

THE HANEEF INQUIRY: SOME UNANSWERED QUESTIONS

*MICHAEL HEAD**

ABSTRACT

The December 2008 report of the Clarke Inquiry into the aborted terrorist prosecution of Dr Mohamed Haneef in 2007 has left some unsatisfactory answers to a number of crucial questions. In particular, why was Haneef charged with a serious terrorist offence despite the relevant Queensland and Australian Federal Police officers concluding that insufficient evidence existed? Unless the relevant documents, including the Cabinet records, are made public, it is impossible to accept the report's assurance that there was no evidence that political pressure or influence had a role in the making of operational decisions relating to Haneef.

This article reviews the conduct of the Clarke Inquiry, the chronology of Haneef's case, evidence of the close involvement of government ministers in both the prosecution and visa revocation aspects of the case, and the conclusions of police and intelligence officers that there was insufficient evidence to charge Haneef with a terrorist offence. It will be argued that the Haneef affair indicates the propensity for the anti-terrorism laws to be used for political purposes.

I. INTRODUCTION

The December 2008 report of the Rudd government's Clarke Inquiry into the aborted terrorist prosecution of Dr Mohamed Haneef in 2007 has thrown up a number of questions that have, as yet, received inadequate attention. In particular, they relate to two interconnected issues: (1) the extent of political pressure or influence, if any, that was brought to bear by members of the former Howard government; and (2) why Haneef was charged with a serious terrorist offence despite the relevant Queensland and Australian Federal Police (AFP) officers concluding that insufficient evidence existed.

Given that Attorney-General Robert McClelland stated, in his letter to John Clarke accompanying the inquiry's terms of reference, that the government regarded the inquiry to be of 'great importance' as part of the process of 'ensuring public confidence in Australia's counterterrorism laws and in the agencies that are responsible for administering and enforcing those laws,'¹ these matters are critical. As the letter implicitly acknowledged, the Haneef affair had helped erode 'public confidence' in the counterterrorism laws and agencies. Arguably, part of that public distrust related to the perception that the Howard government and the security agencies, primarily the AFP, had sought to orchestrate, influence or exploit Haneef's arrest for political purposes in the lead up to the 2007 federal election. As Clarke stated in the report:

Concern has been publicly expressed about whether the independence of the various departments and agencies involved in the Haneef matter was influenced by political considerations or pressure.²

These concerns are all the greater because, as the Haneef case itself illustrated, the counterterrorism legislation adopted since 2002 gives the security agencies extraordinary powers, including to interrogate and detain people without charge or trial, based on a wide-ranging definition of terrorism, and also grants the Commonwealth government exceptional

* Associate Professor Michael Head, School of Law, University of Western Sydney

1 John Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef* (2008) vol 1, 287.

2 *Ibid* 227.

powers, including to proscribe organisations by regulation.³ If any of the actions and decisions taken against Haneef were actuated by political motives, then that would compound fears, held in sections of the public and the legal profession,⁴ that these powers are objectionable because they are susceptible to political use.

Clarke stated that he ‘saw no evidence that political influence was brought to bear in relation to the decisions to arrest, detain and charge Dr Haneef’ and also ‘found no evidence’ that the ministerial decisions to cancel Haneef’s visa and issue a criminal justice stay certificate were ‘made in order to achieve some actual or perceived political advantage or in the interest of expediency’.⁵ However, it will be argued in this article that these conclusions cannot be accepted without further independent investigation because of (1) the inquiry’s lack of access to Cabinet-related material and inability to compel members of the former government to testify, and (2) the considerable evidence presented in the Clarke report itself pointing to the active involvement of members of the Howard government in the conduct of the Haneef case.

It will be suggested that a basic contradiction lies at the heart of the report by the former NSW Supreme Court Justice. Clarke said he could find ‘no evidence’ that Haneef ‘was associated with or had foreknowledge of the terrorist events or of the possible involvement of his second cousins Dr Sabeel Ahmed and Mr Kafeel Ahmed in terrorist activities’.⁶ That is, Clarke found no evidence to sustain the allegations upon which Haneef was detained, nor the allegations upon which he was ultimately charged with a terrorist offence. Yet, the report held no-one responsible or accountable for what became a substantial police, intelligence and media operation that led to Haneef being held for a significant period without justification and without sufficient evidence. Then Haneef was charged with an offence for which he could have been jailed for up to 15 years. The report concluded that Haneef was ‘wrongly charged’ because an individual Commonwealth Director of Public Prosecutions (DPP) officer, Clive Porritt, gave the AFP ‘obviously wrong’ advice and an individual AFP officer, Commander Ramzi Jabbour, had ‘lost objectivity’ and was therefore ‘more receptive to Mr Porritt’s advice’.⁷ No disciplinary action was recommended against either official.

The underlying contradiction, it will be suggested, lends extra weight to the concerns that the decision ultimately made by Jabbour to charge Haneef was in reality the product of political pressure. Clarke noted that Porritt said he felt ‘an unspoken but considerable pressure to provide reassurance to the police’ but denied that he had been subjected to any pressure by AFP officers.⁸ This statement begs the question, which the Clarke report does not answer: what was the source of that ‘unspoken but considerable pressure’?

It will be argued that the limited powers given to the inquiry, and the manner in which it proceeded, prevented an examination of the most important issues raised by the Haneef debacle: was the case politically manipulated and, if so, what does that reveal about the potential for the counterterrorism measures to be used for political purposes? These issues were not precluded by the inquiry’s terms of reference, which empowered it to examine and report on (inter alia) ‘the arrest, detention, charging, prosecution and release of Dr Haneef, the cancellation of his Australian visa and the issuing of a criminal justice stay certificate’.⁹ Nevertheless, the Department of Prime Minister and Cabinet blocked access to the relevant

3 Michael Head, ‘Orwell’s *Nineteen Eighty-Four* 20 Years On: “The War on Terrorism”, “Doublethink” and “Big Brother”’ (2005) 30 *Alternative Law Journal* 208–14.

