Law Council
OF AUSTRALIA

Clarke Inquiry into the case of Dr Mohamed Haneef

The Hon Mr Clarke QC

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Executive Summary

The arrest, detention, charge and subsequent release of Dr Mohamed Haneef represents the first time that a number of legislative provisions, introduced to respond to the threat of terrorism, have been relied on in practice. As such, the case offers a valuable opportunity to review the appropriateness of those provisions and to examine whether there is any disparity between their actual and intended operation.

The case also offers a timely opportunity to review the manner in which criminal law and migration law interact and to explore the ramifications of that interaction for a defendant's fair trial rights.

To that end, the Law Council of Australia hopes that within the terms of reference, the Inquiry will, *inter alia*, address the following critical issues:

- the level of knowledge and understanding AFP officers have of applicable procedures under the *Crimes Act 1914 (Cth)* and the extent to which they adhere to those procedures in "terror" cases;

- the ability of law enforcement agencies to distinguish between their different powers/functions in relation to: intelligence gathering; evidence gathering in the context of a criminal investigation; and the deployment of other controversial pre-emptory measures (such as control orders and preventative detention);

- the basis on which, and the manner in which, information is exchanged between the AFP and the Office of the Commonwealth Director of Public Prosecutions (CDPP), and the basis on which, and the manner in which, the CDPP subsequently provides advice to the AFP about their options and obligations;

- the adequacy of internal and external oversight mechanisms purportedly operating as a safeguard against the misuse of law enforcement powers conferred under the *Crimes Act* and other relevant legislation;

- the disparity, if any, between the intended and the actual operation of relevant legislative provisions which have been introduced to respond to the threat of terrorism;

- the basis on which, and the manner in which, information is exchanged between the AFP and both the Department of Immigration and Citizenship and the Minister for Immigration and Citizenship;

- the extent to which powers conferred under the *Migration Act* may be exercised to achieve, or may inadvertently achieve, a collateral purpose within the criminal justice system – and the extent to which measures are taken to safeguard against this occurring;

- the protocols governing the release of information to the media, both on and off the record, by the police and government representatives; whether those protocols are adhered to in "terror" cases; and the impact that the selective release of information may have on the ability of a defendant to obtain a fair trial.

The Law Council's own submission is focused on what the Haneef case has revealed or confirmed about:

- problems with the operation and applicatoin of sections 3W, section 15AA and Part 1C of the *Crimes Act* - most noteably the the "dead time" provisions;
- problems with the *Criminal Code* terrorist organisation offence provisions; and
- problems with section 501 of the *Migration Act* and the intersection between migration law and criminal law.

The Law Council submission reaches the following conclusions:

- Public comments made by the former Attorney-General, former Prime Minister and by the AFP Commissioner at the time of Dr Haneef's arrest and detention raise concerns that the provisions of the *Crimes Act* were applied without reference to the appropriate statutory test. Their comments suggest that a precautionary "better to be safe than sorry" approach was adopted at various stages of the case, even where such an approach was not sanctioned by the relevant legislation.

- The Law Council is concerned that, throughout the Haneef case, police were operating in the general shadow of Australia's anti-terror laws, guided more by a vague notion that those laws authorised a different and extraordinary approach than by the precise content of the actual laws pursuant to which they were exercising their powers.

- Part 1C of the *Crimes Act* currently allows a person arrested for a terrorism related offence to be held without charge for an indefinite amount of time. The length of the investigation period allowed under sections 23CA and 23DA is capped at 24 hours. However, this does not operate as a safeguard against prolonged detention without charge because allowance for reasonable 'dead time' means that the 24 hours of questioning may be spread out over a period of weeks. The involvement of a judicial officer in determining what is "reasonable" dead time can not substitute for a finite limit on how long a person can be held without charge.

- The presumption against bail imposed by section 15AA is inconsistent with the presumption of innocence. It presumes that defendants in terrorism cases, regardless of their individual circumstances, must be, because of the nature of the accusation again them, likely to re-offend, likely to interfere with witnesses or other evidence, a threat to the community or a flight risk.

- The concerns expressed by the Law Council and others about the terrorist organisation offences in Division 102 of the *Criminal Code* were proven to be well founded in the Haneef case. The Law Council's fear was that because the terrorist organisation offences do not focus on individual conduct, those offences potentially afford police very wide latitude to intrude upon people's privacy and liberty, based purely on who they know and interact with. The intent element of the offences may operate to limit the risk that entirely innocent interaction will be subject to criminal sanction. However, the intent element of the offences is easily overlooked by police when deciding whether to arrest, question, search and detain.

- At least on the basis of the publicly available information, it appears that Dr Haneef spent three weeks in detention as a consequence of very ordinary, unremarkable familial interaction. This would have been much less likely to occur if the offence provisions that police had had to rely upon to arrest and continue to detain Dr Haneef had demanded a more substantive nexus between Dr Haneef's conduct and the commission of a terrorist act.

- The decision of the Federal Court in the Haneef case that the Immigration Minister does not have the power to cancel a person's visa on the basis of an innocent association is an important one. No public purpose is served by vesting in the Minister an unfettered discretion to cancel a visa based on an association that may have ended many years ago, was only fleeting, only reflected a familial connection, or was the product of a purely professional relationship. Broad, unfettered discretions of that kind encourage sloppy research and lazy decision making and for that reason can never serve to protect the Australian community.

- Nonetheless, the decision of the Federal Court in the Haneef case has far from remedied all the problems with the operation of section 501 of the Migration Act. Those affected by an adverse decision still have no rights to merits review and therefore have no opportunity to challenge the veracity and accuracy of the information on which the decision against them was based. Likewise, those affected by an adverse decision may never even have access to the information on which the decision against them was based.

- The timing and effect of the Minister's visa cancellation decision in the Haneef case, together with his many partial and political public comments, created an appearance of impropriety and of interference in the judicial process. Appearances and perceptions in this regard matter. The public's faith in the integrity of our judicial system is undermined when Ministers appear to interfere in, or arbitrarily override, the outcome of judicial proceedings in a manner inconsistent with the separation of powers.

- When an accused person's visa is cancelled because he or she is deemed to have failed the "character test" this has obvious implications for the presumption of innocence. The danger that the person concerned will not be able to receive a fair trial is even further compounded when the Minister responsible for the visa decision makes it publicly know that his decision was based, in part, on secret information not otherwise available to the court or the defendant's lawyers. In addition, where the cancellation of a person's visa threatens to result in that person being transferred inter-state to be held in immigration detention, this has the potential to seriously hinder that person's access to his or her chosen legal representative and his or her ability to prepare and present a defence to the charges faced. Had the charge against Dr Haneef been pursued, the Law Council is of the view that the interaction between migration law and criminal law in this case would have created a real risk that Dr Haneef would not have received a fair trial.

The Law Council has made recommendations with respect to each of the problems identified above. These are summarised below at page 34.

In accordance with Practice Note 1, the Law Council has also made a request to appear before the Inquiry. This is included below at page 36.

Background

Scope and powers of the Inquiry

On 13 March 2008 the Attorney-General, the Hon Robert McClelland MP, announced the appointment of the Hon John Clarke QC to conduct an inquiry into the case of Dr Mohamed Haneef ("the Inquiry"). Under its Terms of Reference, the Inquiry is to examine and report on:

1. 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;

2. the administrative and operational procedures and arrangements of the Commonwealth and its agencies relevant to these matters;

3. the effectiveness of cooperation, coordination and interoperability between Commonwealth agencies and with state law enforcement agencies relating to these matters; and

4. 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.

As stated at the preliminary hearing of the Inquiry, the relevant events that are the subject of this Inquiry span a limited period from Dr Haneef's arrest on 2 July 2007 to his release from detention and departure from Australia on 29 July 2007. The Hon Mr Clarke QC emphasised that the Inquiry is not concerned with the continuation of any investigation into Dr Haneef.

The Government departments and agencies that have been identified as relevant to the Inquiry's terms of reference include: the Australian Federal Police ("AFP"); Queensland Police, the Australian Security and Intelligence Organisation ("ASIO"); the Commonwealth Director of Public Prosecutions ("CDPP"); the Department of Immigration and Citizenship; and the Attorney-General's Department.

Contrary to the submission made by the Law Council to the Attorney General's Department on 6 February 2008, the Inquiry has not been established as a Royal Commission under the *Royal Commission Act 1902* (Cth) and therefore the powers and privileges conferred under that Act do not apply.

As a result, concern has arisen that the Inquiry will not be able to effectively address its terms of reference because:

- witnesses cannot be compelled to give evidence or produce documents;

- there is no direct or derivative use immunity for witnesses who provide self-incriminating evidence; and

- there is no protection from civil action for witnesses who provide evidence which is regarded as defamatory.

There is, in fact, no statutory framework governing the conduct of Inquiry proceedings. As a result, while the Inquiry may be conducted with a degree of legal formality, the approach adopted will be necessarily ad hoc.

Nonetheless, public assurances have been given that government agencies will cooperate fully with the Inquiry by providing access to all relevant documents and permitting all relevant officers to be interviewed.

Further, the Attorney-General has stated that should the Hon Mr Clarke QC find that a lack of cooperation is impeding the conduct of the Inquiry, he may make a recommendation to the Attorney-General for the Inquiry to be reconstituted, for example under the *Royal Commissions Act 1902*.[1]

The Law Council has repeatedly welcomed such assurances but remains concerned that, without access to coercive information gathering powers, the Inquiry may not be able to comprehensively address its very important terms of reference.

