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# With reckless abandon: Haneef and Ul-Haque in Australia's 'War on Terror'

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This brief paper considers the political and social implications of the manner in which Australia has prosecuted the so-called 'war on terror'. It does this by investigating relevant aspects of Australia's anti-terrorism legislation and the performance of Australian security and law enforcement agencies, namely, the Australian Security and Intelligence Organisation (ASIO) and the Australian Federal Police (AFP). Focusing on the Haneef and Ul-Haque cases, the paper will consider how the political climate created by the former Federal Government's legislative approach to the war on terror has influenced the performance of these organisations. By focusing on these two cases, the paper will demonstrate how racial, ethnic and religious stereotyping have informed and shaped Australia's conduct of the war on terror. It will investigate the real potential for social division, and heightened national insecurity, that flows from the use and propagation of these stereotypes. The paper will also highlight the unfairness and prejudice that are inherent to racial and religious stereotyping. Finally, the paper will consider whether the Rudd Labor Government's approach thus far to the war on terror differs in any significant measure from that of its predecessor and evaluate the prospects for real, progressive change.

## **Keywords**

'war on terror', anti-terrorism legislation, ASIO, AFP, national security, human rights, due process

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# **With Reckless Abandon: Haneef and Ul-Haque in Australia's 'War on Terror'**

*Mark Rix*

Senior Lecturer, Graduate School of Business, University of Wollongong

## **Abstract**

This brief paper considers the political and social implications of the manner in which Australia has prosecuted the so-called 'war on terror'. It does this by investigating relevant aspects of Australia's anti-terrorism legislation and the performance of Australian security and law enforcement agencies, namely, the Australian Security and Intelligence Organisation (ASIO) and the Australian Federal Police (AFP). Focusing on the Haneef and Ul-Haque cases, the paper will consider how the political climate created by the former Federal Government's legislative approach to the war on terror has influenced the performance of these organisations. By focusing on these two cases, the paper will demonstrate how racial, ethnic and religious stereotyping have informed and shaped Australia's conduct of the war on terror. It will investigate the real potential for social division, and heightened national *insecurity*, that flows from the use and propagation of these stereotypes. The paper will also highlight the unfairness and prejudice that are inherent to racial and religious stereotyping. Finally, the paper will consider whether the Rudd Labor Government's approach thus far to the war on terror differs in any significant measure from that of its predecessor and evaluate the prospects for real, progressive change.

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## **1. Introduction**

Australia's anti-terrorism legislation contains onerous provisions and powers which are supposedly necessary to protect the country from the threat of terrorism and from terrorist attacks. These have been subjected to rigorous scrutiny, critique and debate that have focused in the main on the legislation's implications for human rights and civil liberties, the rule of law and integrity of the legal system, and executive government and parliamentary democracy in this country. The question of whether the legislation has strengthened or weakened Australian national security has also been a reasonably strong theme. While the legislation's impacts on social and religious harmony have not been completely out of sight of most commentators, its racial and religious undercurrents and their social effects have generally been peripheral or secondary concerns. This paper is centrally concerned with investigating these undercurrents and exploring their implications for Australians of Islamic faith and their ability to live as citizens, residents or visitors in this country free from discrimination, harassment and persecution.

In taking up this central concern, the paper will focus on two recent terrorism cases, the Haneef and Ul-Haque affairs. Both of these are instructive, for they reveal the racial and religious preconceptions that lay just beneath the surface of Australia's anti-terrorism enactments and the political climate in which the legislation was enacted and which in turn it has helped to perpetuate. As will be demonstrated in the investigation of these two cases, the political climate has also enabled the security and law enforcement agencies to exceed their warrant and mandate and to violate the human rights and legal entitlements of terror suspects and to do so largely with impunity. Racial and religious stereotyping, implicitly associating people of Islamic faith and of Middle Eastern, South Asian or other 'dubious' origin with the threat of terrorism, has been a key underlying factor in the creation and attempted perpetuation of this political climate.

## **2. Haneef, Ul-Haque and the 'War on Terror': the Howard Government's political and social legacy**

The manner in which the Haneef and Ul-Haque cases have been handled by the Rudd Labor Government since it came to office in November 2007 is important for it gives some insight into new Government's thinking about the terrorist threat and how best to counter it legislatively and in other ways. The Government appears to be aware that these cases, particularly Haneef's,

have triggered a degree of scepticism and unease in the Australian community about the way in which the war on terror had been prosecuted by the former government and the law enforcement and security agencies. Central to these concerns are the former Government's attempts to use the legal system as a vehicle for pursuing its political and ideological agenda in the run-up to the 2007 Federal election and the manner in which this was seen to compromise or undermine long-established legal principles and presumptive rights.

