

WHAT THE HANEEF INQUIRY REVEALED (and did not)

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The December 2008 report of the Rudd government's Clarke inquiry into the aborted terrorist prosecution of Dr Mohamed Haneef in 2007 has thrown up a number of questions that have, as yet, received inadequate attention. In particular, they relate to two inter-related issues: (1) the extent of political pressure or influence, if any, that was brought to bear by members of the former Howard government; and (2) why Dr Haneef was charged with a serious terrorist offence despite the relevant Queensland and Australian Federal Police ('AFP') officers concluding that insufficient evidence existed.

These matters are critical, especially given that Attorney-General Robert McClelland stated, in his letter to John Clarke accompanying the inquiry's terms of reference, that the government regarded the inquiry as of 'great importance' as part of the process of 'ensuring public confidence in Australia's counter-terrorism laws and in the agencies that are responsible for administering and enforcing those laws'.¹ There was a public perception that the Howard government and through it, the security agencies, primarily the AFP, had sought to orchestrate, influence or exploit Haneef's arrest for political purposes in the lead up to the 2007 Federal election. Clarke stated in the report:

Concern has been publicly expressed about whether the independence of the various departments and agencies involved in the Haneef matter was influenced by political considerations or pressure.²

It will be argued that the limited powers given to the inquiry and the manner in which it proceeded prevented an adequate examination of the most important issues raised by the Haneef debacle: was the case politically manipulated and, if so, what does that reveal about the potential for the counter-terrorism measures to be used for political purposes?

Dr Haneef was arrested at Brisbane airport on 2 July 2007, in the wake of two failed terrorist attacks in London and Glasgow at the end of June. Almost immediately, inflammatory and prejudicial material appeared in the media linking his arrest to a possible 'terrorist doctors' network' in Australia.³ For 12 days, he was detained without trial under provisions of the *Crimes Act 1914* (Cth) that were amended by the *Anti-Terrorism Act 2004* (Cth). The primary allegation against him was that he had given his old mobile phone SIM card to Sabeel Ahmed, a second cousin in Britain who was later accused of withholding information about the London and Glasgow attacks.

On 8 July, just six days after Haneef was arrested, UK authorities provided the AFP with an email from Kafeel Ahmed, one of the Glasgow bombers, to his brother Sabeel Ahmed, which indicated that Sabeel was not involved in the UK attacks and had no foreknowledge of them, and that therefore Haneef could not have had any involvement in them.⁴ Nevertheless, the detention continued until 14 July, when he was charged with 'supporting a terrorist organisation,' while 'reckless' as to whether the organisation was a terrorist one, under s 102.7(2) of the *Criminal Code 1995* (Cth).

On 16 July, Queensland Magistrate Jacqueline Payne ordered Dr Haneef to be released on bail, despite the presumption against bail for terrorist offences, partly because of the weak case against him. In her decision she noted, '[t]here was no evidence before me the SIM card was used in any terrorist activity.'⁵ Two hours later, Immigration Minister Kevin Andrews, after being invited to attend the Howard government's Cabinet National Security Committee ('NSC'), which met that morning, effectively overrode the bail decision by cancelling Haneef's visa, with the intended affect of consigning him to immigration detention while awaiting trial. The following day, Attorney-General Philip Ruddock issued a Criminal Justice Stay Certificate pursuant to s 157 of the *Migration Act 1958* (Cth), which had the effect of preventing Haneef from being removed from Australia despite the cancellation of his visa.

Within days, however, the case disintegrated in the face of mounting public concern about Haneef's treatment and the exposure of key falsehoods in the police evidence. On 18 July, *The Australian* newspaper published the transcript of Haneef's initial formal police interview, which had been leaked by Stephen Keim, Haneef's barrister. The transcript contradicted police claims that Haneef had lived with his two second cousins in the UK, and had no explanation for seeking to fly to India on a one-way ticket.⁶ On 20 July, the Australian Broadcasting Corporation reported that UK police had not found the SIM card in the burning jeep at Glasgow airport, but in Liverpool, 200 kilometres away.⁷ On 27 July, the Director of Public Prosecutions ('DPP') dropped the charge and the Howard government facilitated Haneef's departure for India, his home country.⁸

'No evidence' of political influence

After an almost exclusively closed-door inquiry, Clarke said he could find no evidence that the Howard government brought 'political influence to bear' in

