

**The Clarke Inquiry in Progress: Tentative Observations for Reform, notes for a talk  
at the Federal Criminal Law Conference, at the Hilton Hotel, 488 George Street,**

**Sydney on 5 September 2008**

**Introduction**

For those of us who have been closely involved in the Haneef case, these last two months have been like a walking string of anniversaries: 26 June, his little daughter, Haniyah's first birthday; 2 July, Dr. Haneef was arrested; 6 July, Peter Russo first asked me for assistance in the case; 9 July, my first appearance before Magistrate Gordon; 14 July, Dr. Haneef charged and bail application argued; 16 July, Dr. Haneef granted bail but has visa cancelled; 27 July, case collapses; and 21 August, Justice Spender sets aside cancellation. There are more anniversaries to look forward to: 21 December, Full Court of the Federal Court confirms Justice Spender's decision. And what about 29 August, next year, the first anniversary of "AFP declares Dr. Haneef no longer a person of interest".

In May of this year, I worked with Nitra Kidson, Darryl Rangiah and our instructing solicitors on the submissions on behalf of Dr. Haneef to the Clarke Inquiry. They were delivered on 23 May.

The first thing I want to do, today, is to draw on those submissions<sup>1</sup> to give you some idea of their main contentions. Of course, as a barrister engaged in the ongoing process of the Inquiry, it is not my role to express personal opinions about the matters contained within the purview of the Inquiry. The conclusions argued for in the submissions document remain merely submissions. To the extent that I appear to express opinions in the area covered by the submissions, I am only conveying to you observations and conclusions argued for in the submissions.

Second, I want to discuss aspects of the Clarke Inquiry and the way it has proceeded. I also want to talk about some of the more recent happenings within and around the Inquiry. Not the least of these is Mr. Keelty's announcement of last Friday that Dr. Haneef is no longer a person of interest.

Last, I will, very briefly, touch upon the legal provisions under which the police and officials purported to act against Dr. Haneef.

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<sup>1</sup>The submissions are available at <http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/RWP14628B2902A7E152CA2574810022BC01> I have not attempted to reproduce references to matters which are documented and referenced in the submissions. Hopefully, the submissions are extensively and painstakingly documented and all relevant sources will be accessible by reference to that document and the appendices also available on Mr. Clarke's web site..

## **Errors, Omissions and Misleading Statements**

### **Introduction**

One of the reasons why Mr. Bugg reviewed the case against Dr. Haneef was that factual errors in the prosecution had become evident through the media. One of the more dramatic errors occurred in the bail hearing when the DPP officer, Mr. Clive Porritt, told the court that the SIM card had been found in the burning jeep at Glasgow airport. An ABC journalist, Raphael Epstein, broke a story, 6 days later, that, in fact, the SIM card was found hundreds of kilometres away in Liverpool, with Sabeel Ahmed when he was arrested.

The submissions made on Dr. Haneef's behalf contain a detailed analysis of the different factual statements made by government agencies against other documents and the now known facts. In carrying out this analysis, we were startled by the degree of factual error that we discovered. Every major attempt by government agencies to place known facts on the record contained errors. These included the statutory declaration of Mr. Simms to Magistrate Gordon which occurred on 11 July; the factual briefing of the CDPP officers who provided advice and argued the bail application including Mr. Porritt (this briefing was reconstructed by reference to what was said at the bail hearing and from other public information); the affidavit sworn for the bail hearing by AFP National Manager, Counter-Terrorism, Domestic (and senior investigation officer for the Haneef investigation), Ramzi Jabbour; and the part A open information and the part B confidential information (the latter was also reconstructed in part from statements made about it, especially, subsequent public statements of Mr. Andrews) provided by the AFP to allow Mr. Andrews to cancel Dr. Haneef's visa.

Repeatedly, the same error was made in subsequent documents or, worse, the error was half corrected but the facts still stated wrongly.

I will mention just three of the factual misstatements identified in the submissions.

The first is the repeated failure of authorities to communicate the fact that Dr. Haneef attempted to ring a UK investigator, Tony Webster, at least four times on the afternoon of the night he was arrested to answer any questions Mr. Webster had for him.

