THE ETHICS OF 'TRANSGRESSIVE' LAWYERING: CONSIDERING THE DEFENCE OF DR HANEEF

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This article serves two purposes. First, it provides a brief explanation of the extraordinary facts surrounding the arrest, charge and release of Dr Mohamed Haneef, and subsequent professional ethical complaint against his barrister. Second, it examines the question of the 'role' played by the defence lawyers in this high profile 'terror' case in Australia. The context of this case is significant: it provides a chronology of events for other comments concerning the 'muzzle rule' provided in this Special Edition; it is also argued here that it has a substantive effect on how we see a lawyer's ethical role.

This case had all the hallmarks of being a 'cause' for the lawyers involved: a foreign accused, allegations of links to terrorism, frequent leaks to the media seemingly emanating from the Prime Minister, Attorney-General and the Australian Federal Police (AFP), interference by a Minister to cancel a working visa and extensions of time the accused was held for questioning without charge (the Haneef affair). Finally, it attracted a highly respected Senior Counsel, Stephen Keim, and a seasoned criminal defence solicitor, Peter Russo, both working *pro bono* and both actively courting the media.

While there is much to be said, and much has been said, about this case in Australia, this article is concerned with a narrow examination of the significance of attributing a classification to these lawyers' representation in the Haneef affair: can we understand Keim's and Russo's representation as 'cause lawyering' or 'public interest' lawyering? They would likely respond that such a classification hardly matters and did not affect their conduct of the case. Yet it is contended that this conception plays an apparent role in how the media, the public and the government or officials imagine a lawyer's actions. Both lawyers were criticised publicly by various federal ministers and police in relation to their comments to the media during the course of their representation of Dr Haneef.[1] As a result of his conduct of the case, Keim faced a second battle to defend his professional reputation and registration, and Russo the threat of this.[2] The complaint to the disciplinary body made against Keim came from the AFP and a solicitor with no relationship to the case but with National Party affiliations.[3] The nature of the criticisms levelled at Keim hinted that his representation was in furtherance of a

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1 Jessica Marszalek and Jade Bilowol, 'Govt Trying Haneef by Media Lawyer' *AAP* (Sydney), 22 July 2007; Joel Gibson, 'Bold and Brazen Barrister Relishes the Front Line', *The Sydney Morning Herald*, 21 July 2008, 18; Alysia Debowski, 'Old Dogs, New Tricks: Public interest lawyering in an "Age of Terror"' (2009) 34 *Alternative Law Journal* 15, 18.

2 P Russo, 'Haneef: Peter Russo's Story' (2007) 27(10) *Proctor* 22, 25.

3 The complaints were made by AFP Commissioner Michael Keelty and private solicitor Russell Biddle as reported by the Bar Association of Queensland, *Report to the Legal Services Commissioner – Biddle and Keelty v Keim*, 17 December 2007. This recommendation can be found at <http://www.lsc.qld.gov.au/MediaRoom/BAQ_Recommendation-Keim.pdf> at October 2009. Mr Biddle's political party affiliations are reported by Reid Mortensen, 'Keim on the Muzzle Rule: A Reply and a Joinder' (2009) 28(2) *The University of Queensland Law Journal* 329.

political cause and therefore inherently an abuse of legal duties. Yet the complaint was ultimately dismissed in an atmosphere of almost unanimous support of Keim by the legal community. A key aspect of the ultimate finding was the 'exceptional' circumstances[4] in which Keim (and Russo) acted. The article asks whether this is significant for the ethics applying to their representation.

On the other hand, such a critique of Keim's and Russo's representation may be expressing a genuine concern about the appropriateness of a deliberate breach of professional ethical rules when they actively used and spoke to the media during the Haneef affair. This form of 'transgressive' representation strategy falls within a definition of cause or public interest lawyering which designates them as lawyers acting outside the traditional role.[5] Arguably, both Russo and Keim committed technical infringements of the professional rules. At the least, they both acted extensively (during and after the case) outside the forensic realm which represents a form of advocacy outside the norm. Did they get so caught up in the case, either for reasons of conviction or altruism, that they forgot their proper role as lawyers? In particular, this case raises the interesting threshold question of the limits of acceptable representative partisanship and zeal in such highly politicised cases. Can a lawyer think of a greater cause than the client's? Is there no end to the lengths a lawyer can go if it is arguable that this is undertaken in the client's interests?

Two articles which follow in this edition consider in detail the professional rule - Rule 60 of the *Legal Profession (Barristers) Rule 2007* (Qld) – that Keim was found to have broken. It is not the intention of this piece to consider the merits of the charges or findings against Keim, or the rule itself, but rather the context in which the complaint arose.

This article also considers the representation by Russo, who spoke to the media during the Haneef affair on many occasions. He did not face a similar complaint arguably because, on the one hand, the complaint against Keim related to the release of the record of interview and, by all accounts, Russo had no involvement in this. Furthermore, even if Russo had been involved, the professional rules which govern him as a solicitor are more permissive of publishing material regarding a current proceeding in which the solicitor is engaged as long as it does not 'prejudice a fair trial of those proceedings or prejudice the administration of justice'.[6] There is no comparable so-called 'muzzle rule' for solicitors as there is for barristers in Rule 60 of *Legal Profession (Barristers) Rule 2007* (Qld). However, does Russo's conduct similarly deserve condemnation as a breach of professional ethics?[7] In particular, did his deliberate use of the media in service of his client or to further a bigger cause contravene proper professional practice? Does the extraordinary context, and the conduct of other actors in the affair, change the nature of a defence lawyer's role?

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4 Letter from Robert Brittan on behalf of the Legal Services Commission Queensland to Mr Brian Bartley, dated 1 February 2008, paragraph 36. This report is available at <http://www.lsc.qld.gov.au/MediaRoom/LSC_Decision-Keim.pdf> at October 2009.

