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Dear Secretary

Clarke Inquiry into the case of Dr Mohamed Haneef

Thank you for the opportunity to make a submission to the inquiry into the case of Dr Mohamed Haneef by the Hon John Clarke QC.

We wish to raise several matters in respect of the Inquiry's terms of reference, which address particularly the Inquiry's interest in the role which 'deficiencies in the relevant laws' played in the affair.

A Pre-Charge Detention under the *Crimes Act 1914* (Cth)

The Legislative Scheme

Upon arrest for a terrorism offence,[1] a person may be detained without charge for the purpose of investigating whether he or she committed the offence and/or whether he or she committed another terrorism offence that an investigating official reasonably suspects he or she committed.[2] The period of detention for adults is generally limited to a 'reasonable' period not more than four hours,[3] with the sole exception being where a Magistrate or Justice of the Peace grants an application under section 23DA for the period of detention to be extended. The total of any periods of extension cannot be more than 20 hours.[4] That is, there is a maximum detention period of 24 hours. It is notable that the maximum detention period for other serious offences is 12 hours.[5]

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1 *Crimes Act 1914* (Cth), s 23CA(1).
2 *Crimes Act 1914* (Cth), s 23CA(2).
3 *Crimes Act 1914* (Cth), s 23CA(4).
4 *Crimes Act 1914* (Cth), s 23DA(7).
5 *Crimes Act 1914* (Cth), s 23D.

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However, section 23CA(8) provides for 'dead time' that must be disregarded in ascertaining compliance with the time limit for the detention period. This 'dead time' means that a person may be detained for days or even weeks, with the maximum of 24 hours of questioning spread over that period. Many of the justifications for staggering of the questioning period through the use of 'dead time' are clearly defensible – allowing for breaks for meals or sleep, or the translation of documents relevant to police inquiries and the need to communicate with agencies across different time zones.

However, of particular concern is section 23CA(8)(m), which provides generically for the exclusion of:

> *(m) any reasonable time that:*
> *(i) is a time during which the questioning of the person is reasonably suspended or delayed; and*
> *(ii) is within a period specified under section 23CB.*

An application to a Magistrate, or Justice of the Peace, for a time to be specified for the purposes of section 23CA(8)(m)(ii) may be granted if the decision-maker is satisfied that it is appropriate to do so, that the offence is a terrorism offence, detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or into another terrorism offence, the investigation is being conducted properly and without delay and the accused has been given an opportunity to make representations.[6]

The only case in which a Magistrate has authorised 'dead time' under section 23CB is that of Dr Haneef. The total period of detention for Dr Haneef was 12 days (from 2-14 July 2007). As this case illustrated, the 'dead time' provisions mean that the 24 hour time limit on questioning ceases to be an effective safeguard for the rights of the detainee and the detainee is subjected to the possibility of indefinite detention.

The possibility that a person may be detained for a lengthy period of time means that it is necessary for there to be a cap on the total amount of time that a suspect may be detained without charge. An appropriate period of time would appear to be, at most, 48 hours.

Legislative Intention

An examination of the legislative history of section 23CA(8)(m) and section 23B (which were introduced by the *Anti-Terrorism Act 2004* (Cth)) indicates that the manner in which these sections were utilised in the Dr Haneef case does not accord with the intention of the Parliament. It is therefore imperative that these sections be amended so as to clarify the Parliament's intention that the period of detention would be limited.

The review of the legislative history of these provisions reveals the following:

1. The extrinsic materials indicate that these sections were not intended to authorise extended periods of detention, such as that experienced by Dr Haneef prior to his being charged.

   The original form of section 23CA(8)(m) provided for the detention of a person for:

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6 *Crimes Act 1914* (Cth), s. 23CB(7).

... any reasonable period during which the questioning of the person is reasonably suspended or delayed to allow the investigating official to obtain information relevant to the investigation from a place outside Australia that is in a different time zone, being a period that does not exceed the amount of the time zone difference.