4 Ibid; Michael Head, ‘Detention and the Anti-Terrorism Legislation’ (2005) 9 *University of Western Sydney Law Review* 1–9; Michael Head, ‘Counter-terrorism Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights’ (2002) 26 *Melbourne University Law Review* 666–89.

5 Clarke, above n 1, 227.

6 Ibid vii.

7 Ibid x.

8 Ibid x.

9 Ibid 288.

Cabinet-related documents, effectively making it almost impossible to definitively determine the role of then prime minister John Howard and his ministers. It will be concluded that, as a result, the inquiry's conclusions about the lack of political pressure or influence cannot be accepted. Moreover, it will be suggested that the denial of access to Cabinet-related documents presents wider obstacles to holding any government to account for politically-orchestrated exploitation of the anti-terrorism measures.

II. KEY ASPECTS OF THE HANEEF CHRONOLOGY

This article cannot present a full chronology of Haneef's arrest, detention, charging, prosecution, release and return to his home in India. The Clarke report devotes a 161-page chapter to a description of those events.¹⁰ However, it is necessary to provide a brief outline and highlight certain aspects.

Haneef was arrested at Brisbane Airport on 2 July 2007, in the wake of two failed terrorist attacks in London and Glasgow at the end of June. Almost immediately, inflammatory and prejudicial material appeared in the media linking his arrest to a possible 'terrorist doctors' network' in Australia.¹¹ For 12 days he was detained without trial under provisions of the *Crimes Act 1914* (Cth) that were amended by the *Anti-Terrorism Act 2004* (Cth). The primary allegation against him was that he had given his old mobile phone SIM card to Sabeel Ahmed, a second cousin in Britain who was later accused of withholding information about the London and Glasgow attacks.

Under s 3W(1) of the *Crimes Act 1914*, a person can be arrested if a police officer 'reasonably believes' that the person committed an offence. Part IC of that Act permits detention for the purpose of investigating whether the person committed the offence, which in Haneef's case was knowingly 'supporting a terrorist organisation' as per s 102.7(1) of the *Criminal Code Act 1995* (Cth). (Clarke did not reach a definitive conclusion on whether the arrest was lawful. Instead, he said it was 'at least arguable that there existed reasonable grounds for a belief that Dr Haneef had committed an offence' against s 102.7).¹²

Although a person can ordinarily be held for questioning for only four hours, Part IC of the *Crimes Act 1914* enables police to apply to a judicial officer (a magistrate, justice of the peace or bail justice) for an extension of the 'investigation period' of up to a total of 24 hours in terrorism cases.¹³ In addition, the police can apply for 'dead-time' to be disregarded for the purposes of the questioning time limit for a non-exhaustive list of reasons, including to allow other 'authorities', inside or outside Australia, 'time to collect information', and 'to collate and analyse information' from other sources.¹⁴

There is no time limit on how long the questioning clock can be stopped and no limit on the number of times a judicial officer can approve such AFP requests. As Haneef's experience revealed, the provisions are broad enough to permit extended detention. In effect, the Brisbane magistrate presiding over Haneef's case granted six police requests for further detention, two under s 23D of the *Crimes Act 1914* and four under s 23CB.¹⁵

On 3 July, the AFP obtained permission under s 23DA to question Haneef for an additional eight hours. Haneef was not represented, made no representations, and the application was

10 Ibid 45–206.

11 See, eg, Sean Parnell and Cath Hart, 'Doctors Linked to British Terror Bomb Plots', *The Australian* (Sydney), 4 July 2007, 1 <<http://www.theaustralian.news.com.au/story/0,20867,22013599-601,00.html>> at 20 February 2009; Cosima Marriner, Tom Allard, Julie Robotham and Mark Metherell, 'How Jihad Network Led to Australian Raids', *Sydney Morning Herald* (Sydney), 4 July 2007 <<http://www.smh.com.au/news/national/how-jihad-network-led-to-australian-raids/2007/07/03/1183351209760.html>> at 20 February 2009.

12 Clarke, above n 1, 53–4.

13 *Crimes Act 1914* (Cth) s 23DA.

14 *Crimes Act 1914* (Cth) ss 23CA–CB.

15 Clarke, above n 1, 54–81.

granted in just 10 minutes.¹⁶ Later on the same day, a further 12-hour period was granted. Haneef was again not represented, made no representations and the application took even less time.¹⁷

On the evening of the same day, the police made the first of four applications under s 23CB for a suspension of the investigation period. In an application made in the magistrate's home, the magistrate, after considering the matter for 10-15 minutes, granted a 48-hour suspension.¹⁸ Once again, Haneef was neither represented nor made representations.