5 See Andrew Boon's discussion of various definitions of 'cause lawyering' which is considered later in this article: Boon, 'Cause Lawyers and the Alternative Ethical Paradigm: Ideology and Transgression' (2004) 7 *Legal Ethics* 250.

6 Rule 19.1 of the *Legal Profession (Solicitors) Rule 2007* (Qld).

7 I leave the question of the relative merits of the 'muzzle rule' to the discussion in Mortensen's article, above n 3.

I THE HANEEF AFFAIR: THE CHRONOLOGY

On 30 June 2007, a car loaded with propane canisters was driven into the terminal at Glasgow International Airport and set ablaze. Five people were injured. The two men who were driving the car had left a suicide note, and one of them, Khalid Ahmed, died of his injuries on 2 August. Eight people were taken into custody by 2 July. These included Dr Sabeel Ahmed, Khalid's brother.

At the time of these events, Dr Mohamed Haneef, an Indian national, was employed at the Gold Coast Hospital in Queensland. He was a second cousin of Khalid and Sabeel Ahmed, and had studied medicine with his cousin Sabeel in India. He had also been a medical practitioner in Liverpool, England, before moving to take up his position on the Gold Coast. On 2 July 2007, as he was leaving Australia on a one-way ticket to India, Dr Haneef was arrested by the AFP. He told police that he was returning to India to see his newborn daughter in Bangalore, and that the delay leaving the country was due to staffing issues at the hospital in Queensland.[8]

Dr Haneef was taken to the AFP headquarters in Brisbane. After a rest, he agreed to over 12 hours of questioning in a recorded interview (amounting to 140 pages of transcript), which was allowed under Part 1C of the *Crimes Act 1914* (Cth).[9] A magistrate approved an extension of the period for questioning, and Dr Haneef then continued to cooperate with the AFP in being questioned, with this second record of interview amounting to 378 pages of transcript. While Dr Haneef had the right under the *Crimes Act* to attend the hearing and make representations on his own behalf, he was not informed of this right and did not attend it.

On 5 July, an order was made to hold Dr Haneef without questioning – what is called 'downtime' – for another four days. Earlier in the day, Dr Haneef instructed a solicitor, Russo, to represent him. Russo was present at the hearing before Magistrate Gordon but was asked to leave the room while the Magistrate read secret information provided by AFP officers (who remained with the Magistrate). When Russo returned to the hearing he was informed that the order would be made without further information.

On 6 July, Russo briefed a senior barrister, Keim. A further application for 'downtime' was made by the AFP on 9 July 2007. At this hearing Keim argued that the failure to provide any information as to the basis for Dr Haneef's continued detention was a breach of natural justice.[10] Another hearing on 11 July was attended by senior counsel for each side. A rather vague declaration as to the basis for detention was provided which indicated the AFP believed Dr Haneef's departure was connected with his cousins' arrest in the United Kingdom and that there were on-going investigations in that country. Keim argued that Magistrate Gordon should disqualify himself from deciding the application.[11] The matter was adjourned until 13 July, whereupon the AFP withdrew its application for further downtime.

For the next 12 hours, the AFP questioned Dr Haneef with Russo present. On 14 July 2007, Dr Haneef was charged with recklessly assisting a terrorist organisation under the *Anti-Terrorism Act (No 2) 2005* (Cth).

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8 Russo, above n 2.

9 Dr Haneef was arrested under section 3W of the *Crimes Act 1914* (Cth).

10 Magistrate Gordon made an interim order for a further two days of detention.

11 The basis of this claim was that Magistrate Gordon had twice granted detention orders on the basis of material provided to him which had not been, and still was not, available to Dr Haneef and his legal team.

Throughout this period, there was extensive media coverage of the arrest and interviews. The media reports referred only to 'sources' that identified incriminating evidence against Dr Haneef, and which therefore seemed to originate with the AFP, executive government or Crown prosecutors.[12]

On the day the charges were laid, an application was made to have Dr Haneef released on bail. This was granted on 16 July, and Dr Haneef was released. The basis for Dr Haneef's release on bail was the weakness of the Crown's case. Magistrate Payne's order set out the case as based on two claims that 1) a SIM card that Dr Haneef had left with Dr Sabeel Ahmed had been found at the site of the explosion at Glasgow Airport; and 2) Dr Haneef had lived in the same apartment as Dr Sabeel Ahmed in Liverpool. Magistrate Payne found that there was no evidential basis for these claims except that the SIM card had been left with his cousin some 12 months previously.[13] Those two claims by the AFP were later shown to be false.

However, that same day, the Minister for Immigration and Citizenship, exercising powers he had under the *Migration Act 1958* (Cth), cancelled Dr Haneef's work visa on the ground that he was reasonably suspected of having an association with criminals and was not of 'good character'. The effect of the cancellation of the visa was that Dr Haneef was an illegal immigrant, and immediately subject to immigration detention. Russo and Keim learnt of this decision from a journalist who told them the Minister had made the announcement to the media.[14]

On 17 July, Keim released the first record of interview to *The Australian* newspaper. He made no comment on its contents; nor did he suggest that it conveyed evidence of his client's innocence. At that stage, the source of the transcript was not publicly reported. However, after public speculation, Keim admitted to being the source.[15] He told ABC Television's *Lateline* program that he thought the record of interview was self-explanatory, and made no further comment on its contents.[16] Russo made regular public statements in support of Dr Haneef's innocence throughout the case, but did not learn of the release of the record of interview until it was reported in *The Australian*.

On 18 July, and application was filed in the Federal Court to set aside the Minister's cancellation of Dr Haneef's visa. On 21 August 2007, the Federal Court quashed the Minister's decision cancelling Dr Haneef's visa on the ground that the reasons the Minister gave showed a jurisdictional error.[17]

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12 As is reported by the Legal Services Commission, above n 4, para 15.