There was in all this also a measure of disapproval of the way in which the Howard Government sought to manipulate public opinion by fomenting racially motivated anti-Islamic fear and hatred in the wider community. In going to the lengths it did in attempting to make a negative example of Haneef (and, to a lesser extent, Ul-Haque) the Government only ended up handing its critics and detractors with evidence that the anti-terrorism legislation was riddled with flaws and excesses inimical to individual rights and liberties. For, as became clear as the cases unfolded and publicly unravelled, if people like Haneef and Ul-Haque could be treated in the way they have been then so potentially could any member of the Australian community regardless of their ethnicity or religious predisposition. Just as the law is supposed to be blind to race, religion and the like so ironically, and paradoxically, could the anti-terrorism legislation be used to incriminate individuals of any or all races and religions. However, in the war on terror it just happens to be individuals of Islamic faith and of Middle Eastern or South/Central Asian origin who are, so to speak, in the firing line.

In a 2006 paper analysing Australia's anti-terrorism legislation, the present author pointed out with particular reference to the Anti-Terrorism Act (No. 2) 2005:

Just as with the [Act's] preventative detention and control provisions, the crime of sedition can be used by the authorities to persecute and harass members of the communities they regard as presenting a threat to Australia's national security. This could have the effect of splitting up the Australian community into those regarded as posing no actual or potential threat and those who are suspected of posing such a threat. In a general climate of suspicion, fear and anxiety, this will almost certainly run the distinct risk of converting resentment and hostility into violent and terroristic intent. This is a sort of self-fulfilling prophecy providing the Government with a ready-made defence against charges that it is unfairly targeting certain groups and individuals. In any event, a more deeply

and dangerously divided Australian community could well be the result (Rix 2006: 437).

The paper also noted the fact that, now as then almost a truism, it is Muslim communities and individuals, and people of Middle Eastern origin, who are most at risk from the persecution, harassment and arbitrary detention permitted in this and other anti-terrorism acts under the pretext of preventing terrorism and protecting national security (see, e.g., Lynch 2007 and Aly 2007 which explore a number of these issues; all but one of the 19 terrorist organisations listed on the Australian Government's national security website are self-proclaimed Islamic organisations the only exception being the Kurdistan Workers Party (PKK) (see Australian Government n.d.)).

The Security Legislation Review Committee (SLRC, also known as the Sheller Committee) voiced similar concerns in its June 2006 Report noting the 'profound impact' which recent (unspecified) events had had on Muslim and Arab communities. It identified increasing fear, alienation and distrust of authority as the 'biggest impacts' on these communities.<sup>1</sup> To address this issue, and to allay the fears and concerns of Muslim and Arab communities, the SLRC recommended that all Australian governments embark on a community education program to explain the meaning and intent of the anti-terrorism legislation (SLRC 2006: 8; for a more comprehensive analysis and discussion of the SLRC Report, see Rix 2008). This campaign should also address prejudices and fears in the wider (non-Muslim) community.

The Parliamentary Committee on Intelligence and Security (PJCIS) released its Review of Security and Counter Terrorism Legislation in December 2006. Chapter 3 of the Review was devoted to assessing the impact of the 'new security environment', particularly the anti-terrorism legislation, on Arab and Muslim Australians. It pointed to the rise in 'prejudicial feelings' towards these Australians in the wake of the terrorist bombings in the United States, Britain, Spain and other parts of Europe, and Indonesia and noted that similar feelings had been awakened in other western countries. As the Review noted, the effects on these communities and their members of the rise in such feelings include fear and insecurity, discrimination and the perception that anti-terrorism laws are selectively applied to Muslim Australians, and confusion and uncertainty created by the sweeping offences and loose definitions of terrorism, terrorist organisation

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<sup>1</sup> The 'profound impact' which the unspecified events and the anti-terrorism legislation had had on Muslim and Arab communities is discussed at some length in the submissions to the SLRC from organisations such as the Human Rights and Equal Opportunity Commission, the Public Interest Advocacy Centre, the Australian Muslim Civil Rights Advocacy Network and the Federation of Community Legal Centres (Vic).

