granted, as he would be taken into immigration detention once released from police custody on bail.

Following the Minister's decision, Haneef's lawyers challenged the revocation of his visa in the Federal Court of Australia. An application was filed with the Court on 18 July 2007. Despite legal obstacles to the application, such as the privative clause in the *Migration Act 1958* (Cth), which prevented judicial review of the merits of the Minister's decision,<sup>10</sup> and s 503A of the Act, which prevented the court and Haneef's legal team from accessing some information supporting the Minister's decision,<sup>11</sup> the legal team successfully argued that the Minister applied the wrong test in revoking Haneef's visa, rendering the decision beyond the Minister's power under the Act and invalid.

The Minister lodged an appeal of the decision to the Full Court of the Federal Court of Australia.<sup>12</sup>

On appeal, the Full Court upheld the lower court's decision, and confirmed that the Minister had applied the wrong test in revoking Haneef's visa.

However, the Court at first instance confirmed that the Minister was entitled to cancel Haneef's visa on the material before him. As a result, the Minister could have used the correct test to validly re-make the same decision to cancel Haneef's visa. Fortunately for Haneef, by the time the decision on appeal was handed down, the Labor Party had won Federal government, and a new Minister had been appointed. The new Labor government has indicated that it has no intention of revoking Haneef's visa.

Though Haneef's legal team employed numerous legal strategies on his behalf, legislative reform clearly hindered their legal efficacy. Despite being very successful in their legal strategies, Haneef's lawyers failed to obtain timely relief for their client. Indeed, the Full Court appeal was only resolved on 21 December 2007, over five months after Haneef was first detained. As a result, non-legal strategies became an essential component of the legal team's overall approach.

### Alternative avenues for public interest lawyers

Writing in 1997, Sevilla declared that '[d]efence lawyers are largely powerless ... [t]heir only power ... is the skill of persuasion.'<sup>13</sup> Public interest lawyers have traditionally used litigation as a key means of persuading the government and community that change is necessary. Recent legislative reforms have severely limited the availability and effectiveness of litigation as a public interest strategy. Public interest lawyers must adjust and respond to these changed circumstances. It is essential that public interest lawyers consider alternative avenues for pursuing their clients' interests. Rather than solely operating in the legal sphere, public interest lawyers may need to consider legislative, judicial, executive, administrative, media and grassroots strategies.

### The media

#### The importance of using the media

Following these legislative changes, public interest lawyers may have little choice but to use the media to pursue their clients' interests. The growth of executive discretion has increased the strategic importance of the media. Whether a client is investigated, detained or charged is increasingly left to the discretion of government officials. Once the decision has been made, it may be difficult or impossible to challenge in court. However, an unsympathetic Minister, police officer or prosecutor may reconsider their stance when confronted by a public outcry or showing of support for a client, particularly where the case is of political importance. The media may be used to influence discretionary decisions in a client's favour. In a scenario where a public interest lawyer is legally immobilised by restrictive laws, the media may be one of the only options available to pursue a client's interests.

7. Law Council of Australia, *Policing in the Shadows of Australia's Anti-Terror Laws* (2008) 8. For the legislative basis for this action, see *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 29(3), 38(3); Andrew Palmer, 'Investigating and Prosecuting Terrorism: The Counter-Terrorism Legislation and the Law of Evidence' (2004) 27 *University of New South Wales Law Journal* 373, 392-3.

8. Law Council of Australia, above n 7, 8.

9. Australian Broadcasting Corporation, 'Haneef Charge not an Offence, Say Lawyers', *The World Today*, 25 July 2007; 'Mistake in Wording of Haneef Charge, Lawyer Says', *ABC Premium News* (Sydney), 25 July 2007; Australian Broadcasting Corporation, 'The Haneef Brief: Criminal Defence Lawyer, Peter Russo', *Sunday Profile*, 26 August 2007.

10. *Migration Act 1958* (Cth) ss 338(3)(c), 474(3)(b).

11. *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40, 55, 56, 93.

12. *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414.

13. Charles Sevilla, 'Criminal Defence Lawyers and the Search for Truth' (1997) 20 *Harvard Journal of Law and Public Policy* 519, 519.

## Significant differences in state and territory professional conduct rules may complicate a public interest lawyer's use of the media to pursue a client's interests.

