Report of the Inquiry into the Case of Dr Mohamed Haneef

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Clarke Inquiry into the Case of Dr Mohamed Haneef

21 November 2008

The Hon. Robert McClelland MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney-General

In accordance with the terms of your letter dated 13 March 2008, I have the honour to present the report of my inquiry into the case of Dr Mohamed Haneef.

The report consists of two volumes. In Volume One I deal fully with the matters covered by my terms of reference, and I make a number of recommendations arising from those matters. In describing the events of the case, I made every effort to avoid including any material that might be judged a threat to national security information or continuing operations or might jeopardise any current trials. It is my hope that you will be able to release this volume to the public. Volume Two contains supplementary material that provides greater detail and analysis of the events I examined and includes references to sensitive or classified material. It might be that this material cannot be published at present.

As you are aware, trials that were pending in the United Kingdom during the time I was conducting this Inquiry greatly influenced the course of my work. Much of the material relating to Dr Haneef's experience came from the UK Metropolitan Police Service, which did not agree to unfettered use of the material for the Inquiry's purposes. I am not critical of the approach the UK authorities took: I understand the extreme sensitivity associated with publishing information that might in some way put the trials at risk. Although I was mindful of these concerns, inevitably there are direct and indirect references in the report to information furnished by the Metropolitan Police Service. Much of this material, however, was already in the public domain before the Inquiry began and has now been released as part of the trials in progress. I did not seek clearance of any part of my report from the UK authorities.

Yours faithfully

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Overview

It was in the early hours of 2 July 2007 that the Australian Federal Police first became aware of the probable presence of Dr Mohamed Haneef in Australia and his possible involvement in the terrorist incidents in the United Kingdom on 29 and 30 June 2007. From 2 July until Dr Haneef was charged, a large amount of the information on which the AFP relied came from the United Kingdom. During the investigation, that information was supplemented by information flowing from investigations the AFP and the Queensland Police Service carried out, either themselves or in association with agencies in the Australian Intelligence Community. Nonetheless, reliance on information from overseas bedevilled the investigation.

At the outset it must be said that this Inquiry was concerned with the operations of the relevant Australian departments and agencies during July 2007. It was not an investigation into whether Dr Haneef was guilty or innocent. He is, however, entitled to a presumption of innocence. Quite some time after the Inquiry began the AFP announced that he was no longer a person of interest. I do not find that surprising: I could find no evidence that he was associated with or had foreknowledge of the terrorist events or of the possible involvement of his second cousins Dr Sabeel Ahmed and Mr Kafeel Ahmed in terrorist activities.

Notwithstanding, Dr Haneef's action in endeavouring to fly to Bangalore, India, on 2 July was capable of creating—and did create—a perception that he was fleeing the country and was probably involved in the terrorist events. In my opinion this perception coloured the entire investigation. The perception was strengthened when later it was ascertained that Dr Haneef had been warned before he arranged to buy his air ticket that there was some problem in the United Kingdom linking his SIM card to the terrorist attacks.

The law has, however, always recognised that there can be many reasons for flight—even from the scene of a crime, which was not the case in this instance—and that great caution must be exercised in concluding that flight demonstrates a consciousness of guilt. In this instance, although I did not seek Dr Haneef's explanation, the material that was revealed suggested strongly to me that he had two reasons for leaving:

- He wanted to see his wife and child.
- Because he had learnt there could be a problem involving his SIM card in the terrorist events, he felt frightened and alone in Australia (where he had no family and few friends) and wanted the support of his family.

I do not accept that Dr Haneef left because he was in some way involved in the attack.

After Dr Haneef had been arrested the AFP and then the government—which had no intelligence supporting the existence in Australia of a terrorist cell involving Dr Haneef—became concerned that there might be a terrorist attack imminent in Australia, as well as with the need to investigate whether Dr Haneef was in some way involved in the UK incidents. As a result, what started as a small investigation blew out, coming to involve an investigation of nearly 50 people from Perth to North Queensland and occupying the attention of many officers, from the AFP, the Queensland Police Service, other members of the Australian Intelligence Community (in particular, ASIO and the Defence Signals Directorate) and the Australian Customs Service.