and terrorism-related offences contained in the legislation. All this has led to alienation and withdrawal by many Muslim Australians (including children) from the wider community, exacerbated by some of the sensationalist media coverage of police investigations into alleged terrorist organisations and suspects.<sup>2</sup> To counter these effects, the Review recommended that the Federal Attorney-General's Department improve its efforts to make comprehensive information about the anti-terrorism legislation available in appropriate community languages and generally to ensure that the Australian public has access to this information. To reinforce this, the Review suggested that information about appeal, redress and complaint mechanisms relating to the security and law enforcement agencies and the media be widely disseminated. The PJCIS Review also recommended that Australia's strategy to counter terrorism include 'a commitment to the rights of Muslims to live free from harassment and enjoy the same rights extended to all religious groups in Australia (PJCIS 2006: 38).' With respect to the media, and in order to promote social cohesion, a statement on the importance of informed and balanced reporting should also be a part of Australia's counter terrorism strategy.

Some of these themes were taken up by Robert McLelland, the new Attorney-General, in a speech to the Security in Government Conference held in Canberra in December 2007 (this conference has been held annually since 2004). According to McLelland, the then recent change in Government presented an opportunity to introduce a new approach to national security, including the adoption of a broader perspective on the terrorist threat. This new approach would, like the old, include 'hard intelligence and law enforcement'. But, in addition, 'steps to promote greater inclusiveness and opportunity' would be important elements (McLelland 2007). In calling for greater inclusiveness and opportunity, McLelland observed that 'a terrorist threat in Australia has as much prospect of emanating from a disgruntled and alienated Australian youth as it does from the awakening of a sleeper cell planted by an overseas terrorist organisation.' Fighting terror thus not only required 'determination', it also required just as surely an approach which promoted 'justice, the rule of law, genuine peace and inclusive development (McLelland 2007).'

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<sup>2</sup> The PJCIS review took submissions on the effect of the anti-terrorism legislation on Arab and Muslim communities from organisations including the Islamic Information and Support Centre of Australia in association with Ahlus Sunnah Wal Jama'ah Association (confidential), Australian Muslim Civil Rights Advocacy Network, the Human Rights and Equal Opportunity Commission and the Public Interest Advocacy Centre.

A measure of commitment to justice and the rule of law is demonstrated in the new Government's decision to hold an inquiry into the Haneef Case. During 2007, this case became a cause célèbre subjecting the former Government and its anti-terrorism legislation to intense media and public scrutiny in the lead up to the Federal election. The then Opposition had even called for a full judicial inquiry into the affair. It is worth recounting the particulars of the case.

### **3. The case of Dr Mohamed Haneef**

On Monday, 2 July 2007 Dr Mohamed Haneef, an Indian doctor who worked as a registrar at the Gold Coast hospital in Queensland, was arrested and later charged (14 July) with recklessly supplying support to a terrorist organisation. This and other terrorist organisation offences were introduced into the Commonwealth Criminal Code by the Security Legislation Amendment (Terrorism) Act 2002. Before being charged, Haneef had been arrested and subsequently questioned and detained under provisions of the Crimes Act 1914 as amended by the Anti-Terrorism Act 2004 (for analysis of these offences and provisions as they apply in the Haneef case, see LCA 2008 and Lynch, McGarrity and Williams 2008; see also Rix 2006).

In 2006, Haneef had given a SIM card to his cousin Sabeel Ahmed who lived in England. Sabeel Ahmed was subsequently charged with withholding information about a terrorist attack after his brother, Kafeel Ahmed, was found behind the wheel of the jeep that was crashed into the Glasgow airport building on 30 June 2007. The day before attempted car bombings outside two London nightclubs, in which Kafeel also was a central figure, had been thwarted. A little over two weeks after Haneef was charged, the Commonwealth Director of Public Prosecutions dropped the charge on the basis that there was insufficient evidence to support a conviction (ABC 2007). Writing in the *Sydney Morning Herald* on 14 April 2008, David Marr reports that the Australian Federal Police and the Commonwealth Director of Public Prosecutions both seem to have ignored evidence that Mohamed Haneef was innocent. The British police had become aware of this evidence soon after they began investigating Kafeel's activities in 2007. Marr writes, 'The case against Dr Haneef always centred on allegations that his second cousin Sabeel Ahmed, a doctor practising in England, was part of a terrorist organisation. But in the Old Bailey on Friday [11 April] Mr Justice Calvert-Smith accepted there was "no sign" of Ahmed "being an extremist or party to extremist views".' (Marr 2008) This means that neither Sabeel Ahmed nor the SIM card could have been involved in Kafeel's failed car bombings in London and Glasgow.



