GILBERT + TOBIN
CENTRE OF PUBLIC LAW

THE UNIVERSITY OF NEW SOUTH WALES

FACULTY OF LAW

22 September 2008

The Secretary
Clarke Inquiry
PO Box 5365
Kingston ACT 2604

Email: clarkeinquiry@ag.gov.au
Facsimile: (02) 6270 5860

Dear Secretary

Clarke Inquiry Public Forum – Issues Paper

Please find attached our submission in response to the Inquiry's Issues Paper produced in connection with the Public Forum on 22 September.

Yours sincerely,

Dr Andrew Lynch
Associate Professor
Director

Ms Nicola McGarrity
Director
Terrorism and Law Project

Professor George Williams
Anthony Mason Professor
and Foundation Director

SYDNEY 2052 AUSTRALIA
Email: n.mcgarrity@unsw.edu.au
Telephone: +61 (2) 9385 3445
Facsimile: +61 (2) 9385 1175
Web: www.gtcentre.unsw.edu.au

CLARKE INQUIRY INTO THE CASE OF DR MOHAMED HANEEF
PUBLIC FORUM

ISSUES RELATING TO THE ARREST PROVISIONS OF THE CRIMES ACT 1914 (CTH)

Issue 1	
Given the gravity of the risk of a terrorist act, the threshold in section 3W(1) is too high. It should be lowered to the reasonable suspicion threshold for terrorism offences, particularly as: • the States and Territories have shared their constitutional power to make laws with respect to counter-terrorism (CT) with the Commonwealth;[8] and • the AFP is the principal law enforcement agency for CT.	The reasonable belief threshold in section 3W(1) strikes an appropriate balance between civil liberties and national security, especially in view of the AFP's powers of detention of a person arrested for a terrorism offence. Also, the common law power of arrest may still exist alongside section 3W(1),[9] in which event the AFP can elect to exercise their common law power of arrest for a terrorism offence or rely on section 3W(1).

WE AGREE WITH THE RIGHT HAND SIDE.

However, we believe that the second paragraph does not reflect the law.

Section 3D(1)(b) of the ***Crimes Act 1914*** (Cth) provides that Part IAA is '***not intended to limit or exclude the operation of another law of the Commonwealth relating to: … arrest and related matters***'.

A '***law of the Commonwealth***' is defined in the Encyclopaedic Australian Legal Dictionary as '***any law made by or under the authority of the Commonwealth Parliament***'.

Common law principles do not fall within the definition of a law of the Commonwealth.

The common law power of arrest therefore does not fall within the scope of s 3D(1)(b). It would be overridden by s 3W(1).

Furthermore, it would render the higher threshold in s 3W(1) ('reasonable belief') redundant if the AFP was able to elect between this threshold and the lower threshold at common law ('reasonable suspicion').

Issue 2	
Section 3W(2) should be reformed so that the arrested person need not be released if the investigating officer suspects on reasonable grounds that the person has committed a terrorism offence which is not the offence for which the person was arrested.	Section 3W(2) is not in need of reform. An investigating officer can arrest a person under section 3W(1) for any terrorism offence if requirements of section 3W(1) are met, and then detain the person in accordance with the powers of detention in the *Crimes Act 1914*.

WE DO NOT AGREE WITH EITHER SIDE.

This raises the same basic question as Issue 8, so we will deal with these two issues together.

Issue 8	
Section 3W(2) of the *Crimes Act 1914* (the requirement for release if there is no longer a reasonable belief) and Part 1C of the *Crimes Act 1914* (which deals with applications by the police for an extension of the investigation period and for dead time), are irreconcilable. Under Part 1C,[27] the AFP can apply for an extension of the investigation period or for dead time in relation to a different terrorism offence which the AFP reasonably suspect the arrested person has committed to the terrorism offence for which the person was arrested under section 3W(1).	There is no tension between section 3W(2) and Part 1C. The *Crimes Act 1914* expressly provides that Part 1C prevails over section 3W(2) to the extent of any inconsistency, provided section 3W(2) became law before Part 1C became law.[28] Further, if the AFP have a common law power of arrest and they exercise that power with respect to a terrorism offence, no inconsistency arises.