A number of departments and agencies of the Commonwealth and the Queensland Government very quickly turned towards the matter. There were many meetings of the National Counter-Terrorism Committee, which involves representatives of the Commonwealth and state and territory governments. There were also meetings of the Australian Government Counter-Terrorism Committee and smaller meetings and frequent teleconferences between representatives of departments and agencies such as the Department of the Prime Minister and Cabinet, the Attorney-General's Department, the Department of Immigration and Citizenship, and the Department of Foreign Affairs and Trade. Initially the concern was for the security of the people of Australia, the possible existence of a terrorist cell in Australia, and the criminal investigation. It soon extended, however, to consideration by the Department of Immigration and Citizenship, in association with the other departments just mentioned, of Dr Haneef's visa.

There was enormous media interest in the 'affair', this interest being greatly increased by leaks of apparently sensational aspects of the investigation and the extended detention of Dr Haneef, which had resulted from the first use ever of the provisions of Division 2 of Part 1C of the *Crimes Act 1914.*

Extensive media criticism of the AFP investigation and the charging of Dr Haneef continues to this day. It is understandable, given the media interest in the investigation from the start, the lengthy detention, the charging, and the spectacular and speedy collapse of the prosecution.

This interest was further piqued by the action of the then Minister for Immigration and Citizenship, the Hon. Kevin Andrews MP, in cancelling Dr Haneef's visa immediately after he was granted bail on 16 July. Upon the law as it was then understood (and as explained by a judicial decision of a senior court), the Minister was almost certainly entitled to act as he did on the information supplied to him. But, although I found no evidence of conspiracy or an improper purpose, I do find the cancellation—and particularly its timing—mystifying.

In his interview with the Inquiry, Mr Andrews reiterated his assertion that he acted in the national interest, and I have no doubt he believes he did. ASIO,

however, repeatedly said there was no imminent threat of terrorism in Australia, and the Acting Secretary of the Department of Immigration and Citizenship, Mr Bob Correll, had in his possession a document in which ASIO had said there was no evidence that Dr Haneef had foreknowledge of or participated in the UK terrorist incidents. Mr Andrews said he knew of the general tenor of that document, but he did not know of the detail I mention. He did not ask to see the document; nor did he ask a question about what ASIO (which was conducting a security investigation in parallel with the AFP investigation) had said, and his Acting Secretary did not think it necessary to tell him.

In interview, both the Minister and the Acting Secretary echoed the retort I heard many times during the Inquiry—that ASIO had another remit and did not have the same information as the AFP. But ASIO *did* have the same information and, being Australia's primary intelligence organisation in relation to domestic matters, had furnished intelligence to the AFP. The fact that, when confronted with the detail of the ASIO report, Mr Andrews said he probably would not have acted differently had he seen it, tells me the Minister did not reflect deeply on the detail of the AFP information in the rambling brief he had been given. Nor did he analyse the conflict between that and the ASIO information, of which he had a broad knowledge. As a result, he failed to ask the questions that would have alerted him to the fact that the AFP material he had been given contained information that was somewhat equivocal and, at its highest, was in complete conflict with the assertions of ASIO. In addition, as it seems to me, the Minister failed to consider what purpose he was achieving when at the time he made the visa-cancellation decision he knew it was likely the AFP would, in the event that he made such a decision, seek a Criminal Justice Stay Certificate. If the Stay Certificate was granted, it would prevent Dr Haneef being removed from the country. This matter is, of course, discussed in greater detail in the body of the report.

To return to the investigation. It is my opinion that the body of police officers involved, while never before having had to confront a crisis of the nature involved in this case, worked long hours in a thorough and dedicated way. There were mistakes of detail, but they were in the main the results of the need to rely on overseas information and what I think were the inadequate systems of evidence recording employed. I interviewed a number of these officers, including some who have been singled out for criticism in the media, and I found them, almost without exception, dedicated, competent and impressive.

Unfortunately, the investigation has been presented, somewhat unfairly, as a complete bungle. That is because it took a long time and in the end Dr Haneef was wrongly charged. Should it have taken so long? I think not. The UK police had no continuing interest in Dr Haneef once they had assured themselves he was not a threat to the United Kingdom, and Dr Haneef was cooperating with the AFP. In my view, the 'extension of time' provisions in the Crimes Act—which failed to provide a cap or limit on the detention period—removed, or diminished, the sense of urgency that should have been brought to the task of determining

whether to charge or release. The deficiencies in the system of judicial oversight also became obvious.