The second is the failure, even at this late stage, by the AFP to acknowledge the receipt by them of the Kafeel email which exonerated Sabeel Ahmed of any involvement in or foreknowledge of terrorist activity and, by extension, exonerated Dr. Haneef. The submission to the Clarke Inquiry by the Office of the CDPP makes a veiled reference to their also having not received this document from the AFP.<sup>2</sup>

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<sup>2</sup> The submission may be found at <http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/RWP635A66C049DED89FCA2574AA00118C2B> . See paragraph 14.14 for the reference.

The third concerns the misleading of the bail court by the CDPP officers who appeared that day. This involved the statement that the SIM card had been found in Glasgow in the burning jeep. A mis-communication in instructions can always occur. What is alarming about this error is that no one corrected the public record until ABC journalist, Raphael Epstein, broke the story 6 days later.

Why no attempt was made to inform the court, later that day or on the following Monday, when Ms. Payne delivered her decision has never been adequately explained. We have learned from the CDPP submission to the Clarke Inquiry that the AFP officers instructing on the Saturday knew nothing about the case. They may explain why the error was not corrected, immediately, but it raises more questions about the way the AFP conducted itself in Dr. Haneef's case. It does not explain why the error was allowed to persist in the public mind for another four days until the error was corrected, not by the authorities, but by the investigative efforts of the ABC journalist.

### **Ignoring the Law**

The submissions also seek to test, on the basis of the known facts, the legal validity of the various decisions made concerning Dr. Haneef. These include the decision to arrest; the decisions to apply for detention orders; the decision to charge Dr. Haneef; and the cancellation of Dr. Haneef's visa. I will discuss here only the decision to arrest.

In some respects, the laws being purportedly applied by the AFP officers are quite strict in their requirements.

Section 3W *Crimes Act* 1914 ("the Crimes Act"), under which Dr. Haneef was arrested, requires that the arresting officer hold a reasonable belief that, in this case, Dr. Haneef had committed the offence for which he was being arrested. Sub-section 3W(2) adds a requirement that, upon the arresting officer's state of mind dropping below that threshold requirement, the person must be, immediately, released. The operation of part 1C Crimes Act, which allows the detention without charge, is, itself, dependant upon a continuing legal arrest.

Part 1C allows, upon a lawful arrest, a person to be detained for very limited purposes. The detention is for the investigation of the offence for which the person has been arrested or another terrorism offence which the investigating officer reasonably suspects the detained person may have committed.

There are several touchstones by which one may judge the decision by the arresting officers to arrest Dr. Haneef. Mr. Bugg found no reasonable basis to anticipate a conviction on 27 July. When Mr. Ramzi Jabbour, with the assistance of his superiors in Canberra,<sup>3</sup> made the decision to charge against the advice of the Queensland Police

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<sup>3</sup> It appears to be a reasonable assumption that the arresting and interrogating officers, Mr. Simms and Mr. Thompson, declined to charge Dr. Haneef. The fact that Mr. Simms was a seconded member of the Queensland Police would explain why that Service was so concerned at the time the decision was made to ensure that their views were heard even if, as it turned out, they were not

Service<sup>4</sup> and despite ASIO's contrary opinion,<sup>5</sup> he chose to charge Dr. Haneef with a less serious offence than the offence for which he had been arrested. The difference was that the charge only alleged that Dr. Haneef was reckless about whether the organisation to whom he had given his SIM card was a terrorist organisation. The offence for which the arrest was made alleged that Dr. Haneef knew that the organisation was a terrorist organisation. Mr. Jabbour, therefore, concluded that the more serious offence, the subject of the arrest, was not even remotely available. He must have concluded that recklessness rather than knowledge was the most that could be suggested about Dr. Haneef's state of mind.

The analysis contained in the submissions, drawing on the available fragments of documents received on FOI, suggests that the arresting officers had very little information when they arrested Dr. Haneef. They may have been suspicious that he was leaving Australia (despite the fact that he was travelling in his own name to his home in India where he and his family were probably pretty well known, but also after having arranged 7 days leave from his job and made repeated attempts to contact a UK investigator who, he understood, wanted to speak to him). But whether that amounted to a reasonable belief that he committed the vaguely ridiculous offence for which he was arrested is a very different question. The answer to that question must be, confidently, in the negative.