### Use of the media in the Haneef case

The Haneef case illustrates that the use of the media can become an essential tool to further a client's interests. Haneef's legal representatives conducted an extensive media campaign on his behalf. The campaign sought to create public sympathy for Haneef's situation and to balance leaked information that cast Haneef in a negative light and influence public officials in the exercise of their duties.

Effective use of the media significantly furthered Haneef's interests. Media coverage of the case likely prompted the release of further information to Haneef's legal team. The transcript of Haneef's second interview with police and the legal advice on which the Minister based his decision to revoke Haneef's visa were only provided to Haneef's legal team and the public following extensive media debate on the issue.<sup>14</sup>

The legal team also used the media to monitor the case's progress. While information about the case was only selectively provided to Haneef's legal team, a substantial amount was allegedly leaked to the media. As a result, Haneef's solicitor Peter Russo 'used the media a lot to ascertain what was going on' and entered Haneef into a Google media alert to ensure he had access to all public information about his client.<sup>15</sup>

This use of the media was particularly pertinent in relation to the Minister's cancellation of Haneef's visa. Haneef's legal team was informed by the media that the Minister would be holding a press conference in relation to Haneef's visa. Without strong links to the media, Haneef's legal team may have remained unaware of the Minister's announcement and would have had imperfect information when deciding whether to post bail.

The media was also used to effectively counter the campaign of 'smear and innuendo' conducted by the government against Haneef. According to Russo, Haneef was subject to a 'trial by media', with both the government and media demanding that Haneef publicly rebut circumstantial evidence that seemed to implicate him. Haneef's departure for India following his release was depicted in the media and by the Minister as a sign of his guilt despite the reality being that the Department offered Haneef the option of either remaining in detention or returning to India. Chat room conversations released by the AFP included questionable translations and were taken out of context in a way that seemed to implicate Haneef in terrorist activity. Haneef's lawyers were the only ones capable of

'squaring the ledger' and correcting media reporting of the case<sup>16</sup> while Haneef was being detained.

Intense media scrutiny probably contributed to the Director of Public Prosecutions' decision to drop the charges against Haneef. Favourable media coverage may also have discouraged the Director of Public Prosecutions from laying further charges, despite political pressure to do so.

It is likely that the media coverage also influenced how the new Federal Labor government has approached the Haneef case. The government has made it clear that it will not revoke Haneef's visa. Further, John Clarke QC was appointed to conduct an inquiry into the conduct of the Haneef case. The conduct of the AFP has also been investigated through the Street review.<sup>17</sup> These public initiatives implicitly support the Haneef legal team's campaign by implying that the conduct of government authorities in relation to the Haneef case needs to be independently examined.

### Challenges in using the media

Effective use of the media may pose significant challenges for public interest lawyers. Use of the media may contravene traditional notions of legal ethics. The legal profession has traditionally held the belief that a lawyer should not 'argue her case outside the courtroom'.<sup>18</sup> Lawyers have traditionally operated in the courts, not in the realm of public opinion. As a result, use of the media may cause consternation amongst those adopting a more traditional view of the legal profession's role.

This concern is echoed by the *Model Rules of Professional Conduct and Practice* produced by the Law Council of Australia. Under rule 19 of the *Model Rules*, legal practitioners must generally not publish or take steps to publish information regarding current legal proceedings in which they are engaged. Legal practitioners may only answer unsolicited questions from journalists or express their clients' position if there is no possibility of a jury trial. Even in this scenario, the practitioner's comments must not appear to express the practitioner's own opinion. Legal practitioners may not publicise material that is calculated or likely to a 'material degree' to prejudice the administration of justice or diminish public confidence in the administration of justice. The substance of rule 19 has been adopted by the Law Societies of South Australia and the Northern Territory in their professional conduct rules.<sup>19</sup>

14. Hedley Thomas, 'Chat Deliberately Misread: Haneef', *The Australian* (Sydney), 3 August 2007, 2; Craig Skehan and Cosima Marriner, 'Haneef May Still Face Charges: Keely', *Sydney Morning Herald* (Sydney), 2 August 2007, 7; 'Haneef Revelations Nothing New, Lawyer Says', *ABC Premium News* (Sydney), 1 August 2007; Margaret Wenham, 'Lawyers Scoff at "New" Evidence', *The Courier Mail* (Brisbane), 1 August 2007, 4; 'Haneef Visa Info May be Released', *ABC Premium News* (Sydney), 30 July 2007.