In response to a submission by Professor Williams to the inquiry by the Senate Legal and Constitutional Legislation Committee into the provisions of the *Anti-Terrorism Bill 2004* (Cth) that there should be an absolute limit of 48 hours on questioning, a representative of the Attorney-General's Department stated that such a limit was unnecessary as he would be 'extraordinarily surprised if the dead time ... in relation to the time zones would get anything like the sorts of time periods that were being suggested by Professor Williams'.[7]

The Minister for Justice and Customs, Senator Chris Ellison also noted, in Senate discussion of the Bill, the High Court's interpretation in *Pollard v The Queen*[8] of the term 'reasonable' in the context of pre-charge detention. It is clear from Senator Ellison's comments that it was the intention of the Parliament that the period of detention would be limited:

The High Court clearly states that a reasonable time, which is the standard used in this bill, is a limited time. It does not equate with indefinite detention, as I said yesterday, and the judges further commented on how the discretion to exclude evidence interfaces with the concept of reasonable time.

...

You cannot talk in a hypothetical situation of what might be reasonable in a certain circumstances – it depends on the circumstances of the case – but there is very clear judicial warning from the High Court that if that provision in relation to reasonable time is abused then there will be sanctions that follow. If it were unlawful detention, the person could take action. But, most importantly, the evidence is rendered inadmissible. It makes the efforts of the investigating officer futile.[9]

2. It was always envisaged that these sections may be problematic and should be subject to an independent review. Senator Ellison gave an undertaking to the Parliament on 17 June 2004 that the government would conduct an independent review of the investigatory framework for terrorism investigations three years after the Bill became law. This would 'provide an opportunity to exhaustively analyse the operation of the new provisions and remedy any evident operational or legal shortcomings'.[10] However, with the exception of the present inquiry, no review was ever conducted into these provisions.

3. The sections as enacted were not subject to adequate parliamentary scrutiny. The current sections are considerably wider than those in the draft legislation reviewed by the Senate Legal and Constitutional Committee in its inquiry into the provisions of the *Anti-*

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7 Senate Legal and Constitutional Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill 2004* (2004), para. 3.25.

8 (1992-1993) 176 CLR 177.

9 Senator Chris Ellison (Senate, Hansard, 18 June 2004, pp. 24228-24229). Available at: http://www.aph.gov.au/hansard/senate/dailys/ds180604.pdf.

10 Senator Chris Ellison (Senate, Hansard, 17 June 2004, p. 24184). Available at: http://www.aph.gov.au/hansard/senate/dailys/ds170604.pdf.

Terrorism Bill 2004 (Cth) or the changes which that committee recommended be made to the law.

B *Migration Act 1958* (Cth), s 501

The intervention by the Minister for Immigration, Kevin Andrews, in the Haneef case through use of his discretion to revoke Dr Haneef's visa on the ground that he failed the 'character test' was a regrettable interference in an investigation which had already benefited from the involvement of the judiciary.

However, our submission wishes to draw attention to the means by which this was able to occur – the Minister's interpretation of section 501 of the Commonwealth *Migration Act 1958* as one of extraordinary breadth. The section gives a number of grounds upon which an individual may fail the character test. The Minister resorted to what is unquestionably the weakest – that Haneef had associations with persons whom the Minister 'reasonably suspects' of involvement in criminal conduct.[11] The alternative grounds under which an individual may fail the character test focus squarely on his or her personal criminal conduct or the risk they pose to the Australian community. Additionally, it should be noted that Minister Andrews said that cancellation of the visa was in the 'national interest', which, under s 501(3) of the Migration Act, removed the need for natural justice – essentially depriving Dr Haneef of an opportunity to satisfy the Minister that he did in fact pass the character test.[12]

Justice Spender in the Federal Court of Australia at first instance overturned the Minister's decision to revoke the visa saying that his interpretation of the scope of his discretion under the Act was wrong in not requiring a link between Haneef's association with his second cousins in the United Kingdom and any possible criminality on his own part.[13] Haneef could not be taken to have failed the character test when the facts relied upon to show the necessary association failed to disclose that it was anything other than an innocent one. On appeal, the Full Court of the Federal Court of Australia upheld Spender J's interpretation, saying the Minister's view of this aspect of the character test 'especially in encompassing 'links' or 'connections' without any need to show sympathy, support for, or involvement in, criminal activity runs far too wide. It is a misconstruction of the statutory criterion'.[14]

Although the meaning of 'association' in s 501(6)(b) now benefits from clear judicial interpretation as a result of the Haneef case in the Federal Court, there would be much to be said for amendment of the statutory language so that it is clearly brought in to line with these decisions.