On 5 July, in the second s 23CB application, the magistrate granted a 96-hour suspension, until 9 July. On this occasion, Haneef was represented by Peter Russo, a solicitor, but Russo was not permitted to read the written application, was not given any of the materials on which AFP relied in making the application, and had had little time to obtain instructions from Haneef.¹⁹ On 9 July, in the third s 23CB application, the magistrate reserved judgment on a further 120-hour suspension, but granted police an additional 48 hours to construct a case as to why Haneef should be further detained. Stephen Keim represented Haneef at this hearing, but the defence lawyers were still denied access to the material that the AFP put before the magistrate.²⁰

On 11 July, in the fourth s 23CB application, Haneef's lawyer asked the magistrate to disqualify himself from the case on the ground of apprehended bias, based on the magistrate's involvement in the previous AFP applications where Haneef had not been represented. In response, the magistrate adjourned his decision until 13 July, effectively extending the detention again.²¹ Ultimately, on 13 July, the AFP withdrew the fourth application.²²

This summary is sufficient to demonstrate the lack of basic protections and procedural fairness involved in the process. Moreover, Haneef had no right under Part 1C of the *Crimes Act 1914* to see the material being relied upon to support the AFP applications.²³ That information contained crucial inaccuracies about the mobile phone SIM card and Haneef's alleged cohabitation with his two second cousins in Britain.²⁴

On 8 July, that is, just six days after Haneef was arrested, UK authorities provided the AFP with an email from Kafeel Ahmed, one of the Glasgow bombers, to his brother Sabeel Ahmed, which indicated that Sabeel was not involved in the UK attacks and had no foreknowledge of them, and that therefore Haneef could not have had any involvement in them.²⁵ Nevertheless, the detention continued until 14 July, when he was charged with 'supporting a terrorist organisation', while 'reckless' as to whether the organisation was a terrorist one, under s 102.7(2) of the Criminal Code, a lesser offence than the one which had been cited to support his detention.

On 16 July, Queensland Magistrate Jacqueline Payne ordered Haneef to be released on bail, despite the presumption against bail for terrorist offences, partly because of the weak case against him. In her decision, she noted: 'There was no evidence before me the SIM card was used in any terrorist activity.'²⁶ Within two hours, Immigration Minister Kevin Andrews effectively overrode the bail decision by cancelling Haneef's visa. That morning, Andrews had been invited to attend the Howard government's Cabinet National Security Committee, which discussed the visa issue. The intended effect of the visa revocation was to consign Haneef to immigration detention while awaiting trial. The following day, Attorney-General Philip

16 Ibid 56.

17 Ibid 56-7.

18 Ibid 57-9.

19 Ibid 59-61.

20 Ibid 62-3.

21 Ibid 63-4.

22 Ibid 64-5.

23 Ibid 71-7.

24 Ibid 70-1.

25 Ibid 156-8.

26 Maurice Blackburn Lawyers on behalf of Dr Haneef, submission to the Clarke Inquiry, 7, <[http://www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/\(4CA02151F94FFB778ADAEC2E6EA8653D\)~MB-Submission.pdf/\\$file/MB-Submission.pdf](http://www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/(4CA02151F94FFB778ADAEC2E6EA8653D)~MB-Submission.pdf/$file/MB-Submission.pdf)> at 4 June 2009.

Ruddock issued a criminal justice stay certificate pursuant to s 157 of the *Migration Act 1958* (Cth), which had the effect of preventing Haneef from being removed from Australia despite the cancellation of his visa.

Within 10 days, however, the case disintegrated in the face of mounting public concern about Haneef's treatment and the exposure of key falsehoods in the police evidence. On 18 July, *The Australian* newspaper published the transcript of Haneef's initial formal police interview, which had been leaked by Stephen Keim, Haneef's barrister. The transcript contradicted police claims that Haneef had lived with his two second cousins in the UK, and had no explanation for seeking to fly to India on a one-way ticket.²⁷ On 20 July, the Australian Broadcasting Corporation reported that UK police had not found the SIM card in the burning jeep at Glasgow airport, but in Liverpool.²⁸ On 27 July, the Director of Public Prosecutions (DPP) dropped the charge and the Howard government facilitated Haneef's departure for India, his home country.²⁹

It must be noted that the Part 1C detention powers constitute only one of four methods by which alleged terrorist suspects, or people suspected of having information about terrorism, can be detained without trial. Haneef could have been detained under the 2003 amendments to the *Australian Security Intelligence Organisation Act 1979* (Cth), which empower ASIO to detain and interrogate a person the agency suspects of 'possessing information' related to terrorism, for up to a week without charge.³⁰ Alternatively, the doctor could have been detained under the *Criminal Code* provisions introduced by the *Anti-Terrorism Act 2005* (Cth), which allows for 'preventative detention' of up to 14 days, or placement under a 'control order' – a form of house arrest – for up to 12 months.³¹ The AFP had prepared a draft application for a preventative detention order, which would have further extended Haneef's detention, but its legal coordinator advised that insufficient evidence existed for such an order.³²

III. 'NO EVIDENCE' OF POLITICAL INFLUENCE

After an almost exclusively closed-door inquiry, Clarke said he could find no evidence that the Howard government brought 'political influence to bear' in relation to the decisions to arrest, detain and charge Haneef, or that his visa was revoked 'to achieve some actual or perceived political advantage'.³³ There was 'no evidence of conspiracy or an improper purpose', although the visa cancellation – particularly its timing – was 'mystifying'.³⁴ In reality, as reviewed below, all the evidence, including much of the material compiled in the 310-page public version of Clarke's report itself, indicates that the Howard government seized upon the British attacks to try to launch a terrorism scare campaign in the final months of the 2007 election campaign.³⁵

Clarke also delivered a second volume to the government, the scope and contents of which remain undisclosed to the public. This volume may contain crucial information, and should therefore be released, as Haneef's lawyers have requested. The report states: 'Volume Two contains supplementary material that provides greater detail and analysis of the events I have examined and includes references to sensitive or classified material. It may be that this material

27 Tony Jones, Interview with Stephen Keim, barrister for Dr Mohamed Haneef, *ABC Lateline* (Sydney, 18 July 2007) <<http://www.abc.net.au/lateline/content/2007/s1982091.htm>> at 4 June 2009.

28 Maurice Blackburn Lawyers on behalf of Dr Haneef, above n 26, 9.

29 Ibid.

30 *Australian Security Intelligence Organisation Act 1979* (Cth) div 3.