15. Email from Peter Russo to Alysia Debowski, 17 October 2007.

16. Interview with Stephen Keim (Telephone interview, 23 October 2007).

17. Sir Lawrence Street et al, *The Street Review: A Review of the Interoperability between the AFP and its National Security Partners* (2008).

18. Jonathan Moses, 'Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion' (1995) 95 *Columbia Law Review* 1811, 1811.

19. Law Society Northern Territory, *Rules of Professional Conduct and Practice* (2002) r 17.43–17.44; Law Society of South Australia, *Rules of Professional Conduct and Practice* (2003) r 19.

Professional conduct rules in other states and territories are not as prescriptive as the *Model Rules* in relation to use of the media. In Western Australia, a practitioner may not participate in a media publication which concerns a matter in which they are, or have been, professionally engaged, unless they have their client's informed consent, the participation is not contrary to the interests of their client, and the practitioner gives an objective account in a restrained manner 'consistent with the maintenance of the good reputation and standing of the legal profession'.<sup>20</sup>

In Victoria and Queensland, a practitioner must not take steps to publish information regarding current proceedings in which they are engaged which may prejudice a fair trial or the administration of justice.<sup>21</sup>

The professional conduct rules in New South Wales, Tasmania and the Australian Capital Territory do not explicitly impose any limit on a legal professional's use of the media.<sup>22</sup>

Significant differences in state and territory professional conduct rules may complicate a public interest lawyer's use of the media to pursue a client's interests. The *Model Rules*, as adopted in South Australia and the Northern Territory, place an unwarranted burden on public interest lawyers in their use of the media. It is arguable that the *Model Rules* no longer reflect the public interest lawyer's role in the contemporary legal landscape.

This ethical complexity is reflected by the Haneef case. On 18 July 2007, Haneef's barrister Stephen Keim SC took the 'unorthodox' action of leaking the transcript of Haneef's first interview with police to the media to counter the selective leaking of information by the AFP and government. The leak was condemned by the Attorney-General, the Prime Minister and the Commissioner of the AFP as undermining the legal process. Keim denied that he had done anything wrong, insisting that the contents of the document were already public knowledge and belonged to Haneef, allowing him to do with them as he wished.

Haneef's legal team later released Haneef's visa dossier and the second record of interview with police. The AFP complained about the release of the second transcript to the Queensland Legal Services Commission, declaring it to be unprofessional, inappropriate and contrary to national security. However, the Queensland Law Society, amongst others, publicly supported Keim's release of the information. Keim's actions are currently being investigated by the Queensland Bar Association.

Had Keim been working as a solicitor during the Haneef case, it is unlikely that his actions would have contravened the applicable professional conduct rules. However, unlike the *Legal Profession (Solicitors) Rule 2007 (Qld)*, the Bar Association of Queensland's *2007 Barristers Rule* contains similar provisions to the *Model Rules*. In particular, Queensland barristers must generally not publish or take steps to publish information regarding current legal proceedings and, if they are engaged in the proceedings, must only provide information to the media with their client's

prior consent. In addition, a barrister's comments to the media must not appear to express the practitioner's own opinion or reveal confidential information.<sup>23</sup>

Although in slightly different terms to the *Model Rules*, the *2007 Barristers Rule* also makes legal practice in the public interest unnecessarily complex.

Further, public interest lawyers may need to employ colourful language and establish a relationship with the media to ensure their story receives coverage. This may jeopardise the independence and reputation of the legal profession. Russo is quoted as describing the Minister as a 'buffoon'<sup>24</sup> and the government's tactics as 'bullshit'.<sup>25</sup> These comments may lower the legal profession's standing in the community. Media coverage may also jeopardise the administration of justice by biasing potential jurors or judges.

An effective media strategy may require that public interest lawyers publicly defy the government. This may cause political embarrassment and prevent negotiation or cooperative arrangements with the government. Keim released Haneef's record of interview with police to the media contrary to the government's wishes. This was condemned by the Minister as an 'outrage, a breach of ethics and a possible contempt of court'.<sup>26</sup> According to Ruddock, the legal team's arguments should have been put in court, not leaked to the media. This is likely to have negatively affected Keim's relationship with the government.