Before being charged, Dr Haneef had been detained in custody for 12 days and was held for a further two weeks after being charged. Hours after Dr Haneef had been granted bail on the terrorism charge by a magistrate (16 July), the then Immigration Minister Kevin Andrews cancelled Dr Haneef's immigration (work) visa. This he did on the grounds that Haneef failed the Migration Act's character test, in line with secret evidence Andrews claims was supplied to him by the Australian Federal Police, and placed him in immigration detention. He was released to home detention on 27 July and allowed to return to India on 29 July (his visa remained cancelled). In August, Justice Spender of the Federal Court reinstated Dr Haneef's visa, a decision upheld by the Full Bench of the Federal Court in December quashing an appeal by Andrews (Peatling 2008).

In a press interview announcing that the judicial inquiry into the Haneef affair would be conducted by former NSW Supreme Court Judge the Honourable John Clark QC, Attorney-General Robert McLelland explained:

It is essential that we maintain public confidence in Australia's counter-terrorism measures. Australians are entitled to be reassured that their national security agencies are functioning as effectively as they can be, and that our counter-terrorism laws are being appropriately enforced. Understandably, the Haneef case has prompted some in the community to question this (McLelland 2008).

The inquiry will examine and report on matters relating to the case including the arrest, detention, charging, prosecution and release of Dr Haneef and the cancellation of his visa. Among its other terms of reference, the inquiry will consider the operational performance and effectiveness of Commonwealth agencies involved in the matter, the effectiveness of cooperation and coordination between Commonwealth agencies and the relevant state law enforcement agencies and, finally, identify any deficiencies in the relevant anti-terrorism legislation and the relevant operational and administrative procedures and arrangements of Commonwealth agencies.<sup>3</sup>

While the Attorney-General made clear that Mr Clarke would conduct the inquiry in a manner which did not compromise the safety and integrity of national security information or endanger ongoing investigations and

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<sup>3</sup> It is not clear whether the inquiry will consider why the Australian Federal Police investigation into Dr Haneef remained active well into 2008. As at the week beginning 31 March 2008, 9 AFP officers were still working on the case with the total cost of the investigation approaching AUD 8 million (Maley and O'Brien 2008). In a letter published in *The Australian* on 4 April, one correspondent wrote that it reminded him of the man 'who was fixated on horses. He was digging deep into a load of horse manure dumped at a local tip, chuckling away to himself and muttering, "There has to be a horse in here somewhere."'

overseas trials either impending or underway (as in the UK), there would nevertheless be ‘opportunities for public input into the inquiry, including by advertising for submissions and conducting public forums on the operation of counter-terrorism laws and arrangements (McLelland 2008).’ All relevant Commonwealth agencies, including the Department of Immigration, had pledged their full cooperation with the inquiry which would at its conclusion release a report that would be made public (to be supplemented by a confidential report if circumstances dictated).

Asked about the concerns he had expressed with ‘the broader suite of counter-terrorism laws that operate at the moment’ and the provisions they contain such as control orders and preventative detention, the Attorney-General had an interesting and suggestive answer. Picking up on the interviewer’s reference to the Sheller Committee (SLRC) recommendations, McLelland pointed out that the Government is giving consideration to those recommendations, as well as to the review into the questioning and detention powers contained in the ASIO Act conducted by the Parliamentary Joint Committee on ASIO, ASIS and DSD in 2005 and to the Australian Law Reform Commission’s recommendations on the sedition provisions of ATA (No. 2) (for an analysis of the reports and recommendations produced by these various bodies, see Rix 2008). ‘One of the specific terms of reference of Mr Clarke is to report on the effectiveness of counter-terrorism laws in respect to the facts surrounding the Haneef matter and’, commented the Attorney-General, ‘obviously, there may be some relevant matters that we will have to consider in light of those recommendations (McLelland 2008).’

The inquiry into the Haneef case opened on 30 April. This happened to be the very day on which *The Australian* newspaper reported in a front-page story that the former Immigration Minister Kevin Andrews would testify to the inquiry that the Australian Federal Police had withheld from him the important information cited above proving that Sabeel Ahmed was not a member of a terrorist organisation and was not involved in the attempted London nightclub and Glasgow airport bombings (McKenna 2008). This issue not only raises important questions about Mr Andrews’ veracity and trustworthiness, but also about the AFP’s role in the Haneef debacle. The specific concerns relating to the AFP, besides the allegation of withholding evidence, include whether it ignored the crucial evidence proving that Haneef was innocent of the charges brought against him and, a related point, whether the British police had actually provided the AFP with the information demonstrating that Sabeel Ahmed was not involved in the London and Glasgow bombings. But Mr McLelland has refused to expand the Clarke inquiry’s terms of reference to enable it to investigate the

relationship between the AFP and its British counterparts, specifically, whether the British police had supplied the AFP with the information that exonerated Sabeel Ahmed and, indirectly, Mohamed Haneef as well. This is just one of the shortcomings of the Clarke inquiry that have attracted considerable media attention and public disquiet.