By the close of the following day, the same officers had plenty of information. It all came from Dr. Haneef. It provided full explanations of the matters that may have given rise to suspicion. All of the factual matters were either confirmed by documents in their hands or easily checkable by a few phonecalls to the Gold Coast; to India; and to the UK.

There is very little evidence that that checking was done. There is evidence that the most exculpatory information, like the calls to Mr. Webster and the Kafeel email, was either ignored or suppressed. The duty in s.3W(2) to release Dr. Haneef, if a reasonable belief was no longer available, seems to have been either not adverted to or ignored.

Mr. Jabbour's phone call to his superiors in Canberra on 14 July before deciding to charge Dr. Haneef suggests that the important decisions in this case were being made by management and not by the investigators like Mr. Simms and Mr. Thompson who were being asked to make the arrests and the detention order applications.

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headed. It is the submission of the QPS which confirmed that Mr. Jabbour charged Dr. Haneef after he had spoken to his superiors in Canberra. The identity of those superiors has not been revealed.

<sup>4</sup> The submission of the QPS is at <http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/RWP84A0E088973D9C61CA2574810029463E> . The (redacted) submission of ASIO is at <http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/RWP8E07E62204CA0D5ACA257495001D37B1>

<sup>5</sup> See <http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/RWP8E07E62204CA0D5ACA257495001D37B1> .

## **Options, options, options**

Dr. Haneef's lawyers always assumed that the decision that Dr. Haneef's visa be cancelled, thereby, facilitating his continued detention, was a panic stricken response to the sudden prospect that Dr. Haneef might be granted bail.

However, the documents and fragments of documents from a highly incomplete AFP FOI release paint a different picture. That different picture is portrayed in the submissions.

On 3 July, the day after Dr. Haneef's arrest, the minutes of the whole of government National Counter Terrorism Committee show discussion about the prospect of seeking a Protective Detention Order ("a PDO") for Dr. Haneef. PDOs and also control orders are again discussed a few days later. The consensus of the discussion, on both occasions, was that there was insufficient evidence to support these options. The continued detention without charge under part 1C Crimes Act was seen as a good stop gap measure. However, orders for this form of detention were not seen as necessarily going to be available, indefinitely, and the documents reveal a plaintive plea to the AFP overseas liaison post in the UK to seek evidence from the UK authorities that might support a PDO.

Neither is it considered inevitable that Dr. Haneef would be charged with an offence and, at one stage, the officers were contemplating Dr. Haneef's release occurring as early as 6 July.

Into this series of discussions, the option of immigration detention thrusts its face on 8 July when a further DIAC FOI release reveals a receipt for Part A and Part B documents from the AFP. (The part A and part B documents represent the non-secret and secret briefs, respectively, from the AFP to Minister Andrews to allow him to cancel the visa. They were updated a number of times.)

The new picture then is one of immigration detention to contain and detain Dr. Haneef being an option along with PDOs; detention without charge; bringing a criminal charge; and control orders, at least from 8 July and probably from an earlier date.<sup>6</sup> The prime advantage of the visa cancellation option seems to have been that neither the Department, nor Mr. Andrews, who made the decision, placed a high bar on the standard of evidence required.

As it turned out, the non-secret evidence that Mr. Andrews accepted went to a paltry 4 pages and contained many of the same factual errors and omissions as did earlier documents produced by the AFP. The part B material seems to have been similarly inaccurate because we know, from Mr. Andrews' own words on *Lateline*, on 31 August 2007, that the part B secret material indicated that the highly selective version of a chat room conversation between Dr. Haneef and his brother that Mr. Andrews released, that day, was the whole of that chat room conversation.

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<sup>6</sup> The parts A and B of the brief would have taken some time to prepare.