13 See Keim's account in Keim, 'The rule of law questions raised by the case of Dr. Haneef' (2008) *Pandora's Box* 11, 15.

14 Russo, above n 3, 23.

15 Keim, above n 13, 15.

16 'Tony Jones talks to Stephen Keim SC', ABC Television, *Lateline*, 18 July 2007. A transcript of the interview can be found at <http://www.abc.net.au/lateline/content/2007/s1982091.htm> at October 2009.

17 *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273. Spender J also issued an injunction against the Minister, restraining him from acting on the cancellation of the visa. On 21 December 2007, an appeal was rejected by the Full Court of the Federal Court: *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203. The new Labor government subsequently indicated that it would not pursue a further appeal to the High Court, nor exercise the power to reconsider cancellation of Dr Haneef's visa. Chris Evans, the new Minister for Immigration and Citizenship, issued a press release on 16 January 2008 announcing that he would not pursue Dr Haneef further. Evans, 'Haneef Visa Decision Will Not Be Appealed', *Media Release,* 16 January 2008 available at <http://www.chrisevans.alp.org.au/news/0108/immimediarelease16-01.php> at October 2009.

On 27 July 2007, the Commonwealth Director of Public Prosecutions (the DPP), having reviewed the material relating to the AFP's decision to charge Dr Haneef, concluded that, 'in the circumstances of this case' he did 'not believe that evidence to prove the case to the requisite standard will be obtained'.[18] The charge under the *Anti-Terrorism Act (No 2) 2005* (Cth) was dropped.

On 28 July, Dr Haneef left Australia for India with the 'Minister's blessing'.[19] On 31 July, the Immigration Minister released a translated and highly selective extract from a chat room conversation between Dr Haneef and his brother in defence of his decision.[20]

A national inquiry[21] was commissioned by a new Federal Government on 13 March 2008. The report from the inquiry was presented on 21 November 2008.[22]

On 8 August 2007, the AFP Commissioner, Mick Keelty, lodged a complaint about Keim's conduct with the Queensland Legal Services Commissioner (the Commissioner). The allegation was that the release of the record of interview to the media constituted unsatisfactory professional conduct or professional misconduct[23] by Keim as, among other things, it breached Rule 60 of the *Legal Profession (Barristers) Rule 2007* (Qld).[24] The Commissioner referred the complaint to the Bar Association of Queensland for investigation and report.[25]

On 17 December 2007, the Queensland Bar Association provided its report to the Commissioner. The report found a breach of Rule 60.[26] The report found that

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18 D Bugg, 'Media Release', 27 July 2007 available at <http://www.cdpp.gov.au/Media/Releases/20070727-Haneef.aspx> at November 2009.

19 Keim, 'Whither Now? Pondering the Haneef Case' (April 2008) *Law Society Bulletin* (South Australia) 18.

20 'Andrews documents Haneef suspicions', *The Australian*, 31 July 2007, available at <http://www.theaustralian.news.com.au/story/0,,22163726-601,00.html> at October 2009.

21 The Hon John Clarke QC, was appointed to head the inquiry. His terms of reference included examination of and reporting on:
a) 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
b) the administrative and operational procedures and arrangements of the Commonwealth and its agencies relevant to these matters
c) the effectiveness of cooperation, coordination and interoperability between Commonwealth agencies and with state law enforcement agencies relating to these matters
d) having regard to (a), (b) and (c), any deficiencies in the relevant laws or administrative and operational procedures and arrangements of the Commonwealth and its agencies, including agency and interagency communication protocols and guidelines.

22 A summary of the findings and the Federal Government's response can be found at <http://www.attorneygeneral.gov.au/www/ministers/RWPAttach.nsf/VAP/(966BB47E522E848021A38A20280E2386)~clarke+inquiry.pdf/$file/clarke+inquiry.pdf> at October 2009.

23 As defined in sections 418 and 419 of the *Legal Profession Act 2007* (Qld).

24 Rule 60, which is a type of 'gag' rule, provides that 'a barrister must not publish or assist the publishing of material concerning a current proceeding' with a number of exceptions which include documents already filed or tendered in court and answering 'unsolicited questions' regarding the case. In respect of speaking to the media, barristers are not permitted (under Rule 60(b)) to make statements that are inaccurate, disclose confidential information or express a personal opinion of the case. Rule 60(a) also provides that the exceptions do not apply except with the 'consent of the client first obtained'.

25 In fact, the Commissioner delegated his powers to deal with the complaint to his Complaints Manager, Mr Robert Brittan. Mr Brittan referred the matter to the Queensland Bar Association.

26 Queensland Bar Association recommendation dated 17 December 2007, paragraph 44.

Keim had not obtained the consent of his client to release the transcripts of interview.[27] However, it stated that 'not every breach of a prescription of Rule 60 will constitute unsatisfactory professional conduct or professional misconduct'.[28] It noted that Rule 60 contains exceptions which 'apprehend that a barrister may well … publish some materials … which are likely to be at the very heart of acutely contentious issues when being litigated'.[29] In this case, the Queensland Bar Association placed substantive weight on the 'extraordinary and separate dimension to the matter' as described above.[30] Therefore, it was recommended that the complaints be dismissed as the breach of the rule did not constitute unsatisfactory professional conduct or professional misconduct. It arrived at this finding because there was 'no sufficient public purposes properly to be served otherwise as would warrant bringing a disciplinary charge against him'.[31]

On 1 February 2008, the Commissioner, while not bound by the Queensland Bar Association recommendation, made a similar finding and decided not to bring a discipline action against Keim.[32] However, the Commissioner appeared to place greater weight on the lack of client consent to the release of the transcript as entirely constituting the breach of Rule 60.[33] Nevertheless, he found that the context of the breach was 'exceptional'.[34]