REFERENCES

1. Commonwealth of Australia, *Report of the Inquiry into the Case of Dr Mohamed Haneef* (2008) vol 1, 287 ('Clarke').
2. Ibid 227.
3. See, eg, Sean Parnell and Cath Hart, 'Doctors linked to British terror bomb plots', *The Australian* (Sydney), 4 July 2007, 1 <theaustralian.news.com.au/story/0,20867,22013599-601,00.html> at 20 February 2009; Cosima Marriner et al, 'How jihad network led to Australian raids', *Sydney Morning Herald* (Sydney), 4 July 2007 <smh.com.au/news/national/how-jihad-network-led-to-australian-raids/2007/07/03/1183351209760.html> at 20 February 2009.
4. Clarke, above n 1, 156–158.
5. Maurice Blackburn Lawyers on behalf of Dr Haneef, submission to the Clarke Inquiry, 7 <haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/(4CA02151F94FFB778ADAEC2E6EA8653D)~MB-Submission.pdf/\$file/MB-Submission.pdf> at 4 June 2009.
6. ABC Television, Tony Jones talks to Stephen Keim, barrister for Dr Mohamed Haneef, Lateline, 18 July 2007 <abc.net.au/lateline/content/2007/s1982091.htm> at 27 October 2009.
7. Maurice Blackburn Lawyers, above n 5, 9.
8. Ibid.

relation to the decisions to arrest, detain and charge Haneef, or that his visa was revoked 'to achieve some actual or perceived political advantage'.⁹ There was 'no evidence of conspiracy or an improper purpose', although the visa cancellation — particularly its timing — was 'mystifying'.¹⁰ In reality, as reviewed below, all the evidence, including much of the material compiled in the 310-page public version of Clarke's report, indicates that the Howard government seized upon the British attacks to try to launch a terrorism scare campaign in the final months of the 2007 election campaign.¹¹

Clarke also delivered a second volume to the government, the scope and contents of which remain undisclosed to the public. This volume may contain crucial information, and should therefore be released, as Haneef's lawyers have requested. The report states:

Volume Two contains supplementary material that provides greater detail and analysis of the events I have examined and includes references to sensitive or classified material. It may be that this material cannot be published at present.¹²

There is currently no independent means of determining the nature of the 'sensitive or classified' material, or assessing the decision, left in the hands of the government, not to release it, even in a redacted form.

Before reviewing the evidence, it is necessary to examine an aspect of the Clarke report that has far-reaching implications. Clarke reached his conclusions without examining the relevant cabinet documents, to which the Department of Prime Minister and Cabinet blocked access. These included the minutes of a 16 July 2007 Cabinet NSC meeting, which apparently approved the decisions to cancel Haneef's visa and issue a Criminal Justice Stay Certificate.¹³

Clarke said he was told by the Department of Prime Minister and Cabinet ('PM&C') that he was forbidden by long-standing government 'conventions' from viewing any of the cabinet records or reporting anything that might reveal cabinet deliberations. He cited the Cabinet Handbook, which stated:

Successive governments have accepted the convention that ministers do not seek access to documents recording the deliberations of ministers in previous governments. In particular, Cabinet documents are considered confidential to the government that created them.¹⁴

Limited 'Cabinet-related' documents, apparently related to 'briefings, advice and submissions made to ministers and their responses', were eventually made available to Clarke but subject to Clarke's assurances that the Inquiry would respect Cabinet confidentiality.¹⁵ Clarke stated:

In practice, this meant I could discuss Cabinet matters with former ministers and they could comment if they chose, but I would not be able to report anything that might reveal these Cabinet deliberations to the present government. Departmental officers were told by PM&C they could not disclose to me any aspects of the discussion of the matters in question in Cabinet or Cabinet committees — in particular, at meetings of the National Security Committee. Former ministerial staffers were similarly bound and could comment only with the agreement of their former

ministers. In the circumstances, I had no option but to abide by the conventions.¹⁶

In effect, these conventions mean that it is extremely difficult for any government to be held to account for any wrongs or crimes it has committed, even after it leaves office, unless evidence exists outside Cabinet discussions and related documents. (And, as Haneef's challenge to his visa's cancellation illustrated, it may be difficult to require a Cabinet minister to testify in court, or for a court to draw adverse inferences from a minister's failure to do so.¹⁷) Under the so-called 30-year rule, all Cabinet-related documents are kept secret for three decades, and even then, the release of documents by the National Archives of Australia under the *Archives Act 1983* (Cth) is confined to formal Cabinet submissions and decisions (the more extensive Cabinet notebooks, which record the discussions inside Cabinet are not released for 50 years)¹⁸ and all the material is vetted to exempt any documents that could 'reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth'.¹⁹ Cabinet documents are also largely exempted from disclosure under s 34 of the *Freedom of Information Act 1982* (Cth) and substantially protected by public interest immunity.²⁰