## Mr. Clarke's Inquiry

As one of Dr. Haneef's barristers, I have confidence that Mr. Clarke and his team are working very hard to discover and reveal the truth as to how what happened to Dr. Haneef was able to happen. However, Mr. Clarke's job has not been made easy and his Inquiry is not the full judicial Inquiry that the present prime minister repeatedly promised.<sup>7</sup>

It is not even the semi-open virtual Inquiry that Mr. Clarke, himself, promised. On 30 April 2008, in his opening statement, Mr. Clarke said:

“... I have received assurances from each of the relevant government agencies that they will fully cooperate with the Inquiry. Each of those agencies will provide me with all relevant documents and information, and with access to personnel who I wish to interview. On that basis, I am confident that the Inquiry can be effectively conducted in its present form.”

This promised cooperation would allow Mr. Clarke to provide an open Inquiry, subject to narrowly defined exceptions. He said:

“The interviews will be transcribed. To the extent that it is possible to do so, subject to any issues of confidentiality or national security, the transcripts will be made available to the public on the Inquiry's website.”

This would also apply to the plethora of original documents that the highly cooperative departments were rushing to provide. Mr. Clarke said, during the directions hearing on 30 April:

“[Dr. Haneef's representatives] will be given access to relevant documents, along with members of the public, through the Inquiry's website. What does not go on the website will be obviously confidential documents, but the others will be published on the website ... [this will comprise] every document to which reference is made in any interview, or to which it is likely we will be directing our attention in writing the report.”<sup>8</sup>

Seventy days later, on 9 July 2008, things were not so rosy and it appeared that Mr. Clarke was not calling the shots:

“A very high proportion, however, of the material from departments and agencies carries a security classification which limits the extent of what it can be shown to other people or disclosed generally. The originating agency only has the authority to remove the classification.”

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<sup>7</sup> See <http://www.theage.com.au/news/federal-election-2007-news/haneef-inquiry-a-must/2007/11/02/1193619148288.html> .

<sup>8</sup> Page 13, line 43.

Somebody or something was making Mr. Clarke's openness very difficult. In the same statement, he said:

“While the documents have, in the main, been delivered to the Inquiry, gaining access to the documents has involved a protracted period of negotiation. The delivery of the documents has, however, been on a confidential basis and the Inquiry has not been given authority to publish those which are classified.”

And so Mr. Clarke has been forced to abandon all attempts at an open Inquiry. The final word appears to be that Dr. Haneef's lawyers and the general public will receive no information as to the evidence before the Inquiry until it is too late:

“This means that I will continue my Inquiry in the way I have previously outlined but statements, transcripts of interviews and related documents will not be posted on the Inquiry's website and not all submissions will be published.”

In our submissions, we drew upon a revealing fossil record (obtained mainly through FOI processes) and were able, with some guesswork, to cobble together to raise important issues that must be answered by agencies, officials and politicians. With very few resources, thanks to a very ungenerous set of Attorney-General's funding guidelines, and almost no time allowed by the Inquiry's guidelines, we put together 125 pages of analysis.

Submissions from agencies such as ASIO, the CDPP and the Queensland Police Service have confirmed many of our guesses and filled in some of the knowledge gaps. Though it has lodged a submission, the AFP maintains (at time of writing) that national security considerations prevent it from allowing one sentence of its submission be published by Mr. Clarke.

However, in making final submissions on behalf of Dr. Haneef, we will not have the benefit of knowing what questions were asked of witnesses nor what answers they gave. We will have no further documents apart from those we are continuing to seek and obtain by FOI processes.

As a result, we will be able to provide only limited assistance to Mr. Clarke as how or why Dr. Haneef was subjected to the indignities he experienced over 26 days in July 2007.

Such a set of circumstances does not constitute Mr. Rudd's “full judicial Inquiry”.

### **Recent Developments**

The letter we received the AFP's lawyers on 4 July 2008 was revealing. It forwarded, at the request of counsel assisting the Clarke Inquiry, five transcripts of interviews between Dr. Haneef and the investigating police officers. Dr. Haneef's lawyers had never been told of these transcripts. In fact, the AFP had written on 21 September 2007, saying: “... the

AFP has complied with its obligations under part 1C of the Crimes Act 1914 (CTH) and to this end your firm has been given copies of all the audio records of interviews that he participated in as well as the associated transcripts”.

Obviously, they hadn't complied with their obligations at all.