In order to maintain public confidence both in our laws and in the integrity and competence of the institutions which apply and enforce them – it is vital that this Inquiry is both transparent and thorough.

For that reason, the Law Council hopes that the Hon Mr Clarke QC will act quickly to request further powers the moment any need for them becomes manifest and that the Government will accede to the request as foreshadowed.

Law Council expectations of the Inquiry

The Law Council is pleased that the terms of the Inquiry are broadly framed in order to allow for a general investigation into the adequacy of the laws, practices and procedures observed in operation in the Haneef case.

To that end, the Law Council submits that within the terms of reference, the Inquiry should, *inter alia*, address the following critical issues:

- the level of knowledge and understanding AFP officers have of applicable procedures under the *Crimes Act 1914 (Cth)* and the extent to which they adhere to those procedures in "terror" cases;

- the ability of law enforcement agencies to distinguish between their different powers/functions in relation to: intelligence gathering; evidence gathering in the context of a criminal investigation; and the deployment of other controversial pre-emptory measures (such as control orders and preventative detention);

- the basis on which, and the manner in which, information is exchanged between the AFP and the Office of the Commonwealth Director of Public Prosecutions (CDPP), and the basis on which, and the manner in which, the

[1] See Transcript of announcement of Clarke Inquiry into Haneef Case, 13 March 2008. "It has been made clear that Commonwealth agencies, all Commonwealth agencies, have undertaken to cooperate. But if at some point in time Mr Clarke advises the Government that the absence of cooperation by anyone he believes would provide material assistance to the effectiveness of the inquiry, if he presents that advice to the Government, then we will reconsider the matter and specifically consider any request to reconstitute the inquiry under the Royal Commission powers." http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Transcripts_2008_13March2008-ClarkeInquiryintotheHaneefCase

CDPP subsequently provides advice to the AFP about their options and obligations;

- the adequacy of internal and external oversight mechanisms purportedly operating as a safeguard against the misuse of law enforcement powers conferred under the *Crimes Act* and other relevant legislation;

- the disparity, if any, between the intended and the actual operation of relevant legislative provisions which have been introduced to respond to the threat of terrorism;

- the basis on which, and the manner in which, information is exchanged between the AFP and both the Department of Immigration and Citizenship and the Minister for Immigration and Citizenship;

- the extent to which powers conferred under the *Migration Act* may be exercised to achieve, or may inadvertently achieve, a collateral purpose within the criminal justice system – and the extent to which measures are taken to safeguard against this occurring;

- the protocols governing the release of information to the media, both on and off the record, by the police and government representatives; whether those protocols are adhered to in "terror" cases; and the impact that the selective release of information may have on the ability of a defendant to obtain a fair trial.

Focus of the Law Council submission to the Inquiry

The Law Council has closely monitored the case of Dr Haneef from the time of his arrest on 2 July 2007 until the present.

However, the Law Council does not purport to have access to information concerning the facts of Dr Haneef's arrest, detention, charging, prosecution, release or visa cancellation, beyond that information which has been made generally available in the public domain.

The Law Council's submission, therefore, is primarily a critique of what the Haneef case has revealed about the content and operation of certain Commonwealth laws. The submission contains a series of recommendations regarding how those laws might be amended to address the serious shortcomings revealed in the course of the Haneef case.

In particular, the Law Council submission is focussed on:

- problems with the operation and applicatoin of sections 3W and 15AA and Part 1C of the *Crimes Act* - most noteably the the "dead time" provisions;

- problems with the *Criminal Code* terrorist organisation offence provisions under which Dr Haneef was charged;

- problems with the interaction between migration law and criminal law.

The submission represents a consolidation of the Law Council's previous advocacy and submissions in relation to the Haneef case as set out in Attachment B.

The operation of the *Crimes Act*

Provisions of the *Crimes Act* under which Dr Haneef was arrested and detained

Dr Haneef was arrested pursuant to section 3W of the Crimes Act.

Under subsection 3W(1), a person may only be arrested for an offence, if the arresting officer *believes on reasonable grounds* that the person has committed the offence. The arresting officer must also *believe on reasonable grounds* that arresting the person is necessary because proceeding by way of summons would not achieve one or more of the following purposes:

(i) ensuring the appearance of the person before a court in respect of the offence;

(ii) preventing a repetition or continuation of the offence or the commission of another offence;

(iii) preventing the concealment, loss or destruction of evidence relating to the offence;

(iv) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;

(v) preventing the fabrication of evidence in respect of the offence;

(vi) preserving the safety or welfare of the person.

Under subsection 3W(2), if at any time after a person is arrested but before they are charged, the officer in charge of the investigation ceases to believe on reasonable grounds that the person has committed the offence or that holding the person is necessary to achieve on the purposes listed in (i) to (vi) above – then the person must be released.

This same provision, and therefore these same statutory tests, applies for all offences. There is no special arrest provision and test relating to terrorist offences.

After his arrest, and for the 12 days that he was held in custody before a charge was laid against him, Dr Haneef was detained pursuant to section 23CA of the Crimes Act.

Section 23CA of the *Crimes Act*[2] deals only with people arrested for terrorism offences, and not ordinary criminal offences.

Subsection 23CA(2) provides that, once arrested for a terrorism offence, a person may be detained for the purpose of investigating (a) whether the person committed the offence for which he or she was arrested and/or (b) whether the person committed another terrorism offence that an investigating official reasonably suspects the person to have committed.

In this regard, section 23CA is no different from section 23C, which sets out the purposes for which a person arrested for an ordinary offence may be detained.

[2] Introduced into the *Crimes Act* by the *Anti-Terrorism Act 2004.*

The maximum period for which a person may be detained under section 32CA is called the "investigation period". A person detained under section 23CA must be released (either unconditionally or on bail) within the investigation period or, if they are not, they must be brought before a judicial officer either within that period or as soon as practicable after its expiry.

Under subsection 23CA(4), the maximum length of the investigation period in terrorism cases is set at four hours[3], unless a magistrate extends the period under section 23DA.

Under section 23DA, the investigation period may be extended any number of times, but the total of the periods of extension cannot be more than 20 hours.

The means that the maximum allowable length of the investigation period in relation to terror suspects is 24 hours.

This is considerably longer that the maximum allowable length of the investigation period for ordinary suspects. In the case of ordinary crimes, under section 23D the initial four hour investigation period may only be extended once, and only for a period not exceeding eight hours. This means that the maximum allowable length of the "investigation period" for ordinary suspects is 12 hours.

In either case, the calculation of the investigation period does not take into account so-called "dead time" during which police are unable to, or choose not to, question the suspect they have in detention.

Subsection 23CA(8) lists all the activities which are deemed to be dead time and are thus excluded from the calculation of the investigation period in terrorism cases. This list includes: time taken to transport the suspect to the place of questioning, time taken for the suspect to sleep, time taken for the suspect to talk with his or her lawyer or to await the arrival of his or her lawyer; time taken to conduct an identification parade or conduct a forensic procedure; time taken to make certain applications to the Court and any time during which the suspect can not be questioned because he is intoxicated or receiving medical attention.

All these activities are also regarded as dead time for the purposes of calculating the investigation period in relation to ordinary criminal cases.[4]

However the last item on the subsection 23CA(8) dead time list, at sub-paragraph (m), is unique to terrorism cases.

Sub-paragraph 23CA(8)(m) provides that that the investigation period in terrorism cases does not include any "reasonable time", approved by a magistrate or justice of the peace, during which the questioning of a person is "reasonably suspended or delayed".

To exclude time from the investigation period on this ground, the police must make an application to a magistrate under section 23CB stating the length of time that should be specified as dead time and why it is reasonable that it should be declared as such. Under sub-paragraph 23CB(5)(c), the reasons which may be given include the following:

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[3] Unless the person in custody is a minor or aboriginal or Torres Straight islander in which case the maximum period is 2 hours.

[4] See s23C(7) of the *Crimes Act 1914 (Cth).*

- the need to collate and analyse information relevant to the investigation from sources other than the questioning of the person (including, for example, information obtained from a place outside Australia);

- the need to allow authorities in or outside Australia (other than authorities in an organisation of which the investigating official is part) time to collect information relevant to the investigation on the request of the investigating official;

- the fact that the investigating official has requested the collection of information relevant to the investigation from a place outside Australia that is in a time zone different from the investigating official's time zone;

- the fact that translation is necessary to allow the investigating official to seek information from a place outside Australia and/or be provided with such information in a language that the official can readily understand.

The magistrate may then issue the certificate specifying a period of allowable dead time if he or she is satisfied that:

- it is appropriate to do so, having regard to the application and the representations (if any) made by the person, or his or her legal representative, about the application, and any other relevant matters; and

- the offence is a terrorism offence; and

- detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or into another terrorism offence; and

- the investigation into the offence is being conducted properly and without delay; and

- the person, or his or her legal representative, has been given the opportunity to make representations about the application.

The time taken to make or dispose of such an application under section 23CB is also counted as dead time. This means that the if the judicial officer hearing the dead time application adjourns the matter, even for a period of days, then this adjournment period itself automatically counts as dead time.

No cap is placed on the maximum allowable period of dead time.

Problems with the AFP's understanding of the *Crimes Act* arrest provisions as revealed by Dr Haneef's case

The Haneef case raised serious questions about how sections 3W and 23CA of the *Crimes Act 1914* were understood and applied by the AFP.