31 *Criminal Code* divs 104, 105.

32 Clarke, above n 1, 65-6.

33 Clarke, above n 1, 227.

34 Ibid viii.

35 Another scholar has noted that the 'Clarke report does little to dampen a cynical view of the government's role in this case'. See Andrew Lynch, *Learning from Haneef* (5 February 2009) Inside Story – Current Affairs and Culture <<http://inside.org.au/learning-from-haneef/>> at 4 June 2009.

cannot be published at present.³⁶ No further explanation was provided. There is currently no independent means of determining the nature of the ‘sensitive or classified’ material, or assessing the decision, left in the hands of the government, not to release it, even in a redacted form.

Before reviewing the evidence, it is necessary to examine an aspect of the Clarke report that has far-reaching implications. Clarke reached his conclusions without examining any of the relevant Cabinet documents, to which the Department of Prime Minister and Cabinet (PM&C) blocked access. These included the minutes of a 16 July 2007 Cabinet National Security Committee, which apparently approved the decisions to cancel Haneef’s visa and issue a criminal justice stay certificate so that he would be sent to an immigration detention centre until his trial.³⁷

Clarke said he was told by the Department of Prime Minister and Cabinet that he was forbidden by longstanding government ‘conventions’ from viewing any of the Cabinet records or reporting anything that might reveal Cabinet deliberations. He cited the Cabinet Handbook, which stated:

Successive governments have accepted the convention that ministers do not seek access to documents recording the deliberations of ministers in previous governments. In particular, Cabinet documents are considered confidential to the government that created them.³⁸

Limited ‘Cabinet-related’ documents, which apparently related to ‘briefings, advice and submissions made to ministers and their responses’, were eventually made available to Clarke but subject to Clarke’s assurances that the inquiry would respect Cabinet confidentiality.³⁹ The Clarke report stated:

In practice, this meant I could discuss Cabinet matters with former ministers and they could comment if they chose, but I would not be able to report anything that might reveal these Cabinet deliberations to the present government. Departmental officers were told by PM&C they could not disclose to me any aspects of the discussion of the matters in question in Cabinet or Cabinet committees – in particular, at meetings of the National Security Committee. Former ministerial staffers were similarly bound and could comment only with the agreement of their former ministers. In the circumstances, I had no option but to abide by the conventions.⁴⁰

In effect, these conventions mean that it is extremely difficult for any government to be held to account for any wrongs or crimes it has committed, even after it leaves office, unless evidence exists outside Cabinet discussions and related documents. (And, as Haneef’s challenge to his visa’s cancellation illustrated, it may be difficult to require a Cabinet minister to testify in court, or for a court to draw adverse inferences from a minister’s failure to do so).⁴¹ Under the so-called 30-year rule, all Cabinet-related documents are kept secret for three decades, and even then, the release of documents by the National Archives of Australia under the *Archives Act 1983* (Cth) is confined to formal Cabinet submissions and decisions (the more extensive Cabinet notebooks, which record the discussions inside Cabinet are not released for 50 years),⁴² and all the material is vetted to exempt any documents that could ‘reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth’.⁴³ Cabinet documents are also largely exempted from disclosure under s 34 of the *Freedom of Information Act 1982* (Cth) and substantially protected by public interest immunity.⁴⁴

36 Clarke, above n 1, iii.

37 Ibid 175–9.

38 Ibid 7.

39 Ibid 7–8.

40 Ibid 7–8.

41 *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1271, [312]–[328] (Spender J).

42 *Archives Act 1983* (Cth) s 22A.

43 Ibid ss 33–35. See also National Archives of Australia, *About Cabinet Records* <<http://www.naa.gov.au/collection/explore/cabinet/records/index.aspx>> at 3 March 2008.

44 *Sankey v Whitlam* (1978) 142 CLR 1.

Moreover, former prime minister John Howard declined to make a statement or be questioned by Clarke and denied permission for a former adviser, Jamie Fox, to make a written statement to the inquiry.⁴⁵ Another key witness, the ex-chief of staff of Howard's immigration minister Andrews, refused to make a statement. Andrews also refused to make a statement, but consented to be interviewed (behind closed doors), while Howard's attorney-general, Ruddock, refused to make a statement and gave Clarke just one hour of his time for an interview.⁴⁶ In establishing the Clarke Inquiry, the Rudd government decided not to give the inquiry powers to require witnesses to testify or be cross-examined, even in private. Clarke accepted this limitation, although it was, he conceded, 'one of the most contentious aspects' of the inquiry.⁴⁷ Despite receiving 'exhortations' from law societies, law reform groups and the media to seek statutory powers, Clarke concluded that factors of cost, time and possible public interest immunity and legal professional privilege claims 'militated against pursuing the option of changing the inquiry's constitution'.⁴⁸

In addition, Clarke decided not to probe the constant stream of leaks to the media, which could have only come from government, intelligence or police sources, throughout July 2007 that gave the impression that Haneef was intimately involved in the failed British bombings and in planning similar attacks in Australia. These prejudicial leaks were clearly relevant to the inquiry's terms of reference, because this conduct shed light on the motivations behind the arrest, detention, charging and prosecution of Haneef.⁴⁹ Giving his reasons, Clarke stated that the apparent leaks had been referred to the Queensland Crime and Misconduct Commission, the matter was 'marginal to my terms of reference' (although 'a very serious concern'), and the area could not have been examined satisfactorily without statutory powers to compel and protect witnesses.⁵⁰ Such powers, however, Clarke declined to request from the Rudd government, even though there were also applications in the 'strongest terms' by Haneef's legal team for him to seek such powers.⁵¹ Clarke did not explain why he considered the leaks marginal to the terms of reference.