WE AGREE WITH THE LEFT HAND SIDE.

Both Issue 2 and Issue 8 relate to the interaction between ss 3W(2) and 23CA(1) of the ***Crimes Act 1914*** (Cth).

Section 3W(2) provides that a person must be released if the constable in charge of the investigation ceases to believe on reasonable grounds that the person committed the offence or that holding the person in custody is necessary to achieve a purpose referred to in paragraph (1)(b).

Section 23CA(2) provides that a person may be detained either for the purpose of investigating whether the person committed the offence for which he or she was arrested or whether the person committed another terrorism offence than investigating official reasonably suspects the person to have committed.

These sections are inconsistent in two respects:

1. Section 3W(1) creates a 'reasonable belief test'. Section 23CA creates a 'reasonable suspicion' test. There is no justification for having a lower threshold for a second alleged offence than for the first alleged offence.

2. Section 3W(2) does not allow for a person to be held in custody if the investigating official reasonably believes or suspects that he or she has committed a terrorist offence other than that for which s/he was arrested – s 23CA does allow for this.

It is arguable that the effect of s 23A is for s 23CA to override s 3W(2) to the extent of any inconsistency. However, the preferable approach is for these sections of the ***Crimes Act 1914*** (Cth) to be clarified so that they do not operate inconsistently.

Both ss 3W(2) and 23CA require amendment.

Section 23CA(2)(b) should be amended to require the investigating official to have a reasonable 'belief' that the person committed another terrorism offence.

Section 3W(2)(b) should be amended to add a subsection (iii):

that the person committed another terrorism offence.

This would ensure that ss 3W(2)(b) and 23CA(2)(b) are consistent.

ISSUES RELATING TO THE DETENTION PROVISIONS OF THE CRIMES ACT 1914 (CTH)

Issue 3	
The current scheme providing for oversight by a magistrate or a JP when the police apply for an extension of the investigation period or for dead time,[17] is a sufficient safeguard. Applications are usually made on an urgent basis, and a magistrate may not be available.	This is an insufficient safeguard and the scheme should be reformed to provide for oversight by a judicial officer, namely, a magistrate or a judge. In particular, an application can be made by telephone, facsimile or email, and so there is no need to provide for the possibility of an application to a JP because a magistrate or a judge will be available 24/7.

WE AGREE WITH THE RIGHT HAND SIDE.

That is, we believe that applications for extension of the investigation period or for dead time should be overseen by a judicial officer.

It is inappropriate for a JP to exercise the power to decide whether to grant such applications.

To make such a decision requires the weighing of evidence and submissions (possibly in an adversarial environment). This is fundamentally different from the powers that are generally exercised by a JP. By contrast, this is the type of exercise in which judicial officers engage on a day to day basis.

Issue 4	
There is no need for an absolute limit on the amount of dead time that a prescribed officer may specify[18] because there is sufficient oversight by the prescribed officer.	This is an insufficient safeguard. The correct balance between civil liberties and effective counter-terrorism requires an absolute limit on the amount of dead time that a prescribed officer may specify.

WE AGREE WITH THE RIGHT HAND SIDE.

However, we believe that there should be a limit on the total amount of time in detention rather than simply a limit on the amount of dead time that a prescribed officer may specify.

We believe that an appropriate limit would be 48 hours in detention.

Issue 5	
The current scheme permits the AFP to make an application for dead time in person or in writing to a presiding officer without informing the arrested person or his/her legal representative about the application.[19] This is a sufficient safeguard. In particular: • the presiding officer must be satisfied that the arrested person or his/her legal representative has been given the opportunity to make representations about the application;[20] and • in practice, the AFP will be unlikely to make an application for dead time *ex parte* and without informing the arrested person or his/her legal representative.	This is an insufficient safeguard. The current scheme with respect to dead time only requires the presiding officer to be satisfied that the arrested person or his/her lawyer has been given the opportunity to make "representations". The representations may be to the police and not to the presiding officer. The arrested person should have an unequivocal right to know about the application for dead time, to have sufficient time to prepare his/her case and to appear or be represented at the hearing.

WE DO NOT AGREE WITH EITHER SIDE.