II 'TRADITIONAL' LEGAL ETHICS AND ACTING *PRO BONO*

Amongst the many government, legal professional and other commentators who publicly commented on the case, the then Attorney-General, Mr Ruddock, entered the fray on a number of occasions. In particular, he strongly criticised Keim for talking to the media. For instance, Ruddock challenged the ethics of Keim's decision to release the transcripts of police interviews with Dr Haneef: 'That information ought to have been put before a court … [and] members of the legal professional have ethical obligations'.[35] He further commented for ABC Television's *7.30 Report* on 18 July 2007 that the release of the transcript of interview was

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This recommendation can be found at <http://www.lsc.qld.gov.au/MediaRoom/BAQ_Recommendation-Keim.pdf> at October 2009. The recommendation found, however, that this was a breach of 'the least kind' as it was a breach by a 'premature' publication of material likely to be tendered as evidence in court (at para 53(f)). There was significantly no evidence of abuse of the document when released by Keim (by way of personal comments by Keim on it).

27 Haneef was found to have 'subsequently and unequivocally ratified the publication of the record of interview'. Queensland Bar Association recommendation, ibid, para 24.

28 Ibid, para 29.

29 Ibid. It is also noted at para 38 that the published transcripts were not confidential information.

30 Ibid, para 32.

31 Ibid, para 34.

32 The Commissioner is empowered to exercise his discretion to dismiss a complaint under section 448(1) of the *Legal Profession Act 2007* (Qld). The Commissioner may make this decision on the basis that he is satisfied that there is no reasonable likelihood of a finding of a disciplinary body of either unsatisfactory professional conduct or professional misconduct (s 448(1)(a)); or he considers it is 'in the public interest to do so' (s 448(1)(b)). On this occasion, the Commissioner made his decision to dismiss the complaint on the first basis.

33 Above n 4, paras 24-25 and 37.

34 Ibid, para 36.

35 Richard Ackland, 'A concoction registering well over the limit' *The Sydney Morning Herald,* 20 July 2007, 2.

'...inappropriate, highly unethical and the question of whether there are any consequences really depends upon the parties to the proceedings.' Elsewhere he described it as 'an outrage, a breach of ethics and a possible contempt of court'.[36]

Why Ruddock considered Keim's actions to be 'outrageous' and unethical was not explained in the press.[37] Thus the following discussion does not purport to be an accurate representation of Ruddock's views on the Haneef affair but instead to venture a plausible explanation for his holding these views. The then Attorney-General penned a brief article in *The Australian* newspaper some 6 months before the Haneef affair, in which he engaged with old debates in legal ethics about the role of lawyers, and their duties to clients and courts. He argued that what has often been named the 'standard conception'[38] approach to the legal role is the only ethically plausible model and juxtaposed what he saw as a new breed of activist lawyers who unethically transgress this 'tradition'. The implication is that lawyers committed to politicised or ideologically driven outcomes do not properly, or ethically, perform their legal role.

Tim Dare's recent defence of the 'standard conception' characterises the debate in the following way:

> There is a widespread perception that even when lawyers are acting squarely within their roles, being good lawyers, they display the vices of dishonesty and deviousness. At the heart of the perception is the so called standard conception of the lawyer's role according to which lawyers owe special duties to their clients which render permissible, or even mandatory, acts that would otherwise count as morally impermissible. Many have concluded that the standard conception should be set aside.[39]

The common (and oversimplified) definition of the standard conception, which Ruddock appears to call 'traditional' legal core values, is that a lawyer must act as a partisan and zealous advocate for the client irrespective of the lawyer's personal or other social considerations. Dare summarises some of the critique of this approach above. The justification is hinted at by Ruddock when he explains what he sees as a worrying change in practice and lawyers' conception of ethics:

> I use the word traditional because the concept of ethical legal practice has become infected with a new and unappealing interpretation. The traditional view revolves around practitioners' responsibilities: to the law, the court or tribunal, fellow practitioners and the client. Atticus Finch, from Harper Lee's To Kill a Mockingbird, exemplified these ideals, defending an unpopular client against accusations of a heinous crime. Finch was fighting not to overturn the law but to uphold it. The new view sees representation of the client as an insufficiently grand role. It holds the lawyer responsible for effecting broader social and political change.[40]

Thus the 'traditional' legal role is concerned only to uphold the law by exclusive regard to the client. Ruddock sees an atrophy of commitment to this legal

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36 Ibid.

37 The author makes this assertion on the basis of electronic searches of the public media in Australia conducted as of November 2009.

38 See, for instance, William Simon, 'The Ideology of the Adversary System: Procedural Justice and Professional Ethics' (1978) 29 *Wisconsin Law Review;* Tim Dare, *The counsel of rogues?: a defence of the standard conception of the lawyer's role* (2009).

39 Dare, above n 38, Preface 1.

40 Philip Ruddock, 'Some lawyers ignore their profession's core values', *The Australian*, 3 November 2006.

role: 'Once legal practice becomes 'not actually based around service to a client', the lawyer is tainted with the moral status of the client's cause. Service to that cause, no longer a professional responsibility, is therefore a choice.' This, he seems to imply, takes the lawyer outside the legal role by definition. This author questions the logic of this conclusion.

