

AUSTRALIAN FEDERAL POLICE ASSOCIATION

Clarke Inquiry into the case of Dr Mohamed Haneef

AFPA Submission

23 May 2008



Prepared by

Ian Phillips
B.Ec., LL.B(Hons) (Syd)
Solicitor (ACT & NSW)
Director Legal & Industrial
AFPA

Authorised by Jim Torr AFPA Chief Executive Officer

Introduction

The Australian Federal Police Association¹ represents the industrial, social and professional interests of the vast majority of sworn Australian Federal Police Officers². As a long running representative of AFP employees we are well situated to advance an informative view into matters that are covered by the Terms of Reference of the *Clarke Inquiry into the case of Dr Mohamed Haneef*³.

At the outset, the AFPA would like to extend its support and confidence in Mr Clarke and the Inquiry. As with the AFP⁴, the AFPA has welcomed⁵ the Inquiry into the handling of the Haneef matter and believes it will result in a thorough report to the Government that will show the good work of our AFPA members. That said, the AFPA does understand the pressure and stress on our members in such an environment. We are also aware however that our members' good work is conducted within a structure that is created by the Government, and those that are delegated by the Government.

Exposure to the use of weapons of mass destruction, for example the 2002 Bali Bombings, to AFP leaders and investigations has driven home the requirement for investigations into suspected planned terrorist events to proceed without the slightest delay. This represents a pressure on AFP employees unlike most other traditional AFP investigations.

AFP training acknowledges that preservation of life is the primary goal of a police practitioner. Our members take this training with them in their daily duties, with the net effect that a live Counter-terrorism investigation, with all its implications for the potential loss of life, is carried out with a relentless energy not seen in some other investigation types. This pressure is felt from the top to the bottom of the AFP. That being said, our members always work within the law. CT laws are controversial, adding a final dimension to the challenge of policing.

The Submission will be relatively brief and to the point. It will principally focus on term of reference No. 2 (*2. the administrative and operational procedures and arrangements of the Commonwealth and its agencies relevant to these matters;*).

Second, the submission will look at the deficiencies caused by the Parliament relating to the operation and administration of the AFP during an incident such as Dr Haneef's (Terms of Reference 4 (*4. having regard to (a), (b) and (c), any deficiencies in the relevant laws or administrative and operational procedures and arrangements of the Commonwealth and its agencies, including agency and interagency communication protocols and guidelines.*)).

¹ Hereafter referred to as the 'AFPA'.

² Hereafter referred to as the 'AFP'.

³ Hereafter referred to as 'the Inquiry'.

⁴ 'AFP Welcomes Dr Haneef Inquiry'. See <

http://www.afp.gov.au/media_releases/national/2008/afp_welcomes_dr_haneef_inquiry>. 13 March 2008.

⁵ *Clarke Inquiry into the case of Dr Mohamed Haneef*. See < <http://www.afpa.org.au/read/369.html>>. 30 April 2008.

To avoid all doubt, nothing in this submission is intended to, directly or indirectly, claim, infer or imply that the current or any previous AFP Commissioners or Deputy Commissioner or any other AFP employees have allowed themselves to be inappropriately influenced by the current or any previous federal governments. Secondly, the AFPA is not in a position to comment on the tactical or operational decisions and methodology of the AFP in relation to Dr. Haneef's matter.

The AFP, the Government and the media during the incident in question

The AFPA contends more needs to be done by the Federal Government to ensure a healthy perception of operational independence is held by the public into the operational activities of the AFP. It was the experience of the AFPA that various entities, particularly the media, sought to link the AFP investigation of Dr Haneef with the electoral prospects of the then Federal Liberal Government. To put it bluntly, a terrorist within our midst was perceived to enhance the then Governments '*strong on national security*' mantra and thereby increase their electoral chances. There is no doubt that such a perception, to some degree, has the ability to damage the reputation of the AFP as an impartial and reputable policing organisation.

Such a public perception is also fully capable of degrading the AFP's ability to gain support from the public. Public contribution of information can be critical particularly in the case of CT investigations.

Our members pride themselves on their independent role as Constables and their individual ownership of arrest and use of force decisions including use of lethal force. Perhaps no other role in society is vested with such trust by the broader population. To infer that our members are subject to the political interests of the Government of the day is perhaps the greatest insult that could be laid at their feet.

The AFPA was active at the time of the Haneef arrest to reassure the public that the matter was before a court of competent jurisdiction (electronic radio interviews attached). As is well understood, the Government does have the lawful mechanism to set AFP priorities via section 37(2) of the *Australian Federal Police Act 1979* which provides for a direction by the Minister to the AFP.

The Government also has the ability to draft and introduce legislation that may affect the way the AFP does its work. The Government does not, should not, and should not want the ability to influence the Constable in a particular case.

In the public's eye it is the AFP that is their bulwark against corrupt behaviour by any number of senior public officials including politicians, judges, security agencies and spies. The public need to know the AFP is actually free, and in perception free, from the pressures of politics in making operational decisions.