The *Crimes Act* does not allow for preventative detention.

Section 3W does not lower the threshold test in terrorism cases for when a person may be lawfully arrested and held in custody.

There are no provisions in the *Crimes Act* which suggest that the nature of the risk in terrorism cases is such that police may speculatively detain a person while they determine whether they *ought to* believe him or her to have committed a specific offence, in circumstances where they do not already have a reasonable basis for such a belief.

There are provisions in other Commonwealth and state laws which allow for a period of preventative detention in order to thwart an imminent terrorist act or to preserve evidence of, or relating to, a recent terrorist act. [5]

However, in Dr Haneef's case police did not rely on those laws.

Nonetheless, public comments made by the former Attorney-General, former Prime Minister and by the Police Commissioner at the time of Dr Haneef's arrest and detention raise concerns that the provisions of the *Crimes Act* were applied without reference to the appropriate statutory test. Their comments suggest that a precautionary "better to be safe than sorry" approach was adopted at various stages of the case, even where such an approach was not sanctioned by the relevant legislation.

A strong sense emerged that because of the nature of the criminal behaviour which might be at stake, (that is some sort of facilitation of wide scale terrorist attacks in the United Kingdom) the ordinary principles of criminal procedure as set out in the *Crimes Act* were somehow suspended. The assumption appears to have been that, having established a nexus, however remote, between Dr Haneef and the attempted London bombings and Glasgow airport attack, police were not only authorised to, but in fact obliged to, detain Dr Haneef until they had definitely ascertained that he was not involved in the attack.

For example, more than one week into Dr Haneef's detention without charge, former Attorney-General, the Hon Philip Ruddock MP, concluded an interview with a group of journalists asking questions about when Dr Haneef might be charged or released, by stating:

> *I tell you, you would be asking me different types of questions if these inquiries were truncated unnecessarily and we found out later that there were avenues of inquiries that could have been pursued, that would have been, or may have been ascertained and weren't, and some terrible event happened in Australia. You'd be after me unmercifully.*[6]

The AFP Commissioner, Mick Keelty, speaking to the media on the morning that Dr Haneef was charged said:

> *The detention of Dr Haneef, whilst attracting considerable media attention, is something that the organisation and certainly myself believe was necessary in order to afford everybody the best opportunity to understand what has occurred and what was alleged to have occurred.*[7]

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[5] See the preventative detention order regime contained in Division 105 of the *Criminal Code 1995 (Cth);* a similar regime exists under the *Terrorism (Preventative Detention) Act 2005 (Qld).* Recent media reports suggest that one reason police did not pursue the avenue of preventative detention orders in the Haneef case was that they had "insufficient information" to satisfy the test under the preventative detention order regime that detaining Dr Haneef would substantially assist in preventing an imminent terrorist attack from occurring. See 'Weakness of Mohamed Haneef case exposed' *The Australian,* 16 May 2008.

[6] 7.30 Report, ABC, *Debate rages over anti-terrorism laws*, broadcast 11.7.2007 – accessed at http://www.abc.net.au/7.30/content/2007/s1976318.htm

[7] "Commissioner Keelty's comments from Press Conference –14 July 2007 – accessed at www.afp.gov.au

No explanation was offered for why Dr Haneef's detention was necessary for the effective conduct of the investigation. That appears to have been regarded as self evident from the fact that it was "terrorism" investigation.

In an interview with the Bulletin some months later, Mr Keelty noted:

> *I was surprised as anybody when the DPP advised that Haneef could be charged. Because I didn't think the evidence was strong enough.*[8]

Even acknowledging that the test for arrest and charge are different, the contrast between Mr Keelty's two comments suggest that he regarded it as proper in the circumstances to detain Dr Haneef while different avenues of inquiry were exhausted, even in the absence of available evidence to support a belief based on reasonable grounds that Dr Haneef had committed an offence.

The former Prime Minister, speaking after Dr Haneef's release and defending the AFP against claims of victimisation said:

> *I want to defend very strongly the role of the Australian Federal Police. To put it bluntly, when you're dealing with terrorism it's better to be safe than to be sorry.*[9]

The Law Council does not claim to have access to all the material and evidence that police had access to at the time of Dr Haneef's arrest and detention.

However, from the material which is publicly available, it appears that the primary basis for arresting and detaining Dr Haneef was:

- his familial relationship with brothers, Sabeel and Kafeel Ahmed, (the later of whom was directly involved in the failed London bombings and Glasgow airport attack); and

- the fact that, upon his departure from the United Kingdom, he gave a SIM card registered in his name to Sabeel (who was not alleged to have had any involvement in the attacks but to have withheld form police information which came to his attention after the attacks).

Without more, these facts do not disclose a criminal offence of any kind.

Without more, it is difficult to comprehend how these facts might found a lawful arrest and ongoing detention of a suspect.

It is irrelevant how much material may have been seized as part of the investigation and may have required analysis by police. "Terrorism" case or not, the *Crimes Act* demands reasonable grounds exist *before* arrest and detention.

The Law Council is concerned that, throughout this case, police were operating in the general shadow of Australia's anti-terror laws, guided more by a vague notion that those laws authorised a different and extraordinary approach than by the precise content of the actual laws pursuant to which they were exercising their powers.

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[8] Cited by Sydney Morning Herald, "*Look Out, Here Comes Keelty's Size 12s"* – 1 February 2008 – accessed at http://www.smh.com.au/news/opinion/look-out-reptiles-here-come-keeltys-size-12s/2008/01/31/1201714145872.html

[9] 7.30 Report, ABC, "*Opposition demands inquiry into Haneef case*" - 30 July 2007.

For the safeguards contained in the *Crimes Act* to have meaning greater rigour is required.

For that reason, the Law Council encourages the Inquiry to explore the lawfulness of Dr Haneef's arrest and detention by seeking answers to the following critical questions:

1. When Dr Haneef was arrested by an AFP officer on 2 July 2007, did the arresting officer understand that he should only carry out the arrest if he believed on reasonable grounds that Dr Haneef had committed a particular offence?

2. Did the arresting officer in fact have such a belief and, on review, at the time of arrest did reasonable grounds exist to support that belief?

3. From the time of Dr Haneef's arrest until the time he was charged, some twelve days later, did the investigating officer understand that if he ceased to believe on reasonable grounds that Dr Haneef had committed a terrorism offence he should be released?

4. Did the investigating officer in fact have such a belief and, on review, throughout that twelve day period did reasonable grounds exist to support that belief?

5. Did the investigating officer understand each of the elements of the offence of providing material support to a terrorist organisation sufficiently well to form a belief on reasonable grounds that Dr Haneef had committed such an offence?

6. From the time of Dr Haneef's arrest until the time he was charged, did the investigating officer understand that if he did not believe on reasonable grounds that Dr Haneef's detention was necessary to: preserve evidence, or prevent the commission of another offence or protect the safety of a particular person or ensure Dr Haneef did not flee – then Dr Haneef should be released?

7. Did the investigating officer in fact have such a belief and, on review, throughout that twelve day period did reasonable grounds exist to support that belief?

The Law Council notes that none of the above questions can be satisfactorily answered simply by stating that action was taken under advice from the CDPP, whether or not that was in fact the case.

An investigating officer's statutory obligations are not automatically discharged by seeking and relying on advice from the CDPP. Where legislation requires the arresting or investigating officer to believe, or suspect, or be satisfied of certain matters on reasonable grounds, he or she can not simply outsource that responsibility to the CDPP. Although, of course, the advice of the CDPP may be highly relevant to the view ultimately formed by the relevant officer.

The decisions and actions of AFP officers should not be regarded as beyond scrutiny and review provided they are taken on the basis of CDPP advice.

Problems with the section 23CA and 23CB "dead time" provisions as revealed by Dr Haneef's case

The investigation and detention of Dr Haneef was the first time the dead time provisions in Part 1C of the *Crimes Act,* designed specifically for terrorism cases*,* have been utilised in practice.

Dr Haneef was arrested on 2 July 2007. By the time Dr Haneef had been charged with a criminal offence he had been detained without charge for over 12 days, during which time he had been interrogated for approximately 12 hours.

The exact timeline of events in the Haneef case is difficult to discern from publicly available information.

However, clearly the police made at least one successful application to a magistrate under section 23DA to have the investigation period of four hours extended. The first transcript of interview with Dr Haneef indicates that an extension of eight hours was granted.[10]

It also appears from media reports that on three occasions police successfully applied to a magistrate to have two 48 hour periods and one 96 hour period declared as reasonable dead time during which Dr Haneef remained in detention but the clock was not running down on the investigation period.

The final and fourth application by police to have time declared as reasonable dead time appears to have been made on the ninth day of his detention. It is understood, but it is not clear form the reporting of the case, that without ruling on the application, the magistrate adjourned the matter for two days and when the hearing resumed the application was withdrawn.

Dr Haneef was charged the following day with providing support to a terrorist organisation.

Within a fortnight the charge was dropped when the CDPP decided there was insufficient evidence to pursue it.

Dr Haneef's case confirms the Law Council's concerns that the dead time provisions in Part 1C of the *Crimes Act* can become a form of indefinite detention by default.

- ***The history of the provisions***

Before setting out in more detail the Law Council's concerns with sections 23CA and 23CB of the *Crimes Act,* it is worthwhile recapping the history of the provisions and their introduction into the *Crimes Act* in 2004.