It is quite possible that the prejudicial leaking of material to the media was directly relevant to the responsibility of the Howard government and other authorities for Haneef's ordeal. As early as 4 July 2007, just over 24 hours after Haneef was arrested, *The Australian's* headline read, 'Doctors Linked to British Terror Bomb Plots',⁵² and the *Sydney Morning Herald* reported, 'How Jihad Network Led to Australian Raids'.⁵³ These claims could only have come from government or police sources, since they alone had access to the alleged information. Citing 'senior police' sources, the media reports featured the mobile phone SIM card allegation. In their submission to the Clarke Inquiry, Haneef's lawyers cited numerous media articles that were published from 4–17 July, containing a 'smorgasbord of prejudicial rumours,' some of them attributed to 'senior government sources'.⁵⁴ For example, *The Australian* reported on 4 July:

Senior government sources last night declined to rule out the possibility that the Indian doctor may have been a facilitator or part of a possible 'sleeper cell' connected to the doctors now in detention in Britain.⁵⁵

45 Clarke, above n 1, 1, 10, 124, 176–7, Appendix 10.

46 Ibid.

47 Ibid 1, 14–15.

48 Ibid 15–16.

49 See the terms of reference at Clarke, above n 1, 288.

50 Ibid 14.

51 Ibid 15.

52 Parnell and Hart, above n 11, 1.

53 Marriner, Allard, Robotham and Metherell, above n 11.

54 Maurice Blackburn Lawyers on behalf of Dr Haneef, above n 26, 114–20.

55 Ibid 115.

Moreover, the government had chosen to publicly identify itself with the doctor's detention. Within 12 hours of Haneef's late night arrest, Howard and Ruddock held 3 July media conferences to confirm his arrest, making media appearances that were not only unnecessary to inform the public – a matter for the AFP – but also likely to influence public opinion against Haneef. Although the Howard was careful to urge people not to jump to conclusions about Haneef, he nevertheless stated that the arrest was a reminder that, 'There are people in our midst who would do us harm and evil if they had the opportunity of doing so'.⁵⁶ On 8 July, Ruddock offered media commentary suggesting that Haneef had had sinister motives for attempting to leave Australia 'rather hurriedly'.⁵⁷ Ruddock commented that Haneef's explanation that his wife had just given birth to a baby 'may be reasonable but they may also be a cover for something else'.⁵⁸

In its submission to the Clarke Inquiry, the Law Council of Australia said public comments made by Howard, Ruddock and AFP Commissioner Mick Keelty at the time of Haneef's arrest and detention raised concerns that the provisions in the *Crimes Act 1914* were applied without reference to the appropriate statutory test. The submission cited a media interview conducted by Ruddock more than one week into Haneef's detention, in which the attorney-general defended and took responsibility for the prolonged detention. Responding to questions about when Haneef might be charged or released, he stated:

I tell you, you would be asking me different types of questions if these inquiries were truncated unnecessarily and we found out later that there were avenues of inquiries that could have been pursued, that would have been, or may have been ascertained and weren't, and some terrible event happened in Australia. You'd be after me unmercifully.⁵⁹

The Law Council further quoted Howard, speaking after Haneef's release, defending the actions of the AFP:

I want to defend very strongly the role of the Australian Federal Police. To put it bluntly, when you're dealing with terrorism it's better to be safe than to be sorry.⁶⁰

After reviewing the statements of Ruddock and Howard, and media comments by Keelty, the Law Council expressed the concern that throughout the Haneef case, the police had operated 'in the general shadow' of the anti-terror laws and a 'vague notion' that 'those laws authorized a different and extraordinary approach' than by the precise content of the laws.⁶¹ However, the Clarke report failed to mention the ministers' public statements. It is submitted that these statements underscored the necessity to examine the government's role extremely closely.

IV. HOWARD MINISTERS WERE CLOSELY INVOLVED IN BOTH ASPECTS OF HANEEF CASE

Notwithstanding the Clarke report's conclusions, a careful reading of the report leaves little doubt that members of the Howard government became closely involved in both aspects of Haneef's case. That is, ministers were actively engaged in monitoring both his detention and charging, and in preparing to cancel his visa should he be released by the police or granted bail by a court. This involvement began as soon as the British police requested assistance to locate Haneef to ask him about his discarded SIM card. According to Clarke's account, in less than four weeks, Howard's office convened no fewer than 16 high-level 'whole of government' meetings and 27 teleconferences to discuss issues relating to the Haneef case.⁶²

⁵⁶ Marriner, Allard, Robotham and Metherell, above n 11.

⁵⁷ Australian Lawyers Alliance, *Submission to the Clarke Inquiry* (2008) 13.

⁵⁸ Ibid.

⁵⁹ Law Council of Australia, *Clarke Inquiry into the Case of Dr Mohamed Haneef*, submission to Clarke Inquiry (2008) 12.

⁶⁰ Ibid 13.

⁶¹ Ibid.

⁶² Clarke, above n 1, 209–15.