Ruddock continues that this is not simply a matter of competing ethics, but rather '[a]n increasing shade of moral vanity' being demonstrated. Here he singles out the lawyer acting *pro bono* – 'one of the profession's noblest traditions' – for particular scorn. Ruddock seems to agree that there is merit in the notion of *pro bono publico* defined by an interest in working for justice or 'meeting unmet legal need',[41] as he cites certain causes with approval: 'There is no shortage of genuine cases: a disadvantaged citizen victimised by a loan shark; a pensioner seeking a will'. Yet he contrasts these with causes pursued in the courts which he considers to be ideologically driven and a waste of court and taxpayer time and money. Unsurprisingly he raises the common criticism of lawyers who conduct 'hopeless proceedings in a bid to undermine laws with which they personally disagree'.[42] Few would disagree that, were a lawyer deliberately or negligently to conduct or encourage an unmeritorious action, it would be an abuse of our courts and a breach of professional ethics (as defined in rules or at common law).[43] Yet this is to erect a false dichotomy. Do lawyers who pursue a 'cause' necessarily run abusive cases, even if these be speculative or directed towards law reform? The arguably over-zealous, and ultimately unmeritorious, pursuit of a conviction against Dr Haneef by the AFP appears to transgress Ruddock's definition. Lawyers within the Commonwealth Department of Public Prosecutions presumably considered and approved charges laid against Dr Haneef (and argued several motions before Queensland magistrates) before they were revealed to be without merit and withdrawn.

The implication, when he suggests that lawyers' role influencing social policy must be 'made not in a professional but in a personal capacity', is that no hint of political motivation must be attributable to lawyers acting in their legal capacity.[44] Does this mean that the lawyer can never seek law reform through the law? By implication, Russo and Keim were only acting ethically if they could be said to be simply pursuing the correct path for their client and nothing more. The difficulty arises as to who gets to characterise lawyer action: is it the lawyer's own motivation, the client's view, or what members of the public are likely to think of the actions?

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41 See, Andrew Boon's excellent discussion of what a 'cause lawyer' is – or rather what we mean by 'cause' – in Boon, above n 5, 252.

42 This representation of cause lawyers was reported recently in *The Australian* quoting litigation partner at Clayton Utz, Stuart Clark, bemoaning the rise of unmeritorious cases and the lack of redress available for large companies who are the victims of this use of the law. He called on courts to take a more active role to dismiss such cases and explained that corporate clients could not use their reciprocal weapon of asking for costs for fear of 'appearing vindictive': Chris Merritt, 'Time to crack down on the hopeless cases', *The Australian,* 29 May 2009, 27.

43 See for instance: *White Industries (Pty Ltd) v Flower & Hart* (1998) 156 ALR 169; *Flower & Hart v White Industries (Pty Ltd)* (1999) 87 FCR 134.

44 It is interesting to note that Russo was careful to distance himself from politicised causes pursued in his personal capacity during the Haneef affair, when he did not attend a rally he was scheduled to attend: see Debowski, above n 1, 18. Separation of personal and professional lives can be more difficult than Ruddock appears to allow. Where Russo was subject to intense scrutiny, it is likely that his personal views would have been attributed to his representation of Haneef in the public imagination.

In contrast, many lawyers and professional bodies see law reform or motivation by a cause larger than the client's as a core duty of lawyers working *as lawyers*. For instance, a media release by the Queensland Council for Civil Liberties criticised Ruddock's condemnation of Keim and pointed to the importance of lawyers working within the system to resist governmental abuses.[45] They particularly point to those lawyers working *pro bono* who therefore select the client – or the cause – for reasons other than monetary gain.[46] The Council aligned Keim with other high profile lawyers who had acted against the Federal Government in highly public cases:

> Mr Keim joins a list of distinguished lawyers and judges who have upset Australia's ultra-authoritarian Attorney-General. The list includes lawyers who acted without fee for immigration detainees, such as the refugees detained by the SAS on the Tampa in 2001. In that case Justice French praised pro bono lawyers for acting:
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> > 'according to the highest ideals of the law. They have sought to give voices to those who are perforce voiceless and, on their behalf, to hold the Executive accountable for the lawfulness of its actions. In so doing … they have served the rule of law and so the whole community'.[47]

Are any of these lawyers acting for the cause attributed to them above, or simply acting 'zealously' for their client? It is noted that the perception that a lawyer is acting either beyond 'mere-zeal', rather with 'hyper-zeal',[48] appears to be central to popular definitions of 'cause lawyers'. Russo's dedicated and often literally unsleeping defence of his client during the Haneef affair[49] indicates a commitment which goes beyond the norm. Indeed, his comments often appeared to provide a personal view of the evidence in the case, possibly contravening Rule 13.3 of the *Legal Profession (Solicitors) Rule 2007* (Qld) or at least illustrating his increasing personal frustration and involvement.[50] For instance, he described the Minister for Immigration and Citizenship a 'buffoon'[51] and the government's tactics in the Haneef affair as 'bullshit'.[52] Perhaps the personal and perhaps even unprofessional tenor of the comments can be understood to cast the profession in a poor light, yet they may have been consistent with a robust defence of Dr Haneef in such circumstances. As Keim suggested, Russo's approach of talking to the media in such a way arguably 'achieved the most amazing piece of advocacy. He turned an

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45 Media Release by Queensland Council for Civil Liberties, 'Ruddock Can't Handle the Truth' in which it stated: 'Attorney-General Ruddock can't handle the truth, and so he has made a disgraceful attack on Mr Keim', available at <www.julianburnside.com.au/Ruddock%20on%20Ethics.doc> at November 2009.

46 The strong response by the Queensland Council for Civil Liberties was to the comments of Mr Ruddock in a number of media during 2007.

47 Queensland Council for Civil Liberties, above n 45.

48 These terms, and reference to the larger legal ethical debate about the bounds of the legal role, I borrow from Tim Dare, 'Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers' (2004) 7 *Legal Ethics* 24. See also above n 38.

49 See for instance Mr Keim's account of Mr Russo's around the clock representation of Dr Haneef: Stephen Keim, 'Dr Haneef and me' (2008) 33 *Alternative Law Journal* 99. See also Russo's account in Russo, above n 2, 22-25.