The Haneef matter has also highlighted the public, political and personal pressures that AFP CT Investigators, and indeed the AFP Commissioner himself, are subject to as a result of the extensive media coverage (much of which was critical during the incident in question),

critical comments by certain politicians and the subsequent thirst for more and more information by members of the public.

Parliamentary Joint Committee⁶ Oversight

The AFPA is of the view that, because of the nature of uncommon pressures and risks, some aspects of the work of AFP CT warrant careful monitoring by PJC oversight to ensure additional transparency in relation to AFP administration. Like the terms of references of the Australian Crime Commission⁷ PJC, the PJC would be limited to not interfering in actual investigations but overseeing operational and administrative processes to identify areas of improvement.

The AFPA believes that a PJC will not only provide additional accountability measures to satisfy the Australian Government and opposition, but will also provide protections to AFP employees from unfair criticism by the media and politicians. We request the inquiry listen to the two attached radio interviews in which the AFPA CEO sought to defend the AFP's operational independence. Had the AFPA had the ability to alert the public to a healthy PJC, the reputation of the AFP, our members and the major political parties could have been enhanced. Likewise the perception of the media would have been calmed and better balanced.

PJC oversight of the AFP would have gone some way in allowing the opposition of the day to satisfy itself that the AFP was acting in good faith in relation Haneef. Once the opposition was satisfied with the integrity of the investigation there is no doubt the broader community would be reassured - to some degree - that Mr Haneef had not been arrested in order to improve the electoral prospects of a political party.

Finally, a related issue that also has the ability to damage the reputation of the AFP with the public is a perception that the AFP as an entity, or senior AFP leaders, or to a lesser extent other AFP employees are aligned with a political party. Overt support of a political party is inappropriate and creates a perception of bias. AFP employees should be seen as un-aligned politically. The AFPA believes there is a role for a future PJC to satisfy itself, by whatever means it feels appropriate that the AFP is not damaged by public perceptions of political affiliations or sympathies by AFP staff.

We do not seek to needlessly increase the reporting obligations of the AFP and we note that the AFP already has reporting obligations to the Attorney General, the Minister, ACLEI and the Commonwealth Ombudsman. We contend that much of the AFP's time spent in Senate Budget Estimates could better be spent before a PJC where the members would have:

1. continuity of oversight of the AFP and like agencies;
2. personal nomination by the Prime Minister and appropriate security clearances;
3. representatives from both houses of Parliament;
4. representative from both major parties; and,
5. a reputation for penetrating, and at times confidential, analysis in an environment all together different to Senate Estimates.

⁶ Hereafter referred to as 'PJC'.

⁷ Hereafter referred to as the 'ACC'.

Of the two Commonwealth law enforcement agencies relevant to the Inquiry, the Australian Security and Intelligence Organisation⁸ is subject to PJC⁹ oversight. The role of the PJC over ASIO is to:

- to review the administration and expenditure of ASIO including the annual financial statements;
- to review any matter in relation to ASIO referred to the Committee by the responsible Minister or a resolution of either House of the Parliament; and
- to review, as soon as possible after the third anniversary of the day on which the Security Legislation Amendment (Terrorism) Act 2002 receives the Royal Assent, the operation, effectiveness and implications of amendments made by that Act and the following Acts - The Border Security Legislation Amendment Act 2002, The Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002 and The Suppression of the Financing of Terrorism Act 2002
- to review, by 22 January 2016, the operation, effectiveness and implications of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979 and
- to report the Committee's comments and recommendations to each House of the Parliament and to the responsible Minister;

What PJC cannot do however is:

- reviewing the intelligence gathering and assessment priorities;
- reviewing the sources of information, other operational assistance or operational methods;
- reviewing particular operations that have been, are being or are proposed to be undertaken;
- reviewing information provided by, or by an agency of, a foreign government where that government does not consent to the disclosure of the information;
- reviewing an aspect of the activities of ASIO that does not affect an Australian person;
- reviewing the rules made under section 15 of the Act (to protect privacy of Australians); or
- conducting inquiries into individual complaints about the activities of ASIO;

It is clear by the lists above of what PJC oversight can and cannot do. The AFPA is not asking for broad oversight of all the activities of the AFP. We are however asking for oversight of administration and expenditure, and examination and scrutiny of the AFP's adherence to the AFP values as set out in the AFP Act. As one can see under point three above (of what PJC *can* do), there is a regular review of ASIO legislation.

⁸ Hereafter referred to as 'ASIO'.

⁹ The role of PJC on Intelligence and Security also has oversight of the Australian Secret Intelligence Service (ASIS) and the Defence Signals Directorate (DSD).

Recommendations

1. The inquiry finds in its final report to Government that the men and women of the AFP have acted appropriately in difficult circumstances in relation to the arrest and detention of Dr. Haneef;
2. the inquiry publically acknowledges the nature and time criticality of counter-terrorism investigations; and,
3. having regard to terms of reference 2, in particular, having regard to the arrangements of the Commonwealth, the AFPA recommends that the AFP be placed under the standing scrutiny of a Parliamentary Joint Committee.

Attachments

1. Interview with AFPA CEO Jim Torr on 2UE Radio
2. Interview with AFPA CEO Jim Torr on ABC Radio