The meetings, some of which also involved the State and Territory Labor governments, began on 1 July, the day before Haneef was arrested. They included 10 meetings of the National Counter-Terrorism Committee, as well as the Cabinet National Security Committee meeting of 16 July. Between 3 July and 6 July, Howard personally received five written briefings from his department, and thereafter his office obtained ‘regular’ telephone updates from his department’s senior national security official, former Special Air Services commander Duncan Lewis.⁶³ (In December 2008, Lewis, who played a central role in the Haneef affair,⁶⁴ was appointed as the Rudd government’s national security adviser).⁶⁵

Ministers Ruddock and Andrews were involved on a daily basis. Ruddock, who as attorney-general was responsible for both the AFP and ASIO, received four written briefs from ASIO and six from the AFP, as well as two security intelligence reports and four threat assessments. In addition, he met with AFP Commissioner Keelty ‘on a number of occasions during July 2007’.⁶⁶ One meeting involving Ruddock appears to have been particularly important. On the morning of 11 July, three days before Haneef was charged, Attorney-General’s Department officials had an appointment with the attorney-general for him to approve an ‘MAR document’ relating to Haneef that was then sent on to the Office of the DPP.⁶⁷ It seems that the MAR was a statement of facts to be sent to the DPP.⁶⁸ It remains unclear what happened at that meeting or why Ruddock was involved in authorising the document. In their submission to the Clarke Inquiry, Haneef’s lawyers drew attention to the meeting and stated:

The inquiry will need to obtain much more information, in both oral and documentary form, to resolve the respective roles, in the decision to charge, of the Attorney-General and his department; DPP officers, including Mr. Porritt; and the AFP.⁶⁹

However, Clarke did not mention the 11 July meeting in his report.

As to the immigration minister, according to Clarke’s account, from 3 July, the day after Haneef was arrested, Andrews received frequent updates from his department and the prime minister’s department on various contingency plans to cancel the doctor’s visa so that he could be detained or deported if he were not charged or if he were granted bail.⁷⁰ On 9 July, a Department of Foreign Affairs and Trade email noted that Ruddock and Andrews were preparing a joint ministerial submission on the visa revocation.⁷¹

Both Andrews, in his testimony to Clarke, and Howard, in a letter to the inquiry, insisted that Andrews made the ultimate decision to revoke the visa on 16 July independently, exercising his own ministerial discretion.⁷² Yet, Andrews had told his departmental heads that he would not make any decision until after the Cabinet National Security Committee (NSC) meeting, due that day. Clarke reported that Andrews was called to a meeting with Howard and Ruddock that morning to discuss the visa issue. Clarke noted, without comment, that in a letter to the inquiry, Ruddock denied attending any such meeting.⁷³

The visa decision was officially made at 1 p.m. on 16 July, one hour after the conclusion of the NSC meeting, to which Andrews had been invited. At 1.01 p.m. the prime minister’s office sent an email to two senior officials advising that the Solicitor-General had confirmed that ‘no

63 Ibid 215–16

64 Ibid 33–4.

65 Kevin Rudd, ‘Appointment of Duncan Lewis as National Security Adviser’ (Press Release, 4 December 2008) <http://www.pm.gov.au/media/Release/2008/media_release_0661.cfm> at 23 February 2009.

66 Clarke, above n 1, 124–5.

67 Maurie Blackburn Lawyers on behalf of Dr Haneef, above n 26, 75.

68 Ibid.

69 Ibid 76.

70 Clarke, above n 1, 163–79.

71 Ibid 223.

72 Ibid 176–7.

73 Ibid 173–7.

contempt issue' would arise if Andrews cancelled the visa.⁷⁴ This indicates that Howard was involved in obtaining legal advice that the decision would not be in contempt of the court's grant of bail. This further suggests that the decision to revoke the visa, while formally made by Andrews as the responsible minister, was made in close consultation with Howard and the other members of the NSC.

Clarke noted that 'discrepancies' existed in the evidence about the nature of the discussions at the 16 July NSC meeting, and allegedly between Andrews and Commissioner Keelty following that meeting.⁷⁵ Nevertheless, he concluded that 'notwithstanding' those unresolved discrepancies, he found no evidence of political influence or motivation in connection with the decisions to cancel Haneef's visa and issue a criminal justice stay certificate.⁷⁶ It is suggested that in the light of the documentary record, the discrepancies and Clarke's lack of access to the records of the NSC meeting, that conclusion is unconvincing. Rather, the frequent high-level meetings that were convened on both aspects of the Haneef affair – his charging and the visa revocation – point to considerable political influence being involved, or being perceived to be involved at the time, by senior officers in the AFP, DPP and immigration department.

V. POLICE CONCLUDED THAT INSUFFICIENT EVIDENCE EXISTED TO CHARGE HANEEF

Another crucial question is why, as will be examined below, Haneef was ultimately charged, despite the police and prosecutors responsible for the case concluding that insufficient evidence existed to sustain the charge that was ultimately laid against him.

For nearly a month, there was an intensive operation, involving federal and State police, the intelligence agencies, foreign affairs personnel and customs officers, to determine whether evidence existed against Haneef. In February 2008, Commissioner Keelty told a Senate estimates committee that more than 600 police personnel had worked on the Haneef case, including 249 AFP officers and 335 State and Territory police, in an investigation that cost more than \$7.5 million, searched 22 residential premises, obtained more than 300 witness statements and collected 349 forensic samples.⁷⁷

Clarke's report revealed that the operation extended to the Defence Signals Directorate (DSD), the military's signals intelligence agency, which answered 71 requests to intercept Haneef's telecommunications.⁷⁸ In addition, the Australian Secret Intelligence Service (ASIS), the overseas spy organisation, established a 'crisis team' to support the investigation.⁷⁹ And the Australian Customs Service covertly searched Haneef's luggage at Brisbane airport before he was arrested there on the night of 2 July.⁸⁰ Last, but not least, ASIO devoted 'significant resources' and 'many officers' in a 'parallel investigation' that led to 42 internal reports, four Attorney-General's submissions, two security intelligence reports and a draft security assessment.⁸¹

However, throughout the operation ASIO repeatedly advised that Haneef was not connected to any imminent threat of terrorism in Australia and also said there was no evidence that Haneef had foreknowledge of, or participated in, the UK terrorist incidents.⁸² Moreover, as late as 13 July, the day before Haneef was charged, the Australian Federal and Queensland Police engaged in the joint investigation had concluded that insufficient evidence existed to charge

74 Ibid 194.

75 Ibid 228.

76 Ibid.

77 Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 18 February 2008, 33 (Mick Keelty).