50 Rule 13.3 provides: 'Except where otherwise required by law or a court, a solicitor must not make submissions or express views to a court on any material evidence or material issue in the case in terms which convey or appear to convey the solicitor's personal opinion on the merits of that evidence or issue'.

51 'Haneef's Lawyer Calls Andrews "A Buffoon"', *Hindustan Times* (New Delhi), 30 July 2007, cited by Debowski, above n 1, 18.

52 Hedley Thomas, 'Lawyer's Own Legal Ordeal', *The Weekend Australian*, 28 July 2007, 1.

unknown and fearsome "terrorist suspect" into a real person undergoing a very difficult ordeal – a person with whom people could identify and empathise'.[53] Or can this be understood as poisoning the potential pool of jurors should Dr Haneef be brought to trial?

Where do we place pursuit of a client's case beyond the barriers of the court? Arguably, Ruddock's definition would not censure this conduct as it is not obviously undertaken for a law reforming cause. However, he asserted that publicised lawyering abuses the other pillar of legal duty: duty to the client. Cause lawyers are characterised as 'raising clients' expectations' in pursuit of an ulterior goal. Yet he suggested that this occurs less from real conviction and more from elitism and vanity of the lawyers:

> The claim that a legal elite must lead a bewildered populace out of error strikes me as patronizing. Disdain for those outside the legal priesthood does little to raise the profession in the eyes of a nation disposed towards robust egalitarianism. Practitioners who serve clients, not causes, have many opportunities to demonstrate traditional legal ethics.[54]

Here Ruddock responded to frequent 'cause' and *pro bono* barrister, Julian Burnside QC, who commented that lawyers (in refugee matters) must take a leading role in the 'struggle for justice'.[55] While it may be an elitist claim, perhaps Burnside is correct that lawyers are in the best position to serve this role. The efforts of Russo and Keim to defend their client in numerous courts, including of public opinion, appear to be vital to the ultimate outcome of the matter (that being Dr Haneef's release from custody and the DPP's failure to pursue criminal charges). In contrast, Ruddock's depiction is of lawyers who take on high profile *pro bono* cases for reasons of vanity, seeking exposure and a greater cause than the client's. The difficulty seems to be in where we draw the line, or how we define the role occupied in such cases. Does it matter from the perspective of the administration of justice or of ethics that the lawyer is pursuing a case for reasons of personal vanity or a greater cause if the representation is effective?

Again, when we consider the context of Keim's representation of Dr Haneef, this has interesting implications. While not raised as a major cause of complaint, the disciplinary authorities did consider whether Dr Haneef's interests had been violated, or at least overlooked, when he was not consulted on the decision to release the police interviews.[56] Yet arguably, this action was not motivated by vanity or pursuit of a greater cause by his counsel, but rather the proper exercise of 'forensic judgment' called for in our professional rules.[57] Taking client instructions in this case is clearly required, yet the context indicates urgent action might have been needed and that the client, who was asked to respond to the release of the record of interview after it occurred, then did not perceive a violation of duties owing to him. Keim clearly describes his actions as considered and ethically justifiable:

> I believed that the public would be well served by facts, as opposed to anonymous leaks, and the Minister's claims based on unpublished and, therefore, untested

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53 Keim, above n 49, 100.
54 Ruddock, above n 40.
55 Cited by Ruddock, ibid.
56 Mr Keim concedes this decision was made by him alone without consulting Dr Haneef or Mr Russo. He argues this was done due to the extreme pressures of time: Keim, above n 49, 101.
57 See r 37 *Legal Profession (Barristers) Rule 2007* (Qld)

> information. ... I had no doubts that this was lawful; ethical; in my client's best interests; and the right thing to do.[58]

'Public interest' lawyer Alysia Debowski argues that, for a range of reasons related to increasingly draconian laws and the slowness of our judicial system, 'public interest lawyers must now do more than use the law to pursue their client's interests. Public interest lawyers must now seek alternative measures of securing a positive outcome for their client'.[59] She particularly endorses the use of the media as an effective, albeit often dangerous, tool in this struggle. Media attention may be effective to advance proceedings or negotiations, yet it is even more effective to advance a cause. However, she does not perceive an inherent dichotomy in acting in the client interest and in the public interest; rather, they can coexist. Keim's comments indicate a similar view. In this case, his contention that he released the transcripts, and then 'took responsibility' as the source of the release, appears to be both logical and ethical. He explained that the 'messenger rather than the debate became the talking point, so by taking responsibility I was able to help the public debate get back on to what I thought was the real issue'.[60] As Deborah Rhode argues, taking personal responsibility for actions – even those that are motivated by more than the client's will – is an ethically defensible position.[61] It seems particularly defensible when we compare it to the deliberately anonymous leaks to the media, and the invisibility of other legal actors in the affair.

However, fighting dirty simply because the opposition has done so is not an ethically strong position. Of more concern, as Ruddock suggests, many legal ethicists would perceive greater harm in the trampling of client will than the decision to go to the press. Monroe Freedman, who takes a view similar to Ruddock's, places client autonomy and choice as paramount in the lawyer-client relationship. This he argues is required not only to reduce the elitist instincts of lawyers but also to engender the necessary trust in the sanctity – being client supremacy of will – of the relationship.[62] While I do not intend to tease out this old ethical debate any further, I do ask whether there is something about the *pro bono* lawyer in Keim's 'exceptional' situation (whether defined as a 'cause lawyer' or not) that necessarily leads to a violation of this sacred professional ideal and duty. That is, does the nature of the public and publicised case engender a different legal role, and thus a different power balance between lawyer and client? There is no doubt that in many cases the client is one of the most vulnerable in our society being usually impecunious, often a non-citizen and almost always socially marginalised. Should they be more led than other clients, or is there an ethical imperative to more jealously protect their autonomy in terms of conducting the case? In this case, the lawyer perceived himself as acting in the client's interest, but is the lawyer permitted to choose?