When first introduced into Parliament, the new dead time provisions for terrorism cases were said to be needed to take account of international time zone differences and their impact on conducting investigations with an international reach from Australia.

For that reason, sub-paragraph 23CA(8)(m), as first drafted and introduced to Parliament, excluded from the calculation of the "investigation period":

[10] See questions 83 to 87 of the Taped Record of Interview.

> *any reasonable period during which the questioning of the person is reasonably suspended or delayed in order 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. (Emphasis added.)***

At the time, the Government claimed that capping the maximum allowable period of dead time based on the time zone difference would provide a safeguard to ensure that dead time would not be used to dramatically extend the investigation period.[11]

However, many groups expressed concern that, even with this cap, the dead time allowed for might amount to a period of up to and possibly in excess of 24 hours to be excluded from the calculation of the investigation period.

The Government strongly dismissed such concerns. For example, the Attorney General's Department told a Senate inquiry that it would be "extraordinarily surprised" if the dead time allowed for to take account of time zone differences was anything like a couple of days. It was noted that, in other jurisdictions, 16 hours had been regarded as "reasonable".[12]

Notwithstanding the Government's assurances, the Senate Legal and Constitution Affairs Committee recommended that if police wanted to extend the investigation period in order to take account of dead time arising from time zone differences they should have to apply to a judicial officer for prior approval.[13]

The Government purported to adopt this recommendation but in fact substantially altered the legislation.

A degree of judicial supervision was introduced, but this was also accompanied by the complete removal of any cap on the maximum allowable 'dead time' and a significant expansion of the grounds on which 'dead time' might be claimed.

The amended sub-paragraph 23CA(8)(m) did not accurately reflect the Senate Committee's recommendation. It was never subject to public comment or review, nor were any policy reasons advanced to explain why it was necessary.

- ***Problems with the provisions in action***

The Law Council's primary concern with the dead time provisions is that they authorise a system of indefinite detention without charge, which is inconsistent with the general principles of Australian criminal law and contrary to Australia's human rights obligations under Article 9 of the *International Covenant of Civil and Political Rights* ("ICCPR").

In particular, the Haneef case revealed the following about the operation of sections 23CA and 23CB:

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[11] See Second Reading Speech for *Anti-Terrorism Bill 2004*, accessed at : http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/anti_terrorism04/info/secondreading.doc

[12] See Report of Senate Legal and Constitutional Affairs Inquiry into the provisions of *the Anti-Terrorism Bill 2004*, Page 17, accessed at: http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/anti_terrorism04/report/report.pdf

[13] Recommendation 1, Ibid.

- A person arrested for a terrorism-related offence can be held without charge for an indefinite amount of time. The length of the investigation period allowed under sections 23CA and 23DA is capped at 24 hours. However, this does not operate as a safeguard against prolonged detention without charge because allowance for reasonable 'dead time' means that the 24 hours of questioning may be spread out over a period of weeks.

- There is no clear limit in sub-paragraph 23CA(8)(m) and section 23CB on how many times police can approach a judicial officer to specify certain time periods as dead time. In the Haneef case, the result was that even after the magistrate, upon each application, declared a finite period of allowable 'dead-time', the maximum period of Dr Haneef's detention without charge remained unknown. It is understood that this was because the possibility of further successful applications was never foreclosed.

- The time taken to make and dispose of a dead time application automatically further extends the "dead time". Therefore, if the judicial officer hearing a 'dead time' application under section 23CB fails to make a decision on the spot, and instead adjourns the matter, even for a period of days, then this time itself counts as 'dead time'. An adjournment, by default, becomes an extension of the investigation period. This is what occurred in the Haneef case between 11 July and 13 July 2007.

  This creates the real risk that detained suspects or their legal representatives may be deterred from raising points of law or challenging evidence on the basis that it may delay the presiding judicial officer's pronouncement on the application.

- Given the absence of a limit on the maximum period of detention without charge, there is no incentive for law enforcement officers to charge a suspect, even if at the time of arrest or after initial questioning police form an opinion that they have sufficient information to warrant a terror-related charge.

  This can have serious consequences for a person's liberty because while a person is detained under section 23CA they have no opportunity to apply for and be released on conditional bail.

  In Dr Haneef's case it appears that police held him in custody for 12 days before charging him on the basis of information that was available to them on the first day of his arrest. Therefore section 23CA was, in effect, primarily used to deny Dr Haneef a timely bail hearing.

  A hearing under section 23CB is not akin to a bail hearing because the magistrate has no capacity under that section to consider releasing a suspect subject to conditions of a kind which might mitigate against the risks allegedly posed by the suspect, include the risk of flight. In deciding under section 23CB whether it is necessary to continue to detain the suspect, the magistrate must weigh any risks posed by the suspect against the prospect of unconditional release. Therefore, a person detained in custody has a much better prospect of successfully applying for bail than of successfully resisting a dead time extension application under section 23CB.

- The involvement of a judicial officer in determining what is "reasonable" dead time can not substitute for a finite limit on how long a person can be held without charge.

This is due in part to the difficultly a detained suspect faces in attempting to properly challenge assertions made by police and also to the low threshold test required to establish that the period of dead time sought is reasonable.

Under section 23CB(5), in their application for a 'dead time' declaration police are able to cite routine investigative activities as supporting a need for 'dead time'. For example, amongst other things, the following may be listed as grounds for a dead time application:

> (i) the need to collate and analyse information relevant to the investigation from sources other than the questioning of the person (including, for example, information obtained from a place outside Australia);
>
> (ii) the need to allow authorities in or outside Australia (other than authorities in an organisation of which the investigating official is part) time to collect information relevant to the investigation on the request of the investigating official.

Low threshold aside, it must nonetheless be noted that sub-paragraph 23CB(7)(c) still requires that in order to grant a dead time extension a judicial officer must be satisfied that the detention of the person is necessary to preserve or obtain evidence or to complete the investigation.

On the facts of the Haneef case, as publicly known, it is difficult to see how the presiding Magistrate could have been so satisfied, particularly when a different Magistrate, less than a fortnight later, granted Dr Haneef bail having been convinced that he did not pose any significant risk or threat.

The Law Council hopes that the Inquiry will have the opportunity to review the reasons issued by the Magistrate under sub-paragraph 23CB(8)(c) on each occasion a dead time extension was granted and to consider what those reasons reveal both about the information which was before the Magistrate and about the nature of the test the Magistrate applied in assessing that evidence.

- The suspect's right to be heard in a dead time application, as reflected in sub-paragraph 23CB(7)(e), can be circumvented in practice.

  In the period before Dr Haneef was legally represented it appears that the police may have appeared before the magistrate and that a dead time extension may have been granted without Dr Haneef being heard from.

  If that is the case, the Law Council hopes that the Inquiry will have the opportunity to investigate how the section 23CB process and its significance was explained to Dr Haneef and whether he was given the opportunity to make direct representations to the Magistrate. The Law Council also hopes the Inquiry will have the opportunity to consider what information the Magistrate was given on that issue so that he might satisfy himself, as required by sub-paragraph 23CB(7)(e), that Dr Haneef had been given the opportunity to make representations about the application.

  The Law Council understands that, even after Dr Haneef was legally represented, his lawyer, Mr Peter Russo, was not permitted to hear the evidence presented by police in support of their section 23CB application. Therefore, Mr Russo could not possibly effectively respond to that evidence.

If this is the case, it runs contrary to and undermines the effectiveness of sub-paragraph 23CB(7)(c) which is designed to give the suspect a right to be heard on the application.

- ***Law Council Recommendations***

In light of the above problems with Part 1C of the *Crimes Act* as revealed in the Haneef case, the Law Council proposes the following changes be to the dead time provisions in sections 23CA and 23CB:

- section 23CA should be amended to impose a maximum cap on the amount of dead time allowed to be taken into account under sub-paragraph 23CA(8)(m). The Law Council believes that, as originally proposed, this should be limited to a period necessary to conduct inquiries across time zones;

- there should remain a requirement for advance judicial certification of any period of dead time claimed in reliance on sub-paragraph 23CA(8)(m);

- police should have only one opportunity to apply to a judicial officer under section 23CB to declare a specified period as reasonable dead time for the purposes of calculating the investigation period;

- section 23CB should be amended to ensure that police are not able to extend the period of a suspect's detention without charge if they are already satisfied that sufficient information is available to support a terrorism charge against that suspect;

- section 23CB (and section 23DA) should be amended to require that if a suspect is not legally represented when an application is made under section 23CB or section 23DA, police should be required to produce the suspect in person so that the judicial officer determining the application can satisfy him or herself that that the suspect understands the nature of the application and has been given his or her opportunity to be heard on the application.

- section 23CB should be amended to preclude a judicial officer from adjourning an application made under section 23CB for more than a specified number of hours, or, if this is regarded as an improper interference in the exercise of judicial power, sub-paragraph 23CA(8)(h) should be amended to provide that any period of adjournment in excess of a certain number of hours is not dead time and therefore must included in the calculation of the investigation period.

- consideration should be given to whether section 23CB ought to be amended to require that applications must be made to a Supreme Court Judge. Alternatively, at the very least, the section should be amended to delete the option of making such an application to a justice of the peace or bail justice.

The presumption against bail in section 15AA of the *Crimes Act*

Section 15AA of the *Crimes Act* provides that, where a person is charged with certain terrorism offences, bail is not be granted unless the bail authority is satisfied that exceptional circumstances exist to justify bail. The offence with which Dr Haneef was charged brought him within the scope of this provision.