78 Clarke, above n 1, 27–8.

79 Ibid 28–9.

80 Ibid 40–3.

81 Ibid 102–3.

82 Ibid viii–ix.

the doctor.⁸³ Clarke recorded that these officers included the AFP's lead investigator, national counterterrorism manager Jabbour. Jabbour had prepared a document on 10 July, in which he stated he did not currently have 'sufficient evidence to charge HANEEF' and he told Clarke that was still his view on 13 July.⁸⁴ Early the next morning, however, and without explanation, Jabbour decided to lay the charge, just before Haneef was due to be released from detention. After consulting his superior in Canberra, Assistant Commissioner Frank Prendergast, Jabbour overrode the two arresting officers, both of whom had refused to charge Haneef, even after a prosecutor, Clive Porritt, had initially advised there was not enough evidence to justify the charge.⁸⁵

For his part, Porritt had told other prosecutors as late as 13 July that he did not consider the evidence adequate. He told Clarke that he changed his stance later that day after coming under 'unspoken but considerable pressure' from police commanders.⁸⁶ After a telephone conversation with Graeme Davidson, the DPP Deputy Director Counter Terrorism at DPP head office in Canberra, Porritt advised the AFP that there were 'reasonable grounds for suspecting' that Haneef had intentionally provided his mobile phone and SIM card to a terrorist organisation while reckless as to whether the organisation was terrorist.⁸⁷ Clarke concluded that Porritt would not have given his advice, which was 'unsupportable—on any test,' if not for the police presenting the case against Haneef in such a positive way.⁸⁸ However, Clarke's only explanation for what transpired was ultimately that Jabbour had 'lost both perspective and a degree of objectivity' because he became too intimately involved in the case.⁸⁹ This explanation, which attributes the entire responsibility to the failing of an individual police officer, is also unconvincing, particularly since Jabbour consulted Prendergast, one of the AFP's most senior officers, before charging Haneef. Clarke also stated that Jabbour 'presented as a committed, professional and competent individual, and was held in high esteem by the officers he led'.⁹⁰ If Jabbour were such a capable and highly-regarded officer, why and how did his judgment become so faulty?

The police information given to Porritt, and relayed to a court, contained at least two crucial false statements. One was that Haneef's SIM card was found in the jeep that had crashed into Glasgow airport, when, in fact, it was located in Liverpool, 200 kilometres away. The other was that Haneef had resided in Britain with his second cousin Kafeel Ahmed, who drove the jeep, although the two had never lived in the same house.⁹¹ Also withheld from Porritt and the court was the fact that, before his terrorist attack, Ahmed had sent an email to his brother, Sabeel, which effectively cleared Haneef of any fore-knowledge of his actions. As mentioned earlier, the AFP had this information from 8 July, six days before Haneef was charged.⁹²

Why then was Haneef charged? For the reasons canvassed above, it is not credible to blame Jabbour and Porritt as individuals. The most plausible explanation is that the real 'pressure' was coming from the Howard government itself, either directly through the series of meetings held by ministers with the AFP and other officials, or indirectly as a result of the public statements by Howard and Ruddock, or indirectly in the 'shadow' of the government's approach to the anti-terror laws, as suggested by the Law Council of Australia.

83 Ibid 137–44.

84 Ibid 133.

85 Ibid 144–5.

86 Ibid 153.

87 Ibid 141.

88 Ibid 154.

89 Ibid 279.

90 Ibid.

91 Ibid 135–7.

92 Ibid 84, 137, 157.

However, Clarke said there was no evidence to sustain ‘the concerns that have been publicly expressed about the role government played in the Haneef case’.⁹³ At the same time, he commented:

Suggestions or perceptions that political pressure or influence had a role in the making of operational decisions relating to Dr Haneef had the potential to undermine public confidence in Australia’s response to the threat then perceived to exist.⁹⁴

This observation indicates that Clarke was acutely aware that any finding of political pressure or influence could further ‘undermine public confidence’ in the counterterrorism measures. His remarks echoed the letter sent by Attorney-General McClelland to Clarke setting out the reasons for the inquiry.⁹⁵ In the light of the evidence reviewed above, however, unless all the relevant documents, including the Cabinet records, are made public, it is impossible to accept the report’s assurance.

VI. DISCUSSION

For all the reasons stated above, there is cause to be dissatisfied with the findings of the Clarke report. In particular, it is suggested that there are contradictions between what the report revealed and what it did not.

On the one hand, the report revealed that from the earliest days of the Haneef affair, Howard government ministers were involved in high-level meetings with police, intelligence, national security, immigration and prime minister’s department officials. Those meetings discussed the detention and charging of Haneef, as well as revoking his visa so that he could still be held in immigration detention if he were not charged or if he were released on bail. The inquiry also disclosed that Haneef was eventually charged with a serious terrorism offence despite the police and ASIO investigations concluding that there was no evidence that he had any foreknowledge or involvement in the UK terrorist acts, or linking him to possible plans for terrorism in Australia.

On the other hand, the inquiry was prevented from viewing relevant Cabinet-related documents, was unable to question the ministers involved under oath or subject them to cross-examination by Haneef’s lawyers, and did not examine the circumstances, content or consequences of the media leaks and ministerial public statements that occurred during Haneef’s detention. Given those deficiencies, it is not safe to accept the inquiry’s finding that no evidence was found of political pressure or influence.