Moreover, ex-Prime Minister John Howard declined to make a statement or be questioned by Clarke and denied permission for a former adviser, Jamie Fox, to make a written statement to the inquiry.²¹ Another key witness, the ex-chief of staff of immigration minister Andrews, refused to make a statement. Andrews also refused to make a statement, but consented to be interviewed (behind closed doors), while Ruddock refused to make a statement and gave Clarke just one hour of his time for an interview.²² In establishing the Clarke inquiry, the Rudd government decided not to give the inquiry powers to require witnesses to testify or be cross-examined, even in private. Clarke accepted this limitation, although it was, he conceded, 'one of the most contentious aspects' of the inquiry.²³ Despite receiving 'exhortations' from law societies, law reform groups and the media to seek statutory powers, Clarke concluded that factors of cost, time and possible public interest immunity and legal professional privilege claims 'militated against pursuing the option of changing the inquiry's constitution'.²⁴

In addition, Clarke decided not to probe the constant stream of leaks to the media throughout July 2007 that gave the impression that Haneef was intimately involved in the failed British bombings and in planning similar attacks in Australia. These prejudicial leaks were clearly relevant to the inquiry's terms of reference, because this conduct shed light on the motivations behind the arrest, detention, charging and prosecution of Haneef.²⁵ Giving his reasons, Clarke stated that the apparent leaks had been referred to the Queensland Crime and Misconduct Commission, the matter was 'marginal to my terms of reference' (although 'a very serious concern'), and the area could not have been examined satisfactorily without statutory powers to compel and protect

9. Clarke, above n 1, 227.

10. Ibid viii.

11. Another scholar has noted that the 'Clarke report does little to dampen a cynical view of the government's role in this case'. See Andrew Lynch, 'Learning from Haneef', *Inside Story – Current Affairs and Culture*, 5 February 2009 <<http://inside.org.au/learning-from-haneef/>> at 4 June 2009.

12. Clarke, above n 1, iii.

13. Ibid 175–179.

14. Ibid 7.

15. Ibid 7–8.

16. Ibid 7–8.

17. *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1271 at [312]–[328] (per Spender J).

18. *Archives Act 1983* (Cth) s 22A.

19. Ibid ss 33–35. See also National Archives of Australia, 'About cabinet records' <naa.gov.au/collection/explore/cabinet/records/index.aspx> at 28 October 2009.

20. *Sankey v Whitlam* (1978) 142 CLR 1.

21. Clarke, above n 1, 1, 10, 124, 176–177, Appendix 10.

22. Ibid.

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witnesses.²⁶ Clarke did not explain why he considered the leaks marginal to the terms of reference.

As early as 4 July, just over 24 hours after Haneef was arrested, *The Australian's* headline read, 'Doctors linked to British terror bomb plots',²⁷ and the *Sydney Morning Herald* reported, 'How jihad network led to Australian raids'.²⁸ These claims could only have come from government, intelligence or police sources, since they alone had access to the alleged information. Citing 'senior police' sources, the media reports featured the mobile phone SIM card allegation. In their submission to the Clarke inquiry, Haneef's lawyers cited numerous media articles that were published from 4 July to 17 July, containing a 'smorgasbord of prejudicial rumours,' some of them attributed to 'senior government sources'.²⁹ For example, *The Australian* reported on 4 July:

Senior government sources last night declined to rule out the possibility that the Indian doctor may have been a facilitator or part of a possible 'sleeping cell' connected to the doctors now in detention in Britain.³⁰

Moreover, the government chose to publicly identify itself with the doctor's detention. Within 12 hours of Haneef's late night arrest, Howard and Ruddock held 3 July media conferences to confirm his arrest, making media appearances that were not only unnecessary to inform the public — a matter for the AFP — but also likely to influence public opinion against Haneef. Although the Prime Minister was careful to urge people not to jump to conclusions about Haneef, he nevertheless stated that the arrest was a reminder that, 'There are people in our midst who would do us harm and evil if they had the opportunity of doing so'.³¹ On 8 July, Ruddock offered media commentary suggesting that Haneef had had sinister motives for attempting to leave Australia 'rather hurriedly'.³² Ruddock commented that Haneef's explanation that his wife had just given birth to a baby 'may be reasonable but they may also be a cover for something else'.³³