C The Width of Terrorism Crimes under Divisions 101 and 102 of the *Criminal Code*

The final point of our submission is to link the events of the Haneef affair to the broader problems which have pervaded law-making in anti-terrorism law in Australia to date. In essence, our position is that a tendency towards drafting laws of excessive width, in preference to precisely targeting them towards unambiguous criminal activity relating to terrorism almost ensures that events such as the Haneef affair will occur.

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11 *Migration Act 1958* (Cth), s 501(6)(b).

12 *Migration Act 1958* (Cth), s 501(5).

13 *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273, [230].

14 *Haneef v Minister for Immigration and Citizenship* [2007] FCAFC 203, [135].

Having detained Dr Haneef for so many days, it is not unreasonable to assume the Australian Federal Police felt themselves under some pressure to lay a charge against him. This is not difficult to achieve under Australian law since the terrorism offences are drafted far more expansively than traditional crimes. This is largely so that they may fulfill a preventative purpose, but while that is certainly legitimate, where to draw the line remains the central difficulty. The criminalisation of preparatory activity may produce some surprising results. Many members of the public expressed alarm that the seemingly innocuous act of giving a cousin your SIM card when you leave the country could lead to you being charged with supporting a terrorist organisation if yet another relative engages in terrorist activities several months after your departure. Yet this was the basis upon which Dr Haneef was charged under section 102.7(2) of the Criminal Code.

Ideally, the criminal law should be enacted with precision so as to catch only those acts – whether of 'support' or otherwise – that are crucial to the furtherance of terrorist plans. Overly broad preparatory offences run the risk of being applied to persons whose conduct may be entirely innocent. As UK expert Professor Clive Walker has said, 'penalizing equivocal actions…will leave room for claims of people being victimized for their views or even their stupid curiosity'[15] – or, in Dr Haneef's case, the conduct of his relatives.

This is not without real cost. The actions of the government and its agencies during the Haneef affair were met with deep cynicism across the community. This is hardly a helpful development in a security climate that depends upon people to trust their leaders and their assessment of the threat facing the nation. This unease was surely compounded in our Muslim communities, whose fear of persecution under the anti-terrorism laws has been highlighted by earlier reviews of these laws.[16]

The promotion of social cohesion is integral to stopping terrorism in its tracks. More specifically, the cooperation and good relations between police and intelligence agencies and Australian Muslims is a crucial resource in unearthing and preventing potential terrorists. The ability under a range of Australian laws to pursue Dr Haneef over nothing more than his familial association with terrorism plotters in the United Kingdom understandably alarmed those in close-knit ethnic communities and must seriously have impacted on efforts to reassure Australia's Muslims they have nothing to fear from these laws.

Clearly, wide laws can easily result in executive overreach. This does not make us safer. It may even make us less so by fostering cynicism and division in the community, and wasting police resources on investigations that are trivial or baseless.

D Recommendations

1. Section 23CA of the *Crimes Act* should be amended so that the total period of pre-charge detention (including any 'dead time') should be capped at 48 hours duration. Additionally, s 23CA(8)(m) which provides a generic justification for 'dead time' should be repealed;
2. Section 501(6)(b) of the *Migration Act* should be amended so as to reflect the interpretation given to that provision by the Federal Court of Australia in the Haneef hearings;

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15 Clive Walker, 'Clamping Down on Terrorism in the United Kingdom' (2006) 4 *Journal of International Criminal Justice* 1137, 1145.

16 See *Report of the Security Legislation Review Committee*, June 2006, recommendation 2.

3. The Clarke Inquiry should recommend that the Commonwealth government implement the recommendations of the Security Legislation Review Committee's Final Report in June 2006. In particular, the Inquiry should note that Committee's recommendation that legislation be passed establishing 'continuing review of the security legislation by an independent body'.

Yours sincerely,

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