In essence, section 15AA reverses the presumption in favour of bail and replaces it with a presumption that a restriction of the defendant's liberty is necessary if the defendant is charged with a terrorism related offence.

This is in conflict with Australia's obligations under Article 9(3) of the ICCPR, which provides that it shall not be the general rule that persons awaiting trial should be detained in custody.

Section 15AA was introduced into the *Crimes Act* by the *Anti-Terrorism Act 2004.*

At the time, no evidence was adduced by the government to demonstrate why the reversal of the presumption in favour of bail was necessary to aid in the investigation, prosecution or prevention of terrorist related offences.

No evidence was advanced, for example, to suggest that persons charged with terrorism offences were more likely to abscond, re-offend, threaten or intimidate witnesses or otherwise interfere with the investigation

Existing bail provisions provide the court with the discretion to refuse bail on a range of grounds, and to take into account the seriousness of the offence in considering whether those grounds are made out. No reason was given as to why these existing provisions were inadequate to guard against any perceived risk to the community in terrorism cases.

Of course, in Dr Haneef's case, Magistrate Payne was satisfied that the cumulative effect of a number of factors meant that exceptional circumstances existed in favour of bail and on 16 July 2007 Dr Haneef was granted bail with sureties amounting to $10,000. (Although it is understood that bail was not posted because of the subsequent cancellation of Dr Haneef's visa.)

The Law Council was disappointed to note that following Magistrate Payne's decision and another unrelated decision in which bail was granted in a terrorism case, the former Attorney-General suggested that there may be a need to tighten bail laws further.[14]

The former Attorney-General's position appeared to be that, if bail was granted in terrorism cases, the law was not being applied correctly or it was inadequate to fulfil its purpose. This position assumes that the only acceptable course is for all defendants in terrorism cases to be detained awaiting trial.

Such a view is entirely inconsistent with the presumption of innocence. It presumes that defendants in terrorism cases, regardless of their individual circumstances, must be, because of the nature of the accusation again them, likely to re-offend, likely to interfere with witnesses or other evidence, a threat to the community or a flight risk.

The Law Council strongly opposes the presumption against bail imposed by section 15AA and recommends that the section be repealed.

Dr Haneef was fortunate enough to be a respected medical practitioner with a good employment record and a blemish free past. Others, who face equally weak terrorism charges, may not be in as strong a position do demonstrate "exceptional

[14] Lateline, ABC, "Ruddock hints at tougher anti-terrorism laws" accessed at: http://www.abc.net.au/lateline/content/2007/s1982170.htm

circumstances". Thus without the repeal of section 15AA they will be left to linger in custody.

Terrorist Organisation Offences in the Criminal Code

Details of the charge laid against Dr Haneef under the Criminal Code

On 14 July 2007 Dr Haneef was formally charged under section 102.7(2) of the Criminal Code (Cth) which carries a maximum penalty of 15 years.

The details of the charge were as follows:

> *On or about the 25th of July 2006 in the United Kingdom, Mohamed Haneef did, contrary to section 102.7 (2) of the Criminal Code (Cth) intentionally provide resources, namely a Subscriber Information Module (SIM) card, to a terrorist organisation consisting of a group of persons including Sabeel AHMED and Kafeel AHMED, being reckless as to whether the organisation was a terrorist organisation, and as to whether that resource would help the organisation engage in an activity described in paragraph (a) of the definition of terrorist organisation in Division 102 of the Criminal Code (Cth).*

In order to secure a conviction under subsection 102.7(2) the prosecution must prove beyond reasonable doubt that:

1. the defendant intentionally provided resources to an organisation,

2. the resources would help the organisation engage in preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs) and the defendant was reckless as to that;

3. the organisation is a terrorist organisation ; and

4. the defendant is reckless as to whether the organisation is a terrorist organisation.[15]

A "***terrorist organisation***" is relevantly defined in section 102.1 of the *Criminal Code* as:

> *(a). an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs); or*
>
> *(b).* an organisation that is specified by the regulations for the purposes of this paragraph

(Only paragraph (a) of the definition is relevant to the Haneef case.)

[15] Press Release issued by the Commonwealth DPP, *'Dr Haneef',* 27 July 2007. Accessed at http://www.cdpp.gov.au/Media/Releases/20070727-Haneef.aspx

An "***organisation***" is defined by section 101.1 as a "body corporate or an unincorporated body whether or not the body is based outside Australia, consists of persons who are not Australian citizens, or is part of a larger organisation."
In *R v Izhar Ul-Haque*[16] it was submitted by the Crown (but neither accepted nor rejected by Bell J) that the term organisation refers "to a standing body of people with a particular purpose; not a transient group of conspirators who may come together for a single discrete criminal purpose."

Recklessness is explained in section 5.4 of the Criminal Code as follows:

(1) A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(2) A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) *The question whether taking a risk is unjustifiable is one of fact.*

Problems with the Criminal Code provisions under which Dr Haneef was charged

Section 102.7, under which Dr Haneef was charged, is part of Division 102 of the Criminal Code. This Division was introduced into the Criminal Code by the *Security Legislation Amendment (Terrorism) Act 2002* and contains a number of what are generally described as 'terrorist organisation offences'.

These offences relate to the conduct of a person who is in some way connected or associated with a 'terrorist organisation'. Under the Division it is an offence to:

- direct the activities of a terrorist organisation (102.2)
- be a member of a terrorist organisation (102.3)
- recruit a person to join or participate in the activities of a terrorist organisation (102.4)
- receive from or provided training to a terrorist organisation (102.5)
- receive funds from or make funds available to a terrorist organisation (102.6)

[16] R v Izhar Ul-Haque (unreported, NSW Supreme Court, 8 February 2006) Bell J at 51.

- provide support or resources that would help a terrorist organisation engage in preparation for, planning, assisting or fostering of the doing of a terrorist act (102.7)

- on two or more occasions associate with a member of a terrorist organisation or a person who promotes or directs the activities of a terrorist organisation in circumstances where that association will provide support to the organisation and is intended to help the organisation expand or continue to exist. (102.8)

At the time that Division 102 was introduced, and each time it has been subsequently expanded and refined by amendment, it has attracted considerable criticism including from the Law Council.[17]

Some of the key arguments advanced in opposition to the introduction of Division 102 and the offences contained therein were as follows:

- The terrorist organisation offences cast the net of criminal liability too widely by criminalising a person's associations, as opposed to their individual conduct.

- It was unnecessary to expand the scope of criminal liability in this way because existing principles of accessorial liability already provide for an expansion of criminal responsibility in circumstances of attempt, aiding and abetting, common purpose, incitement and conspiracy.[18] These established principles draw a more appropriate line between direct and intentional engagement in criminal activity and peripheral association.

- In shifting the focus of criminal liability from a person's conduct to their associations, the terrorist organisation offences unduly burden freedom of association and expression and are likely to have a disproportionately harsh effect on certain sections of the population who, simply because of their familial, religious or community connections, may be exposed to the risk of criminal sanction.

- The problems inherent in the terrorist organisation offences are exacerbated by the fact that their precise reach is unknown and unknowable. This is because the definition of a terrorist organisation incorporates any organisation, whether it

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[17] See Report of the Senate Legal and Constitutional Affairs Inquiry into the *Security Legislation Amendment (Terrorism) Bill 2002 [No.2]* and Related Bills, Recommendation 4 and pages 45 – 59: Accessed at http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/terrorism/report/report.pdf. See also the Law Council submission to this inquiry, located at http://www.lawcouncil.asn.au/get/submissions/2110877939.pdf

Criticisms of the expansion and refinement of these provisions can be found in the Report of the Senate Legal and Constitutional Affairs Inquiry into the provisions of the *Anti-Terrorism Bill 2004,* on pages 35 – 38 which summarize a number submissions critical of the provisions:
http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/anti_terrorism04/report/report.pdf

See also the Report of the Security Legislation Review Committee (the Sheller Review), June 15 2006 ,Chapter 7:
http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~SLRC+Report-+Version+for+15+June+2006%5B1%5D.pdf/$file/SLRC+Report-+Version+for+15+June+2006%5B1%5D.pdf

Further critiques can be found in the following articles:

Bronitt, S. 'Australia's Legal Response to Terrorism: Neither Novel nor Extraordinary', Speech delivered at Castan Centre, Monash University, 4 December 2003. www.law.monash.edu.au/castancentre

Burnside J, QC, 2008. 'Citizens' rights and the rule of law in a civil society: not just yet.' The Ninth Manning Clarke Lecture, presented at the National Library of Australia, Canberra, 10 March. Available at www.manningclark.org.au/papers/MCLecture-2008-Julian_Burnside.html

[18] Available at http://www.lawcouncil.asn.au/get/submissions/2110877939.pdf

is listed by regulation or not, which satisfies the broad and imprecise criteria set out in sub-section 102.1(a). Thus, for example, a terrorist organisation includes any organisation which *indirectly* assists or fosters the doing of a terrorist act. Further, members of the organisation include both formal and "informal" members.

In responding to these objections, the Federal Government has often countered that before a person could be found guilty of the majority of offences under Division 102, the prosecution would have to prove beyond reasonable doubt that the accused person either knew or was reckless as to whether the relevant organisation was a terrorist organisation. Therefore, no sanction can follow from innocent interaction and association.