In its submission to the Clarke inquiry, the Law Council of Australia said public comments made by Howard, Ruddock and AFP Commissioner Mick Keelty at the time of Haneef's arrest and detention raised concerns that the provisions in the *Crimes Act 1914* were applied without reference to the appropriate statutory test. The submission cited a media interview conducted by Ruddock more than one week into Haneef's detention, in which the Attorney-General defended and took responsibility for the prolonged detention. Responding to questions about when Haneef might be charged or released, he stated:

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.³⁴

The Law Council further quoted Howard, speaking after Haneef's release, defending the actions of the AFP:

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.³⁵

After reviewing the statements of Ruddock and Howard, and media comments by Keelty, the Law Council expressed the concern that throughout the Haneef case, the police had operated 'in the general shadow' of the anti-terror laws and a 'vague notion' that 'those laws authorised a different and extraordinary approach' than by the precise content of the laws.³⁶ However, the Clarke report failed to mention the ministers' public statements. It is submitted that these statements underscored the necessity to examine the government's role extremely closely.

Howard ministers were closely involved

Notwithstanding the Clarke report's conclusions, a careful reading of the report leaves little doubt that, as soon as the British police requested assistance to locate Haneef to ask him about his discarded SIM card, members of the Howard government became closely involved, both in his treatment by the police and in preparations to cancel his visa should he be released by the police or granted bail by a court. According to Clarke's account, in less than four weeks, Howard's office convened no fewer than 16 high-level 'whole of government' meetings and 27 teleconferences to discuss issues relating to the Haneef case.³⁷

The meetings, some of which also involved the State and Territory Labor governments, began on 1 July, the day before Haneef was arrested. They included 10 meetings of the National Counter-Terrorism Committee, as well as the Cabinet National Security Committee meeting of 16 July. Between 3 and 6 July, Howard personally received five written briefings from his department, and thereafter his office obtained 'regular' telephone updates from his department's senior national security official, former Special Air Services commander Duncan Lewis.³⁸ In December 2008, Lewis, who played a central role in the Haneef affair,³⁹ was appointed as the Rudd government's national security adviser.⁴⁰