Use of the media may also increase a public interest lawyer's public profile. While this may be good for business or attractive in itself, it may also expose the practitioner's actions to intense public scrutiny. A public interest lawyer's personal actions may damage their client's case. Russo was scheduled to attend a rally in Sydney that had links to an extremist group. Once this was revealed in the media, Russo rapidly sent his apologies, being 'too busy' to attend.<sup>27</sup> Prior to the Haneef case, Russo's attendance at the rally may have been perceived as innocent involvement in public affairs. However, his actions are now closely scrutinised by the media and public. Russo's actions could significantly damage Haneef's interests. Further, public interest lawyers may become closely identified with their client's interests after publicly supporting them in the media. This may jeopardise the lawyer's own reputation as a 'neutral partisan' and reduce their credibility in future cases.

### *Cooperating with government*

Public interest lawyers may need to initiate ongoing negotiation and communication with the government to secure a client's interests. A positive relationship with the Minister and law enforcement bodies may be necessary to obtain access to secret information or negotiate a positive outcome to a client's case.

Haneef's legal team negotiated with law enforcement bodies and the Federal government to manage Haneef's case. Haneef's lawyers contacted Corrective Services to seek to have Haneef removed from solitary confinement, negotiated with the AFP for the return of Haneef's property and met with the Indian High

20. Law Society of Western Australia, *Professional Conduct Rules* (2008) r 4.1–4.2.

21. Law Institute of Victoria, *Professional Conducts and Practice Rules* (2005) r 19; *Legal Profession (Solicitors) Rule 2007 (Qld)*.

22. Law Society of New South Wales, *Revised Professional Conduct and Practice Rules* (1995); *Legal Profession (Solicitors) Rules 2007 (ACT)*; Law Society of Tasmania, *Rules of Practice* (1994).

23. Bar Association of Queensland, *2007 Barristers Rule* r 60.

24. 'Haneef's Lawyer Calls Andrews "A Buffoon"', *Hindustan Times* (New Delhi), 30 July 2007.

25. Hedley Thomas, 'Lawyer's Own Legal Ordeal', *The Weekend Australian* (Sydney), 28 July 2007, 1.

26. Jessica Marszalek and Jade Bilowol, 'Govt Trying Haneef by Media Lawyer', *AAP* (Sydney), 22 July 2007; Tony Wright, 'Slow Burn that Led Legal Team to Make Transcript Public; Mohamed Haneef', *The Age* (Melbourne), 19 July 2007, 2; 'Haneef's Barrister Admits Leaking Transcript', *ABC Premium News* (Sydney), 18 July 2007; Joel Gibson, 'Bold and Brazen Barrister Relishes the Front Line', *Sydney Morning Herald* (Sydney), 21 July 2007, 28.

27. Cameron Stewart, 'Doctor's Lawyer Backs Out of Extremist Group's Rally', *The Australian* (Sydney), 27 July 2007, 6.

*... it is highly likely that the anti-terror laws go beyond what is necessary or acceptable to protect Australia's national interest. This may seriously undermine the utility and justification of the anti-terror laws.*

Commissioner to discuss Haneef's case. Further, the legal team worked with the Department of Immigration and Citizenship from the time Haneef went 'into their care', eventually resulting in his release. Haneef's lawyers worked with immigration officials to shield Haneef from the 'media spotlight' following his release by arranging a decoy vehicle and concealing the name of his hotel.

However, public interest lawyers may need to compromise their client's interests to secure a beneficial agreement with the government. While these arrangements between the government and Haneef's legal team provided Haneef with 'some time out of the glare', they also enabled the Department to pressure Russo to 'keep quiet'. According to Russo, immigration officers made 'a very strong request' that Haneef not be 'made available to the media' before leaving Australia.<sup>28</sup> As a result, Russo did not arrange for Haneef to attend media interviews or an open press conference for fear of breaching the Department's rules. This prevented Haneef from making a public statement thanking Australians for their support.

Further, public interest lawyers who work closely with the government may be viewed with suspicion by the general public and their own clients, jeopardising the real and imagined independence of the legal profession. Working with governments also requires a different skill set to that traditionally held by adversarial litigators; they must become skilled negotiators who are willing to compromise. Further, use of the media to pursue a client's interests may hinder successful negotiations with government. Public interest lawyers may need to choose one strategy over another.