Lawyers also have concerns that the powers granted the inquiry are not adequate, specifically, that it does not have the power to compel witnesses to give evidence or to face cross-examination and cannot compel the production of documents as would a Royal Commission or a properly constituted commission of inquiry (ABC 2008; McKenna 2008). Mr Clarke rejected a direct request from Stephen Keim SC, representing Dr Haneef, that the inquiry to be provided with the power to compel witnesses to give evidence. Stephen Keim made his request on the opening day of the inquiry, which could be its only public hearing (Maley 2008 and 2008a). This is another concern, for Mr Clarke has indicated that interviews with witnesses would be conducted in private, ensuring that much of the evidence presented before the inquiry would not be made public. While he has undertaken to post transcripts of interviews on the inquiry website, this will be only done after the removal of any information which is regarded as being prejudicial to national security (Maley 2008a).

Denying the Clarke inquiry the powers of a Royal Commission or commission of inquiry gives rise to a further concern, that witnesses would not have indemnity against either defamation or self-incrimination meaning that they could potentially face civil law suits. Thus, many witnesses could either decide not to appear before the inquiry or, even if they did, refuse to answer questions (Maley 2008a).

In a press conference on the opening day of the inquiry (30 April), the Attorney-General emphasised how important it was that Mr Clarke be able to conduct the inquiry in a manner which gave due regard to the importance of protecting 'sensitive national security information' and to ensuring that 'ongoing investigations' (including presumably into Dr Haneef) and criminal trials such as those currently under way in the United Kingdom would not be prejudiced (McLelland 2008a). Mr Clarke's rejection of the request to seek expanded powers for the inquiry and his undertaking to 'sterilise' interview transcripts suggest that he is not about to throw down the gauntlet to his political masters, at least as far as compelling witnesses to provide evidence and making available unexpurgated records of interview are concerned. A preoccupation with the sanctity of national security information and current investigations and criminal trials had been a feature of the press conference which Mr McLelland hosted in March where he

announced the terms of reference of the Clarke inquiry. In light of this and the other concerns with the Clarke inquiry, the Attorney-General's assurance that 'should at any stage he [Mr Clarke] come to the government and indicate that the absence of cooperation of any witness, any agency, or any person, is impeding a full and proper inquiry...then we will certainly have regard to any request, should it be made to provide powers of compellability in terms of documents and witnesses' seems more than a little hollow (McLelland 2008a).

#### **4. The case of Izhar Ul-Haque**

The Ul-Haque case is much less celebrated but in its own way even more disturbing than the Haneef affair. For while this case brought to light serious flaws, deficiencies and excesses in the anti-terrorism and related legislation, the Ul-Haque case exposed the climate of fear, suspicion and contempt for the rule of law created by the former Government's legislative approach to the war on terror. In this climate the AFP and ASIO were emboldened to exceed their authority and mandate by flagrantly violating the human rights of terror suspects, in this instance, Izhar Ul-Haque and committing criminal offences in the attempt to secure a conviction. It does bear at least one important similarity to the Haneef case, however, in that it also demonstrates the racial, ethnic and religious stereotyping, explicit or implicit, which helped to define the former Australian Government's approach to the war of terror enshrined as this is in its legislative response. As with Haneef, the details of the Ul-Haque case need to be briefly recounted. Before doing so, however, a number of preliminary points about this case need to be made.

Because the Ul-Haque case did not become a cause célèbre during the election campaign it did not expose the former Government, and its legislative response to the terrorist threat, to nearly the same level of media and public scrutiny as the Haneef affair generated. And, because the Ul-Haque case put more of the focus on the activities of the law enforcement and security agencies the Government was largely shielded from direct scrutiny and criticism. For this reason, it is able to be dealt with in a more condensed manner than the Haneef case. Nevertheless, as will be seen below, NSW Supreme Court Justice Michael Adams' findings regarding the behaviour of the AFP and ASIO in the Ul-Haque case demonstrate that it is at least as significant in that it exposes the dangers of the lack of a strict accountability regime for these agencies. This is a point that will be taken up below.