Finally, while Keim has argued in several articles since about the coalescence of acting in the interests of the client and in the public interest, this may not always be the case. Keim argues that the 'ordinary lawyers doing their ordinary work play a

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58 Keim, above n 49, 101.

59 Debowski, above n 1, 44. For a discussion of permissible media interaction by professional rules see Rachel Spencer, 'Lawyers and the Media' (2008) *Law Society Bulletin* (South Australia), 22-24.

60 'Trials and tribulations' (Interview with Stephen Keim) (2008) *Australasian Law Management Journal* 16, 17.

61 See, for instance, Deborah Rhode, 'Law, lawyers, and the pursuit of justice' (2002) 70 *Fordham Law Review* 1543; Rhode, 'Personal integrity and professional ethics' in K Tranter *et al* (eds), *Reaffirming Legal Ethics* (in press, 2009).

62 Monroe Freedman, *Lawyers' Ethic in an Adversary System* (1975).

really important function in our community'.[63] He suggests that defending certain types of client inherently has an important public purpose: 'fighting for the rights of disadvantaged people produces its own social messages'.[64] But are there other less than 'ordinary' cases where lawyers must apply values other than simply defending the client in order to serve what they see as an ethically defensible path? What if releasing the transcript of interview was not required in the circumstances, but was the only way to set the record straight in the public realm? Ultimately, Keim and Russo arguably had an easy ethical choice in this case.[65] However, the case raises at least two unanswered issues: 1) the degree of 'zeal' permitted to protect client interests (including non-legal means) in such cases; and 2) whether the lawyer can ethically consider non-client issues.[66]

This short article does not attempt to answer these questions, but notes that the context of the case appears to be a significant factor in deciding how to apply, or rather the implications for the lawyer of a breach of, the professional rules. The professional bodies considering the complaints made against Keim clearly placed considerable weight on the surrounding circumstances such that a breach of the rules was not unethical at least in so far as it was not adjudged against the 'public interest'.

III THE DEFINITION OF 'CAUSE' OR 'PUBLIC INTEREST' LAWYERING

I have argued that the public perception of lawyers acting in politicised cases seems to rely on an assumed motivation by the lawyers that is greater than simply doing their job for the client. This has resulted in the polarised reactions to cases such as the Haneef affair where his lawyers have received copious praise[67] and public criticism. This seems to indicate at the very least that lawyers play a very visible role in the administration of justice in such cases. Thus lawyers cannot hide behind the impersonal professional role of legal technician.

This has consequences for the legal actors here as significance is placed on their role as defending the 'legitimacy' of the judicial process. Their transgressions are perhaps sanctioned, and even lauded, as necessary to fight forces which seek to pervert the due legal process. I have traced a number of ways in which Russo and Keim have become personally involved and identified with the case, as well as stepped outside the normal bounds of legal representation (chiefly by speaking to the media). Both lawyers expressed some sense of a larger public duty in their role. Thus they were, whether in appearance or fact, not neutral, dispassionate nor fully partisan. How can this be professionally ethical? It is argued that the context of representation has a substantive effect on the representative role. Therefore, as Andrew Boon says, it is 'important to know what impact replacing neutrality and

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63 Above n 60, 18.

64 Stephen Keim, 'Reflections upon the trial of Dr Haneef' (October 2007) *Precedent* 36, 39.

65 Keim stated: 'whether it was deciding to release the record of interview or deciding to take responsibility for it, the answer was incredibly straightforward. It was the right thing for your client. It was the right thing ethically so you just did it': above n 60, 18. On the other hand, he also conceded that there are significant challenges when acting in such cases, which require considerations and skills outside a lawyer's typical training: Keim, ibid, 39.

66 This presupposes that this will not introduce a clear conflict of interest or abuse of the client's interests such as patently negligent representation.

67 Both Russo and Keim have commented on the amount of support received from their peers and the community for their representation of Haneef.

partisanship with other rules of engagement between lawyers and clients might have'.[68]

It is time to define some terms. Boon is correct in asserting that some definitional clarity as to roles occupied by lawyers is important if we are to draw any 'consequence' of a prospective model of professional ethics.[69] Boon provides an excellent discussion of the various understandings of a cause lawyer from 'politically motivated lawyers working for poor people'[70] to those 'using litigation to establish and defend civil liberties and civil rights' to 'radical' lawyers working solely at certain law reform projects.[71] Boon points out that there are some key differences in this spectrum of lawyering. For instance, does a 'cause' have to be meeting the needs (either directly or politically) of those who are socially disadvantaged?[72] Secondly, does a cause lawyer have to be working full time within an environment or organisation committed only or chiefly to the 'cause'? The only common denominator suggested by Boon is that it be in the 'legal' role, rather than in the lawyer's personal capacity.

It is the second question as to the nature of the 'commitment' to the cause that I chiefly consider here. Can we impute a cause to Keim in the pursuit of his defence of Haneef? If so, to what degree does this need to be a motivating factor? Of course I largely leave this specific answer to Keim's contributions in this edition and to his published work and comments elsewhere. Yet the larger definitional question remains in relation to those who take on politicised cases, particularly when this is done as a one-off case. Keim is a successful Senior Counsel who has forged a career taking cases far removed from the classical image of the cause lawyer working in Legal Aid. Does one case make him a different sort of lawyer, or does he occupy that role only in the Haneef affair?