The long delayed transcripts are very revealing. They reveal that, when Dr. Haneef was first arrested and offered to have a lawyer present, he stated at least twice that he wanted a lawyer. He was not provided with a lawyer and the interview proceeded without one.

They also reveal that, although part 1C allows a detained person or his lawyers to make submissions to a magistrate who is hearing applications under part 1C, Dr. Haneef (who had given up on a lawyer by this time) was never given an opportunity to make submissions himself.

Further documents may yet be coming from the AFP despite legal obligations to have provided them, earlier. In this regard, in the last fortnight, we have been advised by the AFP's lawyers that there may be some thousands of documents held by the AFP which have not even been considered by the AFP when processing our original FOI application to the AFP. These documents had also been overlooked when processing our request for internal review under the FOI Act. We are trying to ascertain whether these same documents were ignored when deciding which documents should be provided to Mr. Clarke.

We have, of course, received submissions from the Queensland Police Service; ASIO and the Office of the CDPP. I will let you decide whether the submissions from the Attorney-General's Department and the Department of Immigration and Citizenship are worth anything other than raw material for the next "*Hollow Men*" episode.

Interestingly, none of the Department of Prime Minister and Cabinet; the Department of Foreign Affairs and Trade; or the Australian Customs Service bothered to provide a submission.

### **Mr. Keelty's Moment on the Road to Damascus**

At 4.35pm, last Friday, my instructing solicitors received a letter from the lawyers acting for the AFP. Chris Merritt, of the *Australian* newspaper, has noted how the public announcement, nine minutes later, was attempted to be snuck through with no fanfare, as late as possible, on a day when many of Australia's journalists were on strike.<sup>9</sup>

I want to mention, very briefly, the niggardly, mealy-mouthed and ungracious language used in the documents. The letter and the press release conclude with the words: "At the present time, there is insufficient evidence to institute proceedings against Dr. Haneef for any criminal offence."

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<sup>9</sup> <http://www.theaustralian.news.com.au/story/0,25197,24264598-30537,00.html> .

There is no apology for the 14 months of negative impacts on Dr. Haneef's life and reputation. There is no use of the words: "Our investigation has cleared Dr. Haneef".

The last sentence of the AFP media release may just as truthfully (or, when the sub-text is read, just as untruthfully) have said" At the present time, there is insufficient evidence to institute proceedings against Stephen Keim [or, for that matter, anyone else in the room] for any criminal offence." However, used about someone whose reputation has been trampled for over 14 months by law enforcement authorities in this country, it appears to be a last attempt by an agency, which has an inability to apologise or admit error, to leave one last, nasty slur on the character of Dr. Haneef.

Mr. Keelty and the AFP should be called to account for the manner and content of their announcement as well as the 14 months of investigation that preceded it.

### **Conclusion**

Dr. Haneef's case raises some of the great conundrums faced by a consideration of law and its application. The law was not obeyed by the authorities. Is this the fault of the law or the authorities? Do we rewrite the law or do we restructure the authorities?

I make some very tentative observations.

The test required to be satisfied, to arrest under s.3W of the Crimes Act, reasonable satisfaction that the person has committed the offence, is a good test. I do not think it was applied. Nor does the evidence suggest that the requirement in subs.3W(2) that one must release, if the reasonable satisfaction evaporates, was ever adverted to.

Part 1C of the Crimes Act was never intended to result in detention for 12 days without charge. An express upper limit on the period of detention should be inserted into the legislation.

The hearings before Mr. Gordon in which orders for increased investigation time and periods of down time were made failed to act as the safeguards they were intended to be. The legislation should make clear that they are not secret hearings; that the detainee is entitled to be told the information on which the application is based; and the hearing should take place in the presence of the detainee, whether he has legal representation or not.

The Migration Act is a vehicle of political expediency. It should be completely rewritten.

Australia should work to make sure that its public servants are professional and fearless. Ministers will receive better advice if that is achieved.

Finally, when we address the threat of international terrorism, Australia must ensure that the time and resources dedicated to that objective are managed and deployed by a leadership team that always has, as its number 1 priority, the security and safety of the Australian people. Our law enforcement officers must have leadership they can trust and respect.

**Stephen Keim SC**  
**Chambers**  
**3 September 2008**