Finally, it may be difficult or impossible to legally enforce informal agreements with government officials. As a result, there is no certainty that the government will comply with the assurances of its representatives. Russo was assured by the AFP that no action was proposed to be taken against Haneef on immigration matters.<sup>29</sup> Within a week, Haneef's visa had been revoked by the Immigration Minister.

#### **Statutory avenues of relief**

Public interest lawyers may utilise statutory mechanisms to pursue their client's interests. Key statutory mechanisms that may be pursued include filing complaints with government watchdogs and the Ombudsman or seeking government documents through Freedom of Information applications. However,

complaints are rarely processed in a timely manner and may be of little consolation to a client after the fact.

Haneef's lawyers commenced a Freedom of Information application to obtain Department documents relating to the revocation of Haneef's visa. The Department initially refused to provide Haneef's lawyers with 282 documents on the basis that they were exempt from disclosure under the Freedom of Information legislation. On 8 July 2008, the Administrative Appeals Tribunal ruled that the Department should provide the lawyers with all but one of the documents sought.<sup>30</sup> Despite Haneef's legal team's success, the usefulness of these documents has been severely limited by the Department's delay.

#### **Legislative reform**

Finally, public interest lawyers may seek statutory reform on behalf of their client. This may entail lobbying members of Parliament and using the media to create a climate sympathetic to reform. Statutory reform is generally a long and drawn out process. Many legislative reforms will be sent for review by committees and be subject to public consultation. If successful, statutory reform may secure significant benefits for future defendants. However, it is unlikely to produce timely or meaningful results for current clients.

The drawn out nature of legislative reform is illustrated by the Haneef case. On 13 March 2008 the Federal Labor government established the Clarke inquiry to investigate the handling of Haneef's case. One of the inquiry's terms of reference was to investigate 'any deficiencies in the relevant laws'. The Clarke inquiry's report was tabled in Parliament on 23 December 2008, nearly 3 months after the inquiry's original reporting deadline.

The report recommended that the provisions in the *Crimes Act 1914* (Cth) relating to terrorism offences be reviewed, particularly in relation to powers of arrest, the use of 'dead time' and the process for judicial supervision of detention under the terrorism offences.<sup>31</sup> In its response to the Clarke report's recommendations, the government noted that:

While some amendments could be made quickly to address the key concerns raised by the Inquiry, the Government agrees with Mr Clarke that it would be preferable to conduct a comprehensive review of these detailed and important provisions.<sup>32</sup>

Following the Clarke inquiry, the Federal government commissioned the Attorney-General's Department to conduct a review into the provisions with a public consultation process. With a discussion paper as the

28. Sean Parnell, 'Haneef's Secret Little Deal – Terror Debauché', *The Australian* (Sydney), 30 July 2007, 2; Jason Koutsoukis, 'Farewell Dr Mohamed Haneef, From the Land of the "Fair Go"', *The Sunday Age* (Melbourne), 29 July 2007, 1.

29. Hedley Thomas and Kevin Meade, 'Canberra's Court Bypass Traps Doctor', *The Australian* (Sydney), 17 July 2007, 1.

30. *Haneef v Department of Immigration and Citizenship* (2008) 103 ALD 336.

31. Hon John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef* (vol 1, November 2008).

32. *Australian Government response to Clarke Inquiry into the Case of Dr Mohamed Haneef - December 2008* (2008) Attorney-General's Department <ag.gov.au/www/agd/agd.nsf/Page/Publications\_AustralianGovernmentresponsetoClarkeInquiryintotheCaseofDrMohamedHaneef-December2008> at 9 February 2009.

next anticipated outcome, it is evident that legislative reform remains a distant possibility which is likely to be the subject of strong debate.

The extensive delay often experienced in seeking legislative reform significantly reduces the efficacy of statutory reform as a method of securing a client's interests. As a result, other methods, such as use of the media, are of increased importance to public interest lawyers.

### Implications for legal practice

#### *Implications for legislative reform*

Haneef's case has demonstrated that Australia's anti-terror laws give the government the capacity to 'basically ... wreck people's lives'.<sup>33</sup> Even more concerning is the claim that the 'system worked as was intended'<sup>34</sup> and that the anti-terror laws were 'appropriately applied'.<sup>35</sup> If this is the case, it is highly likely that the anti-terror laws go beyond what is necessary or acceptable to protect Australia's national interest. This may seriously undermine the utility and justification of the anti-terror laws.