However, as the Law Council pointed out in its 2002 submission,[19] the danger with these offences, many of which have never and may never lead to a successful prosecution, is not just that they potentially expose a person to criminal sanction, but that they are available to serve as a hook for the exercise of a wide range of law enforcement and intelligence gathering powers.

For example, without more, innocent interaction and association with a suspected member of a suspected terrorist organisation may not result in conviction and punishment, but it may generate sufficient interest on the part of police to lead to a search warrant, a telephone interception warrant, other surveillance measures and even arrest and detention.

In short, the Law Council's concern is that because the terrorist organisation offences do not focus on individual conduct, those offences potentially afford police very wide latitude to intrude upon people's privacy and liberty, based purely on who they know and interact with. The intent element of the offences may operate to limit the risk that entirely innocent interaction will be subject to criminal sanction. However, the intent element of the offences is easily overlooked by police when deciding whether to arrest, question, search and detain.

The concerns expressed by the Law Council and others about the terrorist organisation offences were proven to be well founded in the Haneef case.

The publicly available evidence indicates that Dr Haneef was arrested, questioned at length and detained for just over three weeks on the basis of the following evidence:

- On leaving the United Kingdom Dr Haneef gave a mobile phone SIM card to his second cousin, Sabeel Ahmed, so that he could utilize the unused credit.

- Approximately one year later, Sabeel's brother, Kafeel Ahmed, who Dr Haneef had also met on occasion in the United Kingdom, was involved in a failed London car bombing and later drove a burning jeep with explosives into the Glasgow airport.

- Sabeel himself was not alleged to have played any role in the planning or execution of the failed London bombing or the Glasgow attack, nor was he alleged to have any prior knowledge of either incident. He was, however

[19] See Law Council's Submission to the Parliamentary Joint Committee Inquiry into the Australia Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (submitted 16 April 2002) available at http://www.lawcouncil.asn.au/submissions.html.

charged (and later convicted) with failing to pass on to police information about the attacks which he received in an email from his brother sent before, but received *after,* the Glasgow attack.

- Dr Haneef was not alleged to have played any role in the planning or ecution of the failed London bombing or the Glasgow attack, nor was he alleged to have any prior knowledge of either incident.

- There is no evidence in the public domain to suggest that the SIM card was used in connection with the London or Glasgow incidents. (Although it is noted that in announcing his decision to drop the charge against Dr Haneef, the then Commonwealth DPP stated that "*there is information which would lead to a reasonable expectation that it could be established that the SIM card was used in connection with the events in the UK in 2007*". This indicates that there may be further information about the use that was made of the SIM card that has not been made public.[20])

When this publicly available information is compared with the elements of the offence with which Dr Haneef was charged, questions immediately arise:

- Where is the evidence that Sabeel Ahmed was part of an organisation that was directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act?

- Where is the evidence that Dr Haneef knew that in providing the SIM card to Sabeel he was in fact providing it to an organisation of which Sabeel was a part?

- Where is the evidence that Dr Haneef was aware of the substantial risk that this organisation was directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act?

- Where is the evidence that Dr Haneef was aware, when he handed over the SIM card, of the substantial risk that it would help this organisation to directly or indirectly engage in, prepare, plan, assist or foster the doing of a terrorist act?

On the basis of the publicly available information, it appears that Dr Haneef spent three weeks in custody as a consequence of very ordinary, unremarkable familial interaction.

This would have been much less likely to occur if the offence provisions that police had had to rely upon to arrest and continue to detain Dr Haneef had demanded a more substantive nexus between Dr Haneef's conduct and the commission of a terrorist act.

For that reason, the Law Council recommendations are as follows:

- The terrorist organisation offences in Division 102 should be repealed.

[20] Press Release issued by the Commonwealth DPP, *'Dr Haneef',* 27 July 2007. Accessed at http://www.cdpp.gov.au/Media/Releases/20070727-Haneef.aspx

- If the terrorist organisation offences provisions are not repealed, the definition of a terrorist organisation in 102.1 should be amended to so that only listed, proscribed organisations are included within the definition.

- If the terrorist organisation offences are not repealed, sections 23CB and 23DA of the *Crimes Act* should be amended to specifically require that the judicial officer hearing the dead time or extension application must be satisfied that the investigating officer has a belief on reasonable grounds that a terrorist offence has been committed and that in forming that belief the investigating officer has turned his or her mind to both the conduct and intent elements of the offence.

Previous Law Council submissions

The Law Council wishes to note that in this submission the organisation has confined itself to addressing problems with the Criminal Code offence provisions as they arise in the Haneef case.

In other contexts, the Law Council has made detailed submissions about other aspects of the terrorist organisation offence provisions in the in Division 102 of the Criminal Code.

- ***Proscription Process***

For example, the Law Council has submitted that the current proscription process as set out in Division 102 should also be amended. The Law Council's primary concerns with the current process relate to:

- the absence of clear or detailed criteria to guide and circumscribe the exercise of the Attorney General's proscription powers;

- the absence of an opportunity for affected parties to be heard prior to an organisation being listed;

- the absence of judicial scrutiny prior to listing; and

- the use of term "advocates a terrorist act" as a basis for proscription.

Previous Law Council submissions on this issue can be accessed at:

http://www.aph.gov.au/house/committee/pjcis/proscription/submissions/sub17.pdf

http://www.aph.gov.au/house/committee/pjcis/proscription/submissions/sub31.pdf

http://www.lawcouncil.asn.au/get/submissions/2110877939.pdf

- ***Definition of "Support"***

The Law Council has also expressed concern that the ambiguity and breadth of the term "support" in section 102.7 may extend to restrict political speech on matters of public interest.

When this section of the *Criminal Code* was considered by the Senate Legislative Review Committee (SLRC) in 2006 it observed:

… the combination of vulnerability and uncertainty requires that the section be amended to limit its application in a way which would reduce any infringement upon the right to freedom of expression.[21]

The SLRC recommended that section 102.7 be amended to ensure that the word "support" cannot be construed in any way to extend to the publication of views that appear to be favourable to a proscribed organisation and its stated objectives. [22] It suggested that one means of achieving this could be to insert defences of the type contained in section 80.3 in relation to treason and sedition. [23]

- ***Definition of a Terrorist Act***

The Law Council has also expressed concern about the definition of a terrorist act in section 101.1 which is incorporated into the definition of a terrorist organisation and into some terrorist organisation offences.

The Law Council believes that the definition is too broad in scope and fails to comply with international human rights standards. In 2006 the definition was reviewed by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. The Special Rapporteur took the view that Australia's definition of a "terrorist act" oversteps the Security Council's characterisation by including acts the commission of which go beyond an intention of causing death or serious bodily injury, or the taking of hostages and by including acts not defined in the international conventions and protocols relating to terrorism. The Special Rapporteur observed:

The latter aspects of Australia's definition of "terrorist acts" clearly include criminal serious risk to the safety of the public (through the combination of sections 100.1 (2) (f) (1) and 100.1 (3) (b) (iv)).

The Special Rapporteur takes the view, however, that although it is permissible to criminalize such conduct it should not be brought within a framework of legislation intended to counter international terrorism unless that conduct is accompanied by an intention to cause death or serious bodily injury.

…

To go beyond the cumulative restrictions of resolution 1566 (2004), however, there must be a rational link between threats faced by Australia and the types of conduct proscribed in its legislation that go beyond proscriptions within the universal terrorism-related conventions. Australia must clearly distinguish terrorist conduct from ordinary criminal conduct.

It is also relevant to note that the definition of a terrorist act includes not just action on the part of a person, but also a "threat of action" (section 101.1 (1)). The Special Rapporteur calls for caution in this respect, in order to ensure compliance with the requirements of legality."[24]

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[21] Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) at para 10.53.

[22] Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) at para 10.54.

[23] Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) at para 10.55.

[24] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Australia: Study on Human Rights Compliance While Countering Terrorism, UN Doc A/HRC/4/26/Add.3 (2006), [10].

A previous Law Council submission on this issue can be accessed at: http://www.lawcouncil.asn.au/sublist.html?year=2002

- ***Further submission***

The Law Council has also made submissions on proposal to make certain terrorist organisation offences strict liability offences; the association offence in section 102.8, the membership offence in 102.3 and the training offence in 102.5. These submissions[25] are available at:

http://www.lawcouncil.asn.au/sublist.html?year=2004 and

http://www.lawcouncil.asn.au/sublist.html?year=2002

If it would be of assistance to the Inquiry, the Law Council would be happy to provide copies of these and other previous submissions on Australia's anti-terror laws.

The operation of the *Migration Act*

As noted above, on 16 July 2007 Dr Haneef was granted bail with sureties amounting to $10,000. However, before an attempt to raise bail was made, the former Minister for Immigration, the Hon. Kevin Andrews MP, cancelled Dr Haneef's 457 work visa under subsection 501(3) of the *Migration Act*.

The decision to cancel Dr Haneef's visa made him an unlawful non-citizen in the migration zone (section 15 of the *Migration Act*), which in turn meant that Dr Haneef must be placed in immigration detention (section 189 of the *Migration Act).*

Accordingly, the Minister stated that, upon his release from detention in the criminal justice system, Dr Haneef "would be detained by immigration authorities and relocated to the Villawood Immigration Detention Centre as soon as arrangements can be made."[26]

In the circumstances, Dr Haneef decided not to post bail.

The Minister said he had revoked Dr Haneef's visa on the grounds that he "reasonably suspected" that Dr Haneef had an association with people involved in terrorism and for that reason failed to satisfy the character test in section 501 of the *Migration Act 1958 (Cth).*

The revocation of Dr Haneef's visa exposed him to the risk of removal from Australia.