Izhar Ul-Haque was charged with training with the Pakistan-based terrorist group Lashkar-e-Toiba (or, Lashkar-e-Tayyiba as it is otherwise

known) in 2003 well before it had been classified as a terrorist organisation by the United Nations. The Criminal Code Amendment (Hizbollah) Act 2003 and similar legislation proscribing Hamas and Lashkar-e-Toiba passed later the same year either pre-empted or ignored the Al-Qaida and Taliban Sanctions Committee of the UN Security Council which, for example, only added Lashkar-e-Toiba to the Consolidated List of individuals and groups belonging to or associated with Al-Qaida on 2 May 2005 (UN n.d.; neither Hamas nor Hizbollah is included on the Al-Qaida groups Consolidated List last updated on 17 October 2007 and neither is on the Taliban groups Consolidated List which, in any event, currently has no entities listed).

On November 5<sup>th</sup> 2007 in the NSW Supreme Court, Justice Michael Adams found that all records of interview with Ul-Haque tendered by the Australian Federal Police as evidence were inadmissible forcing the Director of Public Prosecutions to withdraw the case just before a jury was empanelled (R v Ul-Haque [2007] NSWSC 1251). The AFP had also tried to elicit information from Ul-Haque about the terror suspect Faheem Lodhi by questioning him in a maximum security gaol for more than two hours but without first cautioning him or informing his lawyer of the interrogation (O'Brien 2008). Two AFP officers had demanded that Ul-Haque turn informant against Lodhi (by wearing a wire and spying for them) who was subsequently convicted and gaoled for 20 years for conspiring to bomb the national electricity grid.<sup>4</sup> When he refused to do so, Ul-Haque was threatened that there would be serious and adverse consequences for him. While Ul-Haque had briefly trained with Lashkar-e-Toiba in early 2003, the law enforcement authorities had admitted to him that they accepted that his connection to the organisation had nothing to do with Australia but instead was because of his opposition to the Indian presence in Kashmir. The AFP records of interview were found to be inadmissible because of the improper and oppressive conduct of the AFP (and ASIO) officers involved, and because of the 'inextricable link' between AFP and ASIO including the disclosure by the AFP to ASIO of what Ul-Haque had said in interview. Justice Adams also found that two ASIO officers had committed the criminal offences of kidnapping and false imprisonment at common law and another offence under the Crimes Act (R v Ul-Haque [2007] NSWSC 1251). He also found that the conduct of the ASIO officers amounted to a gross breach of the powers they had been granted under a search warrant which had been issued to them.

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<sup>4</sup> The NSW Court of Criminal Appeal quashed Lodhi's appeal against his conviction, a ruling recently upheld by the High Court of Australia.

In response to the collapse of the Ul-Haque case, the AFP initiated an inquiry headed by former NSW Chief Justice Sir Laurence Street in which former NSW Police Commissioner Ken Moroney and former head of the Defence Signals Directorate Martin Brady were also included (the Federal Attorney-General's Department and the Inspector-General of Intelligence and Security, Ian Carnell, were other additions to the inquiry). The inquiry was charged with investigating the circumstances of the case and recommending changes to law enforcement agency policy and practice such as new procedures and protocols for improved communication and cooperation between the AFP and ASIO in joint operations (O'Brien 2008).

At the conclusion of its review of the conduct of Ul-Haque case, the Street inquiry produced 10 recommendations on how in future joint agency counter-terrorism investigations could be better managed. One of its findings, for example, was that closer and more effective cooperation between the AFP and ASIO had been hampered by 'mistrust, poor communication and a lack of basic equipment, such as "secure" desktop phones' (Maley and O'Brien 2008<sup>5</sup>). There was also an absence of a formal structure to facilitate joint decision making by the two agencies. To overcome these obstacles and deficiencies, the Street inquiry made recommendations for improving inter-agency communication at the operational level such as attaching ASIO officers to the joint counter-terrorism teams in Sydney and Melbourne and the development of a joint operations protocol. Another initiative arising from the inquiry is the development of guidelines outlining the role of the Commonwealth Director of Public Prosecutions in counter-terrorism investigations.