We do not believe that the issues can be reduced in the manner set out in the two options above. There are fundamental problems with s 23CB(4), which mean that this section needs to be substantially redrafted.

Section 23CB establishes a regime for notification of a detained person where an application for dead time is made.

However, the notification requirements differ on the basis of the manner in which the application is made.

If the application is made by telephone, telex, fax or other electronic means, s 23CB(4) requires the investigating official to inform the person before the application is made that either that person or his or her legal representative may make representations to the magistrate, justice of the peace or bail justice about the application.

If the application is made in writing or in person before the magistrate, justice of the peace or bail justice, there is no requirement in s 23CB(4) that the person be informed in advance.

The only requirement for such applications (as well as for applications made by telephone, telex, fax or other electronic means) is set out in s 23CB(7). The magistrate, justice of the peace or bail justice must be satisfied that the person or his or her legal representative has been given the opportunity to make representations about the application. It is unclear whether these representations must be made to the decision-maker or whether it is sufficient if they be made to the investigating official or another member of the AFP.

Section 23CB therefore creates two different notification regimes on the basis of a completely irrelevant factor – the manner in which an application is made. This section needs to be redrafted to create a universal notification regime that operates regardless of the manner in which an application is made.

Section 23CB should be amended to provide that:

- before an application is made, an investigating official is required to inform the person of his or her right to make representations; and
- either the person or his or her legal representative has the right to make representations to the decision-maker (in accord with our submission on Issue 3, this should be a judicial officer).

Issue 6	
In the event an application for an extension of the investigation period or for dead time is based wholly or partly on sensitive information from a national security perspective, the AFP should be unequivocally entitled under the legislation to rely on the information without disclosing it to the detained person or his/her legal representative.	This is an insufficient safeguard. The legislation requires the presiding officer to be satisfied that the arrested person or his/her legal representative has been given the opportunity to make representations about either type of application. Effective representations cannot be made without all the evidence upon which the AFP rely being disclosed.

WE AGREE WITH THE RIGHT HAND SIDE.

On the one hand, we accept that there is information that should not be disclosed to a detained person on the basis that it may prejudice national security. On the other, we believe that, to the greatest extent possible, the detained person's legal representative should have access to all relevant materials.

The best means of achieving this balance is set out in the ***National Security Information (Civil and Criminal Proceedings) Act 2004*** (Cth) (ss 39 and 39A).

That is, if written notice is given by the Secretary of the Attorney-General that the disclosure of information is likely to prejudice national security, the arrested person's legal representative may apply for a security clearance by the Department.

If the legal representative is denied a security clearance, then the detained person will either be required to proceed without access to the relevant information or to obtain another legal representative who has been given, or is prepared to apply for, a security clearance.

Issue 7	
The current scheme requires a prescribed officer to be satisfied about specified matters[21] as well as "any other relevant matters"[22] when ruling on an application by the police for dead time. This is a sufficient safeguard. In particular: • "any other relevant matters" will not necessarily be inimical to the interests of the arrested person and may serve the interests of national security; and • the ruling must be lawful, and may be subject to judicial review to ensure that it was in accordance with procedural fairness rules.[23]	This is an insufficient safeguard, given that the basic principles of the common law with respect to detention have been heavily qualified by statute. The current scheme should be reformed to make an application for dead time consistent with an application for an extension of the investigation period[24] in so far as the latter does not permit the judicial officer to take into account "any other relevant matters".[25] Even in the event of judicial review: • the process is likely to be lengthy and the arrested person is likely to remain in detention for the time being; and • there is still significant flexibility with respect to the merits of a ruling before it becomes unlawful (a ruling may be unfair but lawful). In particular, the prescribed officer as an administrative decision-maker need not be satisfied that it is appropriate to grant dead time according to the civil standard of proof on the balance of probabilities.[26]

A solution would be to adapt section 3W of the *Crimes Act 1914* for terrorism offences so that the arresting officer's reasonable belief or suspicion should relate to terrorism offences rather than a specific crime.	

WE DO NOT HAVE A STRONG OPINION.

However, we favour the left-hand side.