However, this did not occur because a Criminal Justice Stay Certificate was subsequently issued by the Attorney-General to stay Dr Haneef's removal until the charges against him were disposed of.

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[25] See Law Council's Submission to the Parliamentary Joint Committee Inquiry into the *Australia Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (submitted 16 April 2002) and Law Council of Australia Submission to the Senate Legal Constitutional Committee Inquiry into the *Anti-Terrorism Bill (2004)* (submitted 26 April 2004).

[26] Transcript of Ministerial Press Conference, 16 July 2007, accessed at - http://pandora.nla.gov.au/pan/67564/20071110-0000/www.minister.immi.gov.au/media/media-releases/2007/ka_transcript_0727.html

On 27 July 2007, the CDPP came to a view that there was no prospect of making out any offence against Dr Haneef in respect of what was alleged against him, either on the available information or the information likely to be produced from pending investigations.

The Minister stated that these developments made no difference to his previous decision to cancel Dr Haneef's visa, but upon his release from detention in the criminal justice system the Minister allowed Dr Haneef to be transfer to residential detention. Twenty- four hours later, Dr Haneef returned to India.

Section 501 of the *Migration Act* and the Character Test

Sub-section 501(3) of the *Migration Act* gives the Minister the power to cancel a person's visa if the Minister:

- reasonably suspects that the person does not pass the character test; and
- is satisfied that the cancellation is in the national interest.

Under section 501(6), a person is taken *not* pass the character test if:

- the person has a substantial criminal record;
- the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct;
- having regard to the person's past and present criminal conduct or the person's past and present general conduct the person is not of good character; or
- in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would: engage in criminal conduct in Australia, incite discord in the Australian community or in a segment of that community; or represent a danger to the Australian community.

Only the Minister him or herself can make a decision under section 501(3).

Subsection 501(4) of the *Migration Act* specifically provides that the rules of natural justice do not apply to a decision taken under subsection 501(3).

The *Migration Act* also provides that a cancellation decision made under subsection 501(3) can not be reviewed by the Administrative Appeal (sub-paragraph 500(1)(b)) or the Federal Magistrates Court (sub-paragraph 476(2)(c)).

Therefore, if a person wishes to challenge a cancellation decision under section 501(3), their only options are to request the Minister to reconsider the decision under section 501C[27] or to apply to the Federal Court.

27 The review opportunity afforded by s501C is somewhat limited. See for example discussion of s501C(4) in *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273 at paragraphs196 – 202.

Pursuant to section 476A of the *Migration Act,* the Federal Court has original jurisdiction to review a section 501 decision made personally by the Minister.

The grounds for appeal to the Federal Court are very limited. To succeed, an applicant must establish that the Minister made a jurisdictional error in making the decision.

According to subsection 501(5) of the Act, natural justice does not apply to a decision made under subsection 501(3), so a failure to observe natural justice cannot be the basis for establishing jurisdictional error.

Essentially an applicant must demonstrate that the Minister misunderstood the nature of the jurisdiction to be exercised, misconceived his or her duty, failed to apply himself or herself to the question to be decided or misunderstood the nature of the opinion which he or she is to form.[28]

The Federal Court has no jurisdiction to review the merits of the Minister's decision.

In attempting to challenge a Minister's decision under subsection 501(3), applicants face the further hurdle that they may be refused access to the information on which the Minister's decision was based. Section 503A of the *Migration Act*, for example, protects from disclosure confidential information provided to the Minister by law enforcement agencies or intelligence agencies to assist the Minister in making a decision under section 501. The Minister can choose to disclose the information despite the operation of section 503A, but he or she can not be compelled to do so.

Dr Haneef's appeal to the Federal Court

When the Minister cancelled Dr Haneef's visa under subsection 501(3), he did so on the basis that Dr Haneef had failed paragraph (b) of the character test as set out in subsection 501(6). Specifically, the Minister cancelled Dr Haneef's visa because he reasonably suspected that Dr Haneef had an association with someone else, namely Sabeel and Kafeel Ahmed, whom the Minister reasonably suspected had been involved in criminal conduct.

In reaching his decision, the Minister acted on a belief that it was sufficient for him to be satisfied that Dr Haneef had had some form of association with his second cousins who were implicated in the UK terrorist plot, even if that association was long past, or fleeting, or entirely innocent, or based merely on family ties.

Dr Haneef appealed the decision to the Federal Court on the basis, amongst other things, that the Minister had misunderstood the test to be applied by him.

Justice Spender of the Federal Court found in favour of Dr Haneef and quashed the Minister's decision.[29] Justice Spender found that Minister had misconstrued the association limb of the character test and therefore failed to apply it correctly. His Honour found that there must be some nexus between the visa holder and the criminal conduct suspected of the person or group with whom the visa holder has an association. His Honour stated:

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28 Re Patterson; Ex parte Taylor [2001] HCA 51; (2001) 182 ALR 657 at [82]- [83] per Gaudron J

[29] *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273

> *it seems to me impossible to conclude that Parliament would have intended that a person fail the character test where the relationship of a visa holder with a person, group or organisation was utterly remote from the criminality of that person, group or organization.*

In short, Justice Spender decided that the character must, necessarily, have something to do with character.

The Minister appealed Spender J's decision to the Full Bench of the Federal Court. The appeal was rejected and Dr Haneef's visa reinstated.

The Law Council welcomed the decisions of the Federal Court and Full Federal Court which, essentially, did little more than confirm that the Minister does not have the power to cancel a person's visa on the basis of an innocent association.

The Law Council believes that no public purpose is served by vesting in the Minister an unfettered discretion to cancel a visa based on an association that ended many years ago, or was only fleeting, or only reflected a familial connection, or was the product of a purely professional relationship.

The Law Council believes broad, unfettered discretions of that kind encourage sloppy research and lazy decision making and for that reason can never serve to protect the Australian community.

Nonetheless, the decisions of the Federal Court and the Full Federal Court in the Haneef case have far from remedied all the problems with the operation of section 501 of the *Migration Act.*

Those affected by an adverse decision still have no rights to merits review and therefore have no opportunity to challenge the veracity and accuracy of the information on which the decision against them was based.

Likewise, those affected by an adverse decision may never even have access to the information on which the decision against them was based.

In Dr Haneef's case for example, certain protected information was never released to Dr Haneef or the Court. The inherent unfairness of this was underlined when the Minister, having not disclosed this protected information to the court, nonetheless chose to release selected parts of it to the media.

Justice Spender was rightfully very critical of this approach. His Honour observed that the Minister had released information to the media which he had chosen not to disclose to the court, thus denying Dr Haneef a proper opportunity to challenge that information in a meaningful way.[30]

For those reasons, the Law Council recommends that the *Migration Act* be amended to allow all those affected by an adverse decision under section 501 the opportunity to seek merits review before the Administrative Appeals Tribunal.

The Law Council further recommends that section 503A be repealed to ensure that those affected by an adverse decision are not arbitrarily denied access to the information on the basis of which the decision against them was taken.

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[30] *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273 at paragraphs 326 to 327.

Interaction between migration law and criminal law

For the Law Council, the Haneef case presents a critical opportunity to examine and review the interaction between migration law and criminal law and the impact this can have on the fundamental rights of individuals, particular non-citizens of Australia.

- ***Improper purpose and the perception of interference in judicial proceedings***

The purpose of migration law is to determine which non-citizens are able to come to and remain in Australia and on what terms. The purpose is not to provide for a person's detention.

In Dr Haneef's case, the Minister for Immigration made a decision to cancel Dr Haneef's visa and thereby secure his removal from Australia, in circumstances where, because of the outstanding criminal charge and the issue of a Criminal Justice Stay Certificate, his removal in the short term was not possible.

In the absence of an alternative visa, the subsequent effect of the Minister's decision was that, notwithstanding the court's willingness to grant Dr Haneef bail, he faced the prospect of awaiting trial in detention.

As there are no long term immigration detention facilities in Brisbane, Dr Haneef's place of detention would have been at Silverwater. This is far removed from the jurisdiction in which Dr Haneef's trial would have been held and would have made it very difficult for Dr Haneef to consult the lawyers he had engaged to represent him in that jurisdiction.

In ruling upon a challenge to the Minister's decision, Justice Spender was not prepared to infer on the available evidence that the Minister had acted for an improper purpose.

Justice Spender did not have before him evidence of the emails sent between AFP and Immigration officers which were later released under freedom of information laws. He therefore did not consider the implications of correspondence between those two agencies which indicated that there was in place "*a contingency for containing Mr Haneef and detaining him under the Migration Act if it is the case the he is granted bail.*"[31]

That evidence was also not considered by the Full Federal Court, which did not address the question of improper purpose.

On that basis, the Law Council accepts no formal finding has been made to date that the Minister exercised his power under section 501 for an improper purpose.

Nonetheless, on the available information a legitimate perception has arisen that this is indeed what occurred.

In a broader public context, appearances and perceptions matter. The public's faith in the integrity of our judicial system is undermined when Ministers appear to interfere in, or arbitrarily override, the outcome of judicial proceedings in a manner inconsistent with the separation of powers.

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[31] See Hedley Thomas, 'Secret Haneef plan exposed', *The Australian* (2 November 2007); Craig Skehan, 'Haneef appeal could cite emails', *Sydney Morning Herald* (3 November 2007).