In addition to the above, there was also the matter of the lack of accountability of the AFP and ASIO. In a submission to the recent inquiry into the Telecommunications (Interception and Access) Amendment Bill 2008, conducted by Senate Standing Committee on Legal and Constitutional Affairs<sup>6</sup>, the Castan Centre for Human Rights Law at Monash University identified a number of areas where a 'dilution' of the accountability of these agencies had been evident, citing the Haneef and Ul-Haque cases as examples. It also reminded the Senate Committee that in the Ul-Haque case, and as seen above, Justice Adams of the NSW Supreme Court had been highly critical of the conduct both of AFP and of ASIO officers. According

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<sup>5</sup> This is a curious finding in light of the 'inextricable link' between the two organisations identified by Justice Michael Adams.

<sup>6</sup> For clarification, the main purpose of the Amendment Bill is 'to extend the sunset provisions that provide exemptions from the prohibition against listening to or copying communications passing over a telecommunications system' which were due to expire on the 13<sup>th</sup> of June this year.

to the Castan Centre, the two cases demonstrate that the law enforcement and security agencies need to be held more accountable in exercising their statutory powers. The Senate Committee noted that the Centre's submission 'emphasised that this was not just about protecting human rights, but also about preserving agencies' integrity' by requiring them to account more fully for the exercise of their powers (SSCLCA 2008: 31).' Similar concerns about human rights protection and accountability moved Mr Petro Georgiou, a Liberal Party backbencher, to introduce a Private Member's Bill into the House of Representatives in March 2008 with the aim of appointing an Independent Reviewer of Australia's terrorism laws similar to the UK independent reviewer who had been appointed in 2000 (Lord Carlile of Berriew) (Georgiou 2008 and 2008a). The Government used its majority in the House to block debate on the Bill.

## **5. Assessing the impact of the Haneef and Ul-Haque cases**

In its submission to the Clarke inquiry, the Gilbert + Tobin Centre for Public Law at the University of New South Wales noted that the fear of persecution in Australia's Muslim communities engendered by the anti-terrorism legislation, a fear brought to light by the SLRC and PJCIS reviews, had been exacerbated by the manner in which the government, the AFP and ASIO had conducted the Haneef affair. The corrosive effect of the authorities' conduct of the affair had not only been felt in Muslim communities, for it had also given rise to 'deep cynicism' across the wider Australian community. This was a worrying development in a security climate in which the Australian people should be able to have trust in their Government and confidence in its ability accurately to assess the level of threat faced by the country. As the submission pointed out:

The promotion of social cohesion is integral to stopping terrorism in its tracks. More specifically, the cooperation and good relations between police and intelligence agencies and Australian Muslims is a crucial resource in unearthing and preventing potential terrorists. The ability under a range of Australian laws to pursue Dr Haneef over nothing more than his familial association with terrorism plotters in the United Kingdom understandably alarmed those in close-knit ethnic communities and must seriously have impacted on efforts to reassure Australia's Muslims they have nothing to fear from these laws (Lynch, McGarrity, Williams 2008; a similar point is made, but not as forcefully, in the Law Council of Australia's submission to the inquiry (LCA 2008: 23)).

The problem here is with the catch-all nature of the terrorism organisation offences that have been inserted into the Criminal Code, in particular, those relating to recklessly associating with, recklessly providing resources to and recklessly helping an organisation to carry out a terrorist act. Because these offences did not precisely target ‘unambiguous criminal activity’, a repeat of the Haneef affair was almost inevitable (for detailed analysis of the terrorism organisation and other terrorism offences see Lynch, MacDonald and Williams (eds.) 2007 and Lynch and Williams 2006). Not only did excessively wide criminal laws of this type create opportunities for ‘executive overreach’, they could well make Australia less secure ‘by fostering cynicism and division in the community, and wasting police resources on investigations that are trivial or baseless (Lynch, McGarrity, Williams 2008).’ For these reasons Australia can ill afford to have a repeat of the Haneef affair. Hopefully, this is a consideration which will move Attorney-General McLelland and his Government quickly to set about removing the ambiguities, sloppy definitions and catch-all offences that are contained in Australia’s anti-terrorism laws. The legislative appointment of an Independent Reviewer of the anti-terrorism legislation would be an important first step in this direction.