Yet, the government, having organised or accepted the limitations on the powers of the inquiry, welcomed the report. Attorney-General Robert McClelland described it as ‘balanced, thorough and constructive’.⁹⁶

It is beyond the scope of the present article to assess Clarke’s recommendations and the government’s response to them. In any case, the recommendations regarding the anti-terrorism laws were generally abstract. Instead of making specific proposals, Clarke suggested that consideration be given to the appointment of an independent reviewer of the Commonwealth laws, and that the sections of the *Crimes Act 1914* and the *Criminal Code Act 1995* that were applied to Haneef be reviewed in the light of his report’s discussion of them.⁹⁷ McClelland accepted the recommendations and released an overall response to the report and several previous reviews of the anti-terrorism legislation by the Australian Law Reform Commission

93 Ibid 207.

94 Ibid 207.

95 Ibid 287.

96 Robert McClelland, ‘Comprehensive Response to National Security Legislation Reviews’ (Press Release, 23 December 2008).

97 Clarke, above n 1, xii.

and the Parliamentary Joint Committee on Intelligence and Security.⁹⁸ Later, the government released draft legislation for discussion.⁹⁹

Regardless of the final outcome of that process, however, the concerns outlined above will remain. If the key issue of political interference or pressure in the Haneef affair has not been rigorously and exhaustively probed, there is no guarantee that such influence will not be brought to bear in present and future terrorism investigations and prosecutions.

The Attorney-General said the government's response to the Clarke Inquiry and the previous reviews would ensure that Australia had 'strong counter-terrorism laws' but 'balanced by appropriate safeguards'.¹⁰⁰ A National Security Legislation Monitor would be established, within the prime minister's portfolio, to conduct ongoing reviews of the practical operation of the legislation.¹⁰¹ Oversight of the intelligence agencies by a parliamentary committee and the Inspector-General of Intelligence and Security (IGIS), another office within the prime minister's department, would be extended to the AFP.¹⁰²

The questionable value of such scrutiny, however, was demonstrated by the inability or failure of the IGIS and the existing parliamentary committee to halt the detention of Haneef. If not for the courageous actions of Haneef's lawyers in taking their case to the public on 18 July 2007 – actions for which AFP commissioner Keelty took a formal complaint against Keim, Haneef's barrister, to the Queensland Legal Services Commissioner¹⁰³ – it is quite possible that Haneef would have been detained for many months, if not years, awaiting trial. In an implicit admission that public concern played a critical role in the Haneef affair, Keelty later complained that lawyers were 'advancing cases in the court of public opinion' in terrorism cases.¹⁰⁴

The Clarke report was the third report into a major scandal involving the counterterrorism legislation handed to the Rudd government. The first was an AFP internal review of its operations and its relations with ASIO and the DPP after the dropping, in November 2007, of terrorist charges against Sydney medical student Izhar ul-Haque.¹⁰⁵ The charges were withdrawn after a NSW Supreme Court judge ruled inadmissible an alleged confession by ul-Haque and commented that the AFP and ASIO officers involved had possibly committed the criminal offences of kidnapping and false imprisonment.¹⁰⁶ The second report was from the inquiry by the Inspector-General of Intelligence and Security (IGIS) into ASIO's actions in relation to ul-Haque.¹⁰⁷ Neither report led to any proposals to limit the powers of the AFP or ASIO.

VII. CONCLUSION

In conclusion, there is a grave danger that whatever modifications are made to the counterterrorism laws, the potential will remain for the operation of the laws to be politically influenced.

Elsewhere, this author has argued that the introduction of the laws themselves was driven by political calculations, and that the provisions seriously erode fundamental legal and democratic

98 Robert McClelland, above n 96.

99 Robert McClelland, 'National Security Legislation Discussion Paper' (Press Release, 12 August 2009).

100 Robert McClelland, above n 96, 1–2.

101 Ibid 2.

102 Ibid 2–3.

103 *Re: Keim, Ex parte: Biddle; Re: Keim, Ex parte: Keelty, Report to Legal Services Commissioner* <http://www.lsc.qld.gov.au/MediaRoom/BAQ_Recommendation-Keim.pdf> at 10 June 2009.

104 Mick Keelty, 'Court of Public Opinion Wrong Place to Test Law', *Sydney Morning Herald* (Sydney), 30 January 2008 <<http://www.smh.com.au/news/opinion/court-of-public-opinion-wrong-place-to-test-law/2008/01/29/1201369129231.html?page=2>> at 10 June 2009.

105 Australian Federal Police, *The Street Review: A Review of Interoperability between the AFP and its National Security Partners* (March 2008).

106 *R v Ul-Haque* [2007] NSWSC 1251 [62].

107 Inspector-General of Intelligence and Security, *Report of Inquiry into the Actions Taken by ASIO in Respect of Mr Izhar Ul-Haque and Related Matters* (November 2008).

rights.¹⁰⁸ In this author's opinion, the impact of alert and distrustful public opinion in helping to expose and prevent a miscarriage of justice involving these laws is to be welcomed, and not condemned as the AFP Commissioner did. Without the 'court of public opinion,' an innocent man could have been the victim of a politically-motivated frame-up.

Nevertheless, the outcome of the official inquiry into the Haneef affair remains unsatisfactory. That is because without thoroughly investigating the allegations of political interference, there is no effective guarantee that a similar injustice, or worse, could not happen again. Instead, members of the public are being deprived of the information they need to be able to safeguard society against such government abuses of power.

108 Michael Head, 'A Disturbing Convergence? Civil Liberties and the "War on Terror"' (2005) 1 *Asia Pacific Yearbook of International Humanitarian Law* 63–92; Head, above n 3; Head, 'Counter-terrorism Laws', above n 4.