The separation of powers is not a doctrine to be strategically navigated around. It is the bedrock of our democracy and should be actively respected.

The Law Council believes that the timing and effect of the Minister's decision, together with his many partial and political public comments, created an appearance of impropriety and of interference in the judicial process.

In order to limit the possibility that this may occur again in the future, the Law Council recommends that:

If a decision is taken to cancel the visa of a person who is facing criminal charge(s) and:

- it is not intended to remove that person from Australia before the final disposition of the criminal charge(s); and

- a criminal justice stay certificate is issued accordingly,

the *Migration Act* should provide that the person must be granted a criminal justice visa or other bridging visa.

In this way, whether or not he or she remains in detention pending trial will be determined by the court with jurisdiction to hear the criminal charge(s).

- ***Impact of visa cancellation on fair trial rights***

When an accused person's visa is cancelled because he or she is deemed to have failed the "character test" this has obvious implications for the presumption of innocence.

The danger that the person concerned will not be able to receive a fair trial is even further compounded when the Minister responsible for the visa decision makes it publicly know that his decision was based, in part, on secret information not otherwise available to the court or the defendant's lawyers.

In addition, where the cancellation of a person's visa results in that person being transferred inter-state to be held in immigration detention, this has the potential to seriously hinder that person's access to his or her chosen legal representative and his or her ability to prepare and present a defence to the charges faced.

Fortunately for Dr Haneef, the charges against him were not pursued. Had a different course been followed, the Law Council is of the view that the interaction between migration law and criminal law in this case would have created a real risk that Dr Haneef would not have received a fair trial.

For that reason, the Law Council recommends that when there are criminal charges pending against a non-citizen, the Minister should be specifically required to consider the impact that any decision to cancel that person's visa will have on his or her ability to obtain a fair trial, before making a final decision.

Summary of Recommendations

The Operation of the *Crimes Act*

The Law Council recommends the following changes be made to the dead time provisions in sections 23CA and 23CB in Part 1C of the *Crimes Act*:

- section 23CA should be amended to impose a maximum cap on the amount of dead time allowed to be taken into account under sub-paragraph 23CA(8)(m). The Law Council believes that, as originally proposed, this should be limited to a period necessary to conduct inquiries across time zones;

- there should remain a requirement for advance judicial certification of any period of dead time claimed in reliance on sub-paragraph 23CA(8)(m);

- police should have only one opportunity to apply to a judicial officer under section 23CB to declare a specified period as reasonable dead time for the purposes of calculating the investigation period;

- section 23CB should be amended to ensure that police are not able to extend the period of a suspect's detention without charge if they are already satisfied that sufficient information is available to support a terrorism charge against that suspect;

- section 23CB (and section 23DA) should be amended to require that if a suspect is not legally represented when an application is made under section 23CB or section 23DA, police should be required to produce the suspect in person so that the judicial officer determining the application can satisfy him or herself that that the suspect understands the nature of the application and has been given his or her opportunity to be heard on the application.

- section 23CB should be amended to preclude a judicial officer from adjourning an application made under section 23CB for more than a specified number of hours, or, if this is regarded as an improper interference in the exercise of judicial power, sub-paragraph 23CA(8)(h) should be amended to provide that any period of adjournment in excess of a certain number of hours is not dead time and therefore must included in the calculation of the investigation period.

- consideration should be given to whether section 23CB ought to be amended to require that applications must be made to a Supreme Court Judge. Alternatively, at the very least, the section should be amended to delete the option of making such an application to a justice of the peace or bail justice.

The Law Council also strongly opposes the presumption against bail imposed by section 15AA and recommends that the section be repealed.

The Terrorist Organisation Offences in the *Criminal Code*

The Law Council recommends that the terrorist organisation offences in Division 102 of the *Criminal Code* be repealed.

If the terrorist organisation offences provisions are not repealed, the Law Council recommends:

- the amendment of the definition of a terrorist organisation in 102.1 to ensure only listed organisations are included within the definition; and

- the amendment of sections 23CB and 23DA of the *Crimes Act* to specifically require that the judicial officer hearing a dead time or extension application must be satisfied that the investigating officer has a belief on reasonable grounds that a terrorist offence has been committed and that in forming that belief the investigating officer has turned his or her mind to both the conduct and intent elements of the offence.

The Operation of the *Migration Act*

In respect of the operation of the *Migration Act,* the Law Council recommends:

- that the *Migration Act be* amended to allow all those affected by an adverse decision made under section 501 the opportunity to seek merits review before the Administrative Appeals Tribunal.

- that section 503A be repealed to ensure that those affected by an adverse decision are not arbitrarily denied access to the information on the basis of which the decision against them was taken.

- that if a decision is taken to cancel the visa of a person who is facing criminal charge(s) and:

  - it is not intended to remove that person from Australia before the final disposition of the criminal charge(s); and

  - a criminal justice stay certificate is issued accordingly,

  the *Migration Act* should provide that the person must be granted a criminal justice visa or other bridging visa.

- that when there are criminal charges pending against a non-citizen, the Minister for Immigration and Citizenship should be specifically required to consider the impact that any decision to cancel that person's visa will have on his or her ability to obtain a fair trial, before making a final decision.

Request for Oral Presentation to Inquiry

In accordance with Practice Note 1 issued by Mr Clarke QC on 30 April 2008 the Law Council requests the opportunity to make a further oral presentation to the Committee.

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies.

The Law Council has closely monitored Dr Haneef's case since the time of Dr Haneef's arrest until the announcement of the present Inquiry. The Law Council has engaged in correspondence with and met with Government and the AFP on multiple occasions to discuss the conduct and implications of the Haneef case. (See attachment two for details.)

The Law Council also has a long history of engagement with Government and Parliament on the content and operation of Australia's anti-terror laws more generally.

As a result, the Law Council is in a unique position to provide specialist assistance to the Inquiry, particularly with regards to identifying and analysing "deficiencies in the relevant laws or administrative and operational procedures and arrangements of the Commonwealth and its agencies" as required by paragraph (4) of the terms of reference.

The opportunity to provide an oral presentation will allow the Law Council to supplement this written submission with further detail and to respond to any questions posed by the Inquiry.

If the above request is granted, it is anticipated that the President of the Law Council of Australia, Mr Ross Ray QC, will appear to make an oral presentation to the Inquiry.

For the purpose of making the necessary arrangements Mr Ross Ray QC can be contacted through Helen Donovan at the Law Council Secretariat as follows:

Ph: 02 62463711

Fax: 02 6257 6503

Email: helen.donovan@lawcouncil.asn.au.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.

Attachment B

Law Council Advocacy on Haneef Case

The Law Council of Australia has been actively engaged in advocacy relating to the handling of the case of Dr Mohamed Haneef since his arrest on 2 July 2007.

The Law Council has made written submissions to Government concerning the case, including the following:

- AFP Commissioner Mick Keelty
    - Letter of 21 December 2007 re Role of the AFP in the Arrest and Detention of Mohamed Haneef;
    - Letter of 5 November 2007 re Publication of Law Council Letter re Role of the AFP in the Arrest and Detention of Mohamed Haneef;
    - Letter of 2 November 2007 re Role of the AFP in the Arrest and Detention of Mohamed Haneef;
    - Letter of 12 September 2007 re Law Reform Proposals in the Wake of the Mohamed Haneef Case.
- The Hon Phillip Ruddock MP, former Attorney-General
    - Letter of 6 September 2007 re Law Reform Proposals in the Wake of the Mohamed Haneef Case.
- The Hon Kevin Andrews MP, former Minister for Immigration and Citizenship
    - Letter of 12 September 2007 re Law Reform Proposals in the Wake of the Mohamed Haneef Case.
- The Hon David Johnston MP, former Minister for Justice and Customs
    - Letter of 12 September 2007 re Law Reform Proposals in the Wake of the Mohamed Haneef Case.
- The Hon Bob Debus MP, Minister for Home Affairs
    - Letter of 16 January 2008 re Judicial Inquiry into the Conduct of the Dr Haneef Case.
- Mr Ian Govey, Deputy Secretary, Attorney-General's Department
    - Letter of 6 February 2008 re Scope of Judicial Inqiury into the Dr Mohamed Haneef Case

The Law Council has also discussed the Haneef case in face to face meetings with AFP Commissioner Mick Keelty, the Minister for Home Affairs, the Hon. Bob Debus MP, and the Attorney-General, the Hon. Robert McClelland MP.

In addition, the Law Council has featured prominently in the public debate surrounding the case. For example, the Law Council:

- issued over seven press releases on the topic, including:
    - 12 July 2007 – New Laws Fail First Test – Indefinite Detention by Any Other Name;

- 18 July 2007- Cloak and Dagger Process Puts Our Fundamental Rights at Risk;
- 23 July 2007 – Law Council Calls for Bridging Visa as an Alternative to Haneef Detention;
- 23 August 2007 - Andrews' Test Not About Character;
- 30 January 2008 – No Agency Should be Immune from Public Scrutiny.

- conducted dozens of radio and television interviews on the case as it has progressed - including an appearance on Meet the Press;
- prior to the 2007 Federal Election, asked each of the major political parties, in the Law Council of Australia Federal Election Questionnaire, whether they would review and reform the *Crimes Act* in the wake of the case; and
- asked both the former Attorney-General and the former shadow Attorney-General, in the 2007 Federal Election Debate, whether they would review and reform the *Crimes Act* in the wake of the case.