The Ul-Haque case gives rise to similar concerns and misgivings to those arising from the Haneef case, but ones that are more directly focused on the actions of the law enforcement and security authorities than on the behaviour of the Government itself. In the Ul-Haque case, the AFP and ASIO were found by Justice Adams to have behaved in a manner which was improper and oppressive, rendering the records of interview with Ul-Haque they had obtained inadmissible as evidence in a criminal trial. It is to say the least alarming that these two agencies, which should be committed to upholding the rule of law and protecting Australia’s national security, feel that they can behave in such a reckless and unlawful manner. But it is even more frightening when ASIO officers commit criminal offences in a desperate and misguided attempt to collect enough evidence to have an accused but still innocent person convicted of criminal offences. This is a clear perversion of due process and the rule of law which undermines rather than preserves the AFP’s and ASIO’S integrity and reputation in the wider community.

Just as importantly, such behaviour undermines national security. Even if national security is taken to mean nothing more than the security of the nation from terrorist attack, then it is clear that in genuine terrorism cases the national security of Australia would be gravely weakened were the AFP and ASIO to behave in the same manner as they did in the Ul-Haque affair. But, if national security is to mean more than just the protection of the country



from terrorist attack, and include as it should the security and liberty of the person from arbitrary arrest and detention and similar abuses of state power, then these two agencies have already effectively undermined Australia's national security (see Rix 2008 for an elaboration of some of these points).

Notwithstanding the outrageous and completely unacceptable behaviour of the AFP and ASIO in the Haneef and Ul-Haque cases, they cannot take all the blame for the abuses of due process and human rights that occurred. The lack of accountability of these agencies for the exercise of their statutory powers is just one element, however important, of the political climate in which these abuses were allowed to take place. Other elements have only recently come to light.

In a case being heard before the Commonwealth Administrative Appeals Tribunal (AAT) in Brisbane it has been revealed that representatives of the Department of Prime Minister and Cabinet (then John Howard's department) met with Immigration and Foreign Affairs officials on 4 July 2007 (Haneef was arrested on 2 July) to discuss how the Haneef case should be handled. The action in the AAT was launched by lawyers representing Mohamed Haneef in a bid to assist the Clarke inquiry to procure documents relating to the case. The inquiry does not itself have the power to compel Government departments and agencies to provide it with documents. One of the documents which the action seeks to procure is the options paper developed by the various departments represented at the meeting on 4 July which set out the possible courses of action that could be taken should the APF lay charges against Haneef (who was charged on 14 July). According to Haneef's lawyers, 'the involvement of Mr Howard's department raised the possibility the former prime minister may have colluded with his immigration minister to create a political storm similar to the Tampa controversy which helped the Coalition win the 2001 election (*The Australian*, 17 June 2008)'. It is almost inconceivable that Mr Howard was not briefed by his senior advisors about the meeting. While most of the requested documents had been provided to Mr Haneef's legal team, about 15 documents which Government lawyers claim either it is not in the public interest to release or are exempt from freedom of information legislation have yet to be released. The Immigration Department has so far refused to release the options paper.

The political climate created by the former Government's anti-terrorism legislation not only emboldened the AFP and ASIO to perpetrate abuses of due process and human rights. It also sanctioned representatives of Government departments to meet and agree on what could be done in the event that Dr Haneef was charged with committing a terrorist offence. What

could be done in this event was clearly to be determined by what would put the Government in the best possible light and cause it the least amount of damage in the public's eyes. Whether or not the Prime Minister and Immigration Minister were directly involved, and whether or not they knew of the meeting, is really not the point. The more important point is the politicisation of the public service and the corruption of its capacity for providing independent advice to the Howard Government or any other that might have succeeded it.

## **6. Conclusion**

The Haneef and Ul-Haque cases are both important for they reveal how a crude association of Islam with terrorism, an important element of the political climate created by the Howard Government's anti-terrorism legislation, permitted the AFP and ASIO to perpetrate abuses of due process and human rights. And at the very time when social cohesion, Australia's best defence against terrorist violence, is most required the political climate and the abuses it has allowed have sowed the seeds of division, suspicion and cynicism in the Australian community. But their importance goes further than even these compelling considerations suggest. These two cases also reveal how easily Australia's national security can be endangered by the two agencies when they are not subject to a strict accountability regime. If they were to behave in the same way in genuine terrorism cases as they did in the Ul-Haque affair then Australia's national security would be in grave danger in the sense that it would not be secure from terrorist attack. But if national security means more than the protection of the country from terrorist attack, and include also the security and liberty of the person from arbitrary arrest and detention, then Australia's national security has already been undermined. Moreover, the politicisation of the public service has seriously compromised its capacity for providing independent advice to government. Thus far, the Rudd Government has shown little inclination to escape the legacy of its predecessor. It can only be hoped that as it grows in maturity and self-confidence it will become more inclined to do so. Australia's national security depends on it.

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