At a more practical level, Haneef's treatment has encouraged the Senate to more closely examine a proposal to expand police powers.<sup>36</sup> According to Senator Kerry Nettle, Haneef's case is a reminder that 'law enforcement and intelligence agencies ... make mistakes' and that it may not be wise to grant them further discretionary powers.<sup>37</sup> Haneef's case reinforced the importance of civil liberties and the impact of legislative changes on people's freedom.

#### *Implications for legal practice*

It is not uncommon for the legal profession to use the media and negotiate with government officials. However, recent legislative reforms have increased the significance of these non-legal tactics for public interest lawyers in pursuing a client's interests. This is clearly out

of step with the *Model Rules*. It is time for law societies to seriously review the role of the media in a public interest lawyer's legal practice. It is highly inappropriate for public interest lawyers like Keim to be exposed to disciplinary proceedings for pursuing the only avenue available to secure their client's interests.

The current conduct rules in Victoria and Queensland (for solicitors only) appropriately acknowledge this shift in public interest lawyering yet still protect the administration of justice. Other states and territories should review their professional conduct rules in line with the Victorian and Queensland provisions to ensure consistency and flexibility in public interest lawyers' dealings with the media.

In the current legal landscape, it is now essential that public interest lawyers think laterally when considering a client's case. This may be unfamiliar to some practitioners. It is therefore important that public interest lawyers share their accumulated skill sets and assist each other in utilising non-legal strategies. Discussion and collaboration between public interest lawyers may ensure a better holistic outcome for a client.

Further, legal education should reflect the changing nature of public interest legal practice. Legal skills are no longer sufficient to secure a public interest lawyer's client's interests. Public interest lawyers must be schooled to think laterally and effectively engage with non-legal avenues of redress. Without this education, public interest lawyers employing non-legal strategies may unintentionally reveal their defence strategy prematurely, waive attorney-client privilege, damage a client's credibility or prejudice court proceedings.

Finally, it is important to recognise that pursuing legal and non-legal avenues may significantly increase a public interest lawyer's workload. This may take a physical and mental toll. It is essential that public interest lawyers do not neglect legal avenues to pursue non-legal strategies. As the Haneef case illustrates, legal and non-legal strategies are most effective in tandem. Therefore, public interest lawyers must learn to seek and accept help when it is needed.

### Conclusion

Public interest lawyers are faced with a challenging new legal landscape. Traditional legal techniques are no longer sufficient to secure a client's interests. Rather, as the Haneef case demonstrates, new and traditional strategies must be used in tandem to achieve favourable outcomes. Recent legislative changes seriously threaten the role and capacity of public interest lawyers to assist their clients. Public interest lawyers must proactively respond to these challenges to secure the greater good of society. It is time for old dogs to learn new tricks.

ALYSIA DEBOWSKI is a Sydney lawyer.

© 2009 Alysia Debowski

email: [alysia.debowski@alumni.unimelb.edu.au](mailto:alysia.debowski@alumni.unimelb.edu.au)

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34. Thomas, 'Lawyer's Own Legal Ordeal', above n 25, 1.

35. Australian Federal Police, *Submission to the Clarke Inquiry* (2008) 43.

36. Tom Allard, 'Police to Get Unlimited Powers; Haneef – the Secret Files', *The Age* (Melbourne), 1 August 2007, 1.

37. *Ibid.* See also Etienne, above n 1, 1210–13.



## MENTIONS

### Australian Indigenous Arts and the Law: An Aboriginal Story

May 5, 2009, 6–8 pm: Monash University Caulfield Campus, Faculty of Art and Design, Building G, Room G1.04

How are Indigenous arts recognised and protected in Australia? What happens when someone takes an Indigenous artwork or cultural site and uses it for their own profit?

The faculties of Law, Arts, and Art&Design at Monash present a Hypothetical debating these issues. Participants will include judges, lawyers, artists, archeologists and more. For bookings or queries email [marketing@law.monash.edu.au](mailto:marketing@law.monash.edu.au), or telephone 03 9905 2326.