23. Clarke, above n 1, 14–15.

24. Ibid 15–16.

25. See the terms of reference at *ibid* 288.

26. Ibid 14.

27. Parnell, above n 3.

28. Marriner, above n 3.

29. Maurice Blackburn Lawyers, above n 5, 114–120.

30. Ibid 115.

31. Marriner, above n 3.

32. Australian Lawyers Alliance submission to the Clarke Inquiry 13.

33. Ibid.

34. Law Council of Australia Submission to Haneef Inquiry 12.

35. Ibid 13.

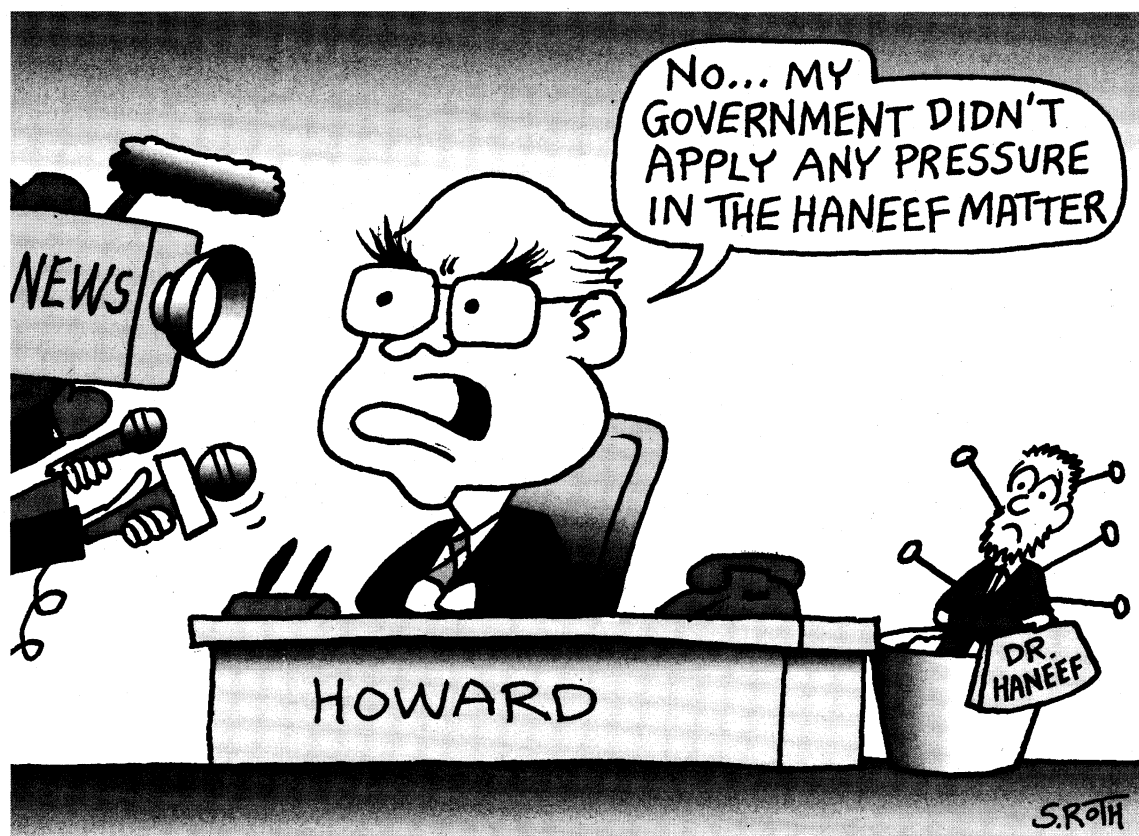
36. Ibid.

37. Clarke, above n 1, 209–215.

38. Ibid 215–216.

39. Ibid 33–34.

40. Kevin Rudd, 'Appointment of Duncan Lewis as National Security Adviser', Media Release, 4 December 2008 <pm.gov.au/media/Release/2008/media_release_0661.cfm> at 27 October 2009.



41. Clarke, above n 1, 124–125.

42. Maurice Blackburn Lawyers, above n 5, 75.

43. Ibid.

44. Ibid 76.

45. Clarke, above n 1, 163–179.

46. Ibid 223.

47. Ibid 176–177.

48. Ibid 173–177.

49. Ibid 194.

Ministers Ruddock and Andrews were involved on a daily basis. Ruddock, who as Attorney-General was responsible for both the AFP and the Australian Security Intelligence Organisation ('ASIO'), received four written briefs from ASIO and six from the AFP, as well as two security intelligence reports and four threat assessments. In addition, he met with AFP Commissioner Keelty 'on a number of occasions during July 2007'.⁴¹ One meeting involving Ruddock appears to have been particularly important. On the morning of 11 July, three days before Haneef was charged, Attorney-General department officials had an appointment with the Attorney-General for him to approve an 'MAR document' relating to Haneef that was then sent on to the Office of the DPP.⁴² It seems that the MAR was a statement of facts to be sent to the DPP.⁴³ It remains unclear what happened at that meeting, or why Ruddock was involved in authorising the document. In their submission to the Clarke inquiry, Haneef's lawyers drew attention to the meeting and stated:

The inquiry will need to obtain much more information, in both oral and documentary form, to resolve the respective roles, in the decision to charge, of the Attorney-General and his department; DPP officers, including Mr Porritt; and the AFP.⁴⁴

However, Clarke did not mention the 11 July meeting in his report.

As to the immigration minister, according to Clarke's account, from 3 July, the day after Haneef was arrested, Andrews received frequent updates from his department and the prime minister's department on various contingency plans to cancel the doctor's visa

so that he could be detained or deported if he were not charged or if he were granted bail.⁴⁵ On 9 July, a Department of Foreign Affairs and Trade email noted that Ruddock and Andrews were preparing a joint ministerial submission on the visa revocation.⁴⁶

Both Andrews, in his testimony to Clarke, and Howard, in a letter to the inquiry, insisted that Andrews made the ultimate decision to revoke the visa on 16 July independently, exercising his own ministerial discretion.⁴⁷ Yet, Andrews had told his departmental heads that he would not make any decision until after the Cabinet National Security Committee ('NSC') meeting, due that day. Clarke reported that Andrews was called to a meeting with Howard and Ruddock that morning to discuss the visa issue. Clarke noted, without comment, that in a letter to the inquiry, Ruddock denied attending any such meeting.⁴⁸

The visa decision was officially made at 1 pm on 16 July, one hour after the conclusion of the NSC meeting, to which Andrews had been invited. At 1:01 pm the Prime Minister's office sent an email to two senior officials advising that the Solicitor-General had confirmed that 'no contempt issue' would arise if Andrews cancelled the visa.⁴⁹ This indicates that Howard was involved in obtaining legal advice that the decision would not be in contempt of the court's grant of bail. This further suggests that the decision to revoke the visa, while formally made by Andrews as the responsible minister, was made in close consultation with Howard and the other members of the NSC.