Issue 9	
Overall, the provisions in the *Crimes Act 1914* which deal with applications for an extension of the investigation period for terrorism offences and applications for "dead time" were the subject of a Senate Committee report on 11 May 2004,[29] and are an appropriate balance between civil liberties and counter-terrorism law enforcement.	Overall, the balance is inappropriate. The balance should be redressed in favour of civil liberties. In particular, the trading of the absolute limit corresponding to the time zone difference in the original paragraph 23CA(8)(m) in the bill considered by the Senate Committee, for the open-ended "judicial officer" oversight in section 23CB in the Act was significantly inimical to the civil liberties of an arrested person.

WE AGREE WITH THE RIGHT HAND SIDE.

The left hand side is based on an incorrect understanding of the role of the Senate Committee in reviewing the ***Anti-Terrorism Act 2004*** (Cth).

The Bill reviewed by the Senate Committee was substantially different from the Bill that was eventually passed by the Commonwealth Parliament.

In particular, the original form of s 23CA(8)(m) only provided for the detention of a person for:

> ***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 the different time zone, being a period that does not exceed the amount of the time zone difference.***

The provision as enacted was:

> ***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.***

Section 23CB(5)(c) gives a non-exhaustive list of possible bases for the extension of detention using 'dead time' and which extends far beyond that as originally contained in 23CA(8)(m).

ISSUES RELATING TO THE CHARACTER TEST

UNDER THE MIGRATION ACT 1958 (CTH)

Issue 10	
Given the gravity of the risk of a terrorist act, the "association" aspect of the character test should only require a familial, social, commercial, professional or other innocent association to enliven the requisite association. Then, the Minister can exercise his or her discretion as to whether the association reflects adversely on the character of the visa holder. If it does, the Minister will cancel the visa.	This is not an appropriate balance between civil liberties and the national interest. Such a low threshold for the requisite threshold has been rejected by the Federal Court.[36] For one thing, it unfairly discriminates against non-citizens. They are tainted with having failed the association test simply because of a familial, social, commercial, professional or other innocent association. This cannot occur to a citizen of Australia.

WE AGREE WITH THE RIGHT HAND SIDE.

That is, we believe that the broad definition of 'association' does not strike an appropriate balance between civil liberties and national security.

However, we disagree with the rationale set out on the right hand side. It is implicit in any migration regime that it will discriminate between citizens and non-citizens.

Issue 11	
The current scheme with respect to the "association" aspect of the character test, as interpreted by the Federal Court,[37] is fair and an appropriate balance between civil liberties and the national interest, because a mere familial, social, commercial, professional or other innocent association does not enliven the requisite association. Rather, the association must reflect adversely on the character of the visa holder. It would not be enough for the visa holder merely to be a "person of interest" to the police with respect to a terrorist offence.	This is neither fair nor an appropriate balance, because the Minister need only be satisfied that: • the visa holder is a person of interest to a law enforcement or intelligence body in Australia or overseas with respect to a terrorist offence; and • has been arrested by the police for a terrorism offence. The police need only have a reasonable suspicion to arrest whereas they must have reasonable and probable cause to lay a charge. A reasonable suspicion is a lower threshold than a reasonable belief. A reasonable suspicion is too low to invoke the association test.

WE AGREE WITH THE LEFT HAND SIDE.

That is, we support the definition of 'association' given by the Federal Court.

We further believe, however, that it is important for the ***Migration Act 1958*** (Cth) to be amended to expressly incorporate the Federal Court's definition rather than leaving the scope of 'association' ambiguous on the face of the statute.

CHARGING A PERSON WITH A TERRORISM OFFENCE

Issue 12	
The common law with respect to the AFP charging a person for a terrorist offence represents an appropriate balance between civil liberties and the national interest. The charging officer must still believe that the information in his/her possession is true.	This is not an appropriate balance between civil liberties and the national interest. A higher threshold is needed, namely, that the charging officer must personally believe that the accused is probably guilty of the terrorism offence. Further, the charging officer should charge on the information to hand.

WE AGREE WITH THE RIGHT HAND SIDE.

We believe that the investigating official, as opposed to another member of the AFP, must personally believe that the accused is probably guilty of the terrorism offence.

This is so for two primary reasons.

First, the investigating official is the person who has had the most direct contact with the detained person.

Second, this reduces the prospect of politicisation in the charging process, even as a matter of public perception.