By the same token, as Ruddock and the empirical work of Scheingold and Bloom suggests many lawyers may take on *pro bono* cases of this nature for reasons external to a political or social justice cause. This may be a question of vanity, 'liberal guilt', different professional experiences (of clients or area of law) or other motivations.[73] Does selection of the client define the legal role such that we must know why Keim took on the Haneef case? What if this motivation changed throughout the course of representation? Classifying Russo, the criminal defence solicitor, is also problematic. While he is well known to take on cases defending those who are socially marginalised, he is not part of an organisation devoted to a cause or the public interest specifically. Similarly, he does not fit within an easy definition of those who select clients based on achieving larger lawyer social ends – he was called by the Brisbane Watchhouse to represent Dr Haneef.[74]

Scheingold and Bloom suggest that an indicator of lawyer 'commitment', and thus the label of a cause lawyer, is 'the propensity of cause lawyers to transgress

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68 Boon, above n 5, 254.

69 Ibid.

70 Ibid, 251.

71 Ibid, 252. See also Austin Sarat and S Scheingold's two edited collections for discussions about a range of lawyering styles and goals: Sarat and Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (1998); Sarat and Scheingold (eds), *Cause Lawyering and the State in a Global Era* (2001).

72 As Boon suggests: 'there seems no intrinsic reason why lawyers as deeply engaged in work for right wing causes should not be treated as cause lawyers': Boon, above n 5, 253.

73 See, S Scheingold and A Bloom, 'Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional' (1998) 5 *International Journal of the Legal Profession* 209, 220.

74 Russo, above n 2, 22.

conventional professional ethical boundaries'[75] to a greater degree than other lawyers. This suggests that 'commitment' here represents more than selection of client. Boon elaborates on this definition by warning that this should not be understood as a willingness or propensity to make 'regulatory infractions', but rather 'deliberate transgression for a cause'. This definition is problematic when we consider the example of Keim working in the Haneef case. He can hardly be said to have engaged in an 'irrelevant regulatory infraction' as the 'muzzle rule' is supposedly underpinned by a deep professional ethical principle not to abuse the court's processes which is said to require counsel to remain solely within the forensic realm. Russo's deliberate comments on record also transgress the typical realm of legal representation.

However, the effectiveness of these strategies for the client could be interpreted as examples of supreme zeal and partisanship for the client. The transgressions were not made with any ulterior cause in mind. This article contends that Russo's and Keim's representation was deeply ethical in nature as it had regard to both the client and the public interest. In this context these interests were consistent and provided the motivation for the lawyers to act as they did, often stepping outside traditional advocacy. The full limits of permitted zeal and commitment to public purposes are not attempted. However, it is argued that regard to client interest *and* the public interest is ethically appropriate.

Finally, and returning to the importance of the context in which the lawyers acted, I raise another piece of the complex jigsaw of the Haneef affair which has received little comment[76] – the conduct of the government lawyers. Several recent terrorism-related cases in Australia have raised serious questions about the role played by government lawyers. Academic attention has tended to be focused on the tactics of ASIO or the AFP.[77] However, in many cases charges laid and arguably tactics adopted were necessarily concocted or conducted by lawyers. For instance, while the DPP ultimately dropped all charges against Dr Haneef, this was done only after intense media scrutiny and numerous court appearances. Keim and Russo were convinced on the face of material provided to them that no charges were ever warranted. Of more concern is the silence of prosecution lawyers over a small, but by no means insignificant, piece of evidence concerning the location of the SIM card when it was discovered.[78] The court had been misled for a number of days on this matter and, without a media report,[79] there is no indication of when or if the record would be corrected. Keim points out that the fact that the court was misled indicates a 'failure by authorities' and 'raises real questions for the rule of law'.[80] Thus the 'legitimacy' of the judicial system itself was in jeopardy and the defence lawyers

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75 Cited by Boon, above n 5, 254.

76 Rather, the storm of media attention, including academic and legal professional body comment, has tended to focus on the conduct of the AFP, terrorism legislation and the Executive and its ministers.

77 For instance, Waleed Aly documents that the undoubtedly illegitimate pressure imposed by ASIO officers in eliciting information which ultimately led to the unsuccessful prosecution of Izhar Ul-Haque. He is particularly concerned with the laws under which government agencies have pursued suspects, often simply to 'test' the extent of powers conferred by new laws: W Aly, 'Axioms of Aggression: Counter-terrorism and counter-productivity in Australia' (2008) 33 *Alternative Law Journal* 20.

78 Joanne Knight, 'Exorcising terrorism' (Autumn/Winter 2008) *Dissent* 38, 40.

79 This fact was first reported on 20 July 2007 by ABC journalist Raphael Epstein, and was allegedly the first time any court or the defence had heard of this error, as described by Keim, above n 13, 17.

80 Ibid.

appeared to be its only custodians. The 'cause' attributed to the defence lawyers then became the 'public interest' broadly defined.

In the absence of any regard for these ethical signposts,[81] we fall back on the necessity of the robust adversarial system which requires 'hyper-zealousness' by those facing the forces of executive power, as has long been suggested by legal ethicist David Luban.[82] Lawyers fighting for the greater 'cause' of justice in a system under threat may fight with any legal or non-legal weapons not only to service the client but to ensure the legitimacy and integrity of the legal process.[83] There appears to be a perception that it is the public interest lawyers who assume full responsibility for the administration of justice. It is on this basis that their transgressive role is ethically permissible and expected.

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81 Arguably other quasi-legal mechanisms such as the 'model litigant' guidelines contained in *Legal Services Directions 2005* Appendix B govern federal government and its lawyers, and should mandate a certain uprightness or ethical standard in conducting proceedings.

82 David Luban, 'The Adversary System Excuse' in David Luban (ed), *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (1983) 83.

83 For instance, Justice Pincus argues of the Haneef affair that the excessive and often manifestly misleading or untrue leaked statements by government and police sources against Dr Haneef 'can substantially affect the result of a criminal case'. Further he argues that the 'theory that judicial directions can expunge any adverse effect of such publicity is a dubious one'; B Pincus, 'The Haneef Affair' (2008) 19 *Public Law Review* 91, 99.