Clarke noted that 'discrepancies' existed in the evidence about the nature of the discussions at the

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July 16 NSC meeting, and allegedly between Andrews and Commissioner Keely following that meeting.⁵⁰ Nevertheless, he concluded that 'notwithstanding' those unresolved discrepancies, he found no evidence of political influence or motivation in connection with the decisions to cancel Haneef's visa and issue a Criminal Justice Stay Certificate.⁵¹ It is suggested that in the light of the documentary record, the discrepancies and Clarke's lack of access to the records of the NSC meeting, that conclusion is unconvincing. Rather, the frequent high-level meetings that were convened on both aspects of the Haneef affair — his charging and the visa revocation — point to considerable political influence being involved, or being perceived to be involved at the time by senior officers in the AFP, DPP and immigration department.

Moreover, ASIO repeatedly advised that Haneef was not connected to any imminent threat of terrorism in Australia and also said there was no evidence that Haneef had foreknowledge of, or participated in, the UK terrorist incidents.⁵² Further, as late as 13 July, the day before Haneef was charged, the federal and Queensland police engaged in the joint investigation had concluded that insufficient evidence existed to charge the doctor.⁵³ A prosecutor, Clive Porritt, initially advised there was not enough evidence to justify the charge.⁵⁴ However, he told Clarke that he changed his stance on 13 July after coming under 'unspoken but considerable pressure' from police commanders.⁵⁵

The police information given to Porritt, and relayed to a court, contained at least two crucial false statements. One was that Haneef's SIM card was found in the jeep that had crashed into Glasgow airport, when, in fact, it was located in Liverpool. The other was that Haneef had resided in Britain with his second cousin Kafeel Ahmed, who drove the jeep, although the two had never lived in the same house.⁵⁶ Also withheld from Porritt and the court was the fact that, before his terrorist attack, Ahmed had sent an email to his brother, Sabeel, which effectively cleared Haneef of any fore-knowledge of his actions. As mentioned earlier, the AFP had this information from 8 July, six days before Haneef was charged.⁵⁷

Conclusion

Why then was Dr Haneef charged? For the reasons canvassed above, it is most likely that the real 'pressure' was coming from the Howard government itself, either directly through the series of meetings held by ministers with the AFP and other officials,

or indirectly as a result of the public statements by Howard and Ruddock, or indirectly in the 'shadow' of the government's approach to the anti-terror laws, as suggested by the Law Council of Australia.

Clarke found there was no evidence to sustain 'the concerns that have been publicly expressed about the role government played in the Haneef case'.⁵⁸ At the same time, he commented:

Suggestions or perceptions that political pressure or influence had a role in the making of operational decisions relating to Dr Haneef had the potential to undermine public confidence in Australia's response to the threat then perceived to exist.⁵⁹

This observation indicates that Clarke was acutely aware that any finding of political pressure or influence could further 'undermine public confidence' in the counter-terrorism measures. His remarks echoed the letter sent by Attorney-General McClelland to Clarke setting out the reasons for the inquiry.⁶⁰ In the light of the evidence reviewed above, however, unless all the relevant documents, including the cabinet records, are made public, it is impossible to accept the report's assurance.

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Postscript

Since this article was submitted, the Commonwealth government has introduced the National Security Legislation Monitor Bill 2009 and released a National Security Legislation Discussion Paper. The Discussion Paper proposes a number of changes to the regime for pre-charge detention of terrorism suspects, but these would place only an 8-day limit (a 1-day investigation period and up to 7 days of 'dead time') on pre-charge detention.

50. Ibid 228.

51. Ibid.

52. Ibid viii–ix.

53. Ibid 137–144.

54. Ibid 144–145.

55. Ibid 153.

56. Ibid 135–137.

57. Ibid 84, 137, 157.

58. Ibid 207.

59. Ibid 207.

60. Ibid 287.