The AFP submitted that, until it called in the Commonwealth Director of Public Prosecutions officer, it was the AFP's opinion that there was not enough evidence to charge Dr Haneef. The brief the AFP provided to the CDPP officer contained some misleading information but contained nothing that was of particularly recent origin.

It is a matter of history that the CDPP officer, Mr Clive Porritt, said the AFP had enough evidence to charge. What is perhaps surprising is that the case officers who had interviewed Dr Haneef on all occasions, Federal Agent Neil Thompson and Detective Sergeant Adam Simms, both said they did not accept that there was enough to charge and they were not prepared to formally charge Dr Haneef. In addition, Detective Superintendent Gayle Hogan of the Queensland Police Service had reservations about the charge but seems (and there was some doubt about this because of differing evidence) to have deferred to the AFP because of the advice given by the CDPP officer. For the AFP's part, both Commander Ramzi Jabbour and Assistant Commissioner Frank Prendergast concluded that, in the light of the CDPP officer's advice, they should charge Dr Haneef, and that is what happened.

Some observations need to be made about this decision to charge:

- The advice given by Mr Porritt was obviously wrong and should never have been given. Apart from anything else, there was no evidence that in July 2006 there existed a terrorist organisation involving Sabeel Ahmed or Kafeel Ahmed. Even if there had been, there was no evidence that Dr Haneef knew he was giving his SIM card to a terrorist organisation or knew facts that would have demonstrated that he was reckless in giving his SIM card to Sabeel. In short, the material was completely deficient in the most important respect.

- Although Mr Porritt said he took account of a misstatement that Dr Haneef had resided with his cousins, I am not persuaded his advice would have been different had that misstatement not appeared in his brief. That advice was crucial to the charge. I have no doubt that if the proper advice had been given Dr Haneef would have been released. There was comment in the media that the CDPP officer was pressured by the AFP. Although Mr Porritt said he felt 'an unspoken but considerable pressure to provide reassurance to police', he denied that he had been subjected to any pressure by AFP officers.

- Notwithstanding, my view is that, although I respect Commander Jabbour's belief that he was obliged to follow the CDPP advice, Commander Jabbour had formed a strong opinion that Dr Haneef was implicated and so was more receptive to Mr Porritt's advice. It is my view that Jabbour had become suspicious about Dr Haneef and had lost objectivity. He was unable to see that the evidence he regarded as highly incriminating in fact amounted to very little. Had he not become so close to the case, there is a strong possibility

he would have taken more notice of his investigating police officers, who had interviewed Dr Haneef for many hours and reached the conclusion that his was a plausible story.

- Despite those shortcomings, Commander Jabbour appeared an impressive, dedicated and capable police officer. He was respected by the senior Queensland police officers and his fellow AFP members and had worked under great pressure for many hours throughout the investigation.

Finally, I record my surprise that not one of the people involved in the police investigation and the charging whom the Inquiry interviewed stood back at any time prior to the decision to charge and reflected on what Dr Haneef was known to have done. That was to give a SIM card registered in his name—a card that could have been bought for a small sum of money, even with a false name in the United Kingdom—to his cousin, who had asked for it, about 12 months before the terrorist attack. If the police officers had reflected on those basic facts they would have realised that in such circumstances the evidence demonstrating criminal intent or recklessness would have had to be very strong indeed if a conviction were to be secured. Only one person who provided a statement to the Inquiry seems to have expressed that view at the time: the CDPP specialist counsel who appeared in the bail application emphatically questioned the case. By then, of course, Dr Haneef had been charged.

Recommendations

Recommendation 1

The Inquiry recommends that the government consider incorporating in legislation the special arrangements and powers that would apply to inquiries and other independent reviews and investigations involving matters of national security.

Recommendation 2

The Inquiry recommends that a committee—consisting of the Deputy Director-General of ASIO, the Deputy Commissioner of the Australian Federal Police, the Deputy Director of the Commonwealth Director of Public Prosecutions and senior representatives (at minimum at deputy secretary level) of the Department of the Prime Minister and Cabinet, the Department of Immigration and Citizenship and the Attorney-General's Department—be established to conduct a review and determine ways of dispelling misapprehensions about the respective roles, functions and responsibilities of government agencies and departments in a counter-terrorism context and the purpose of the information they produce in that context. The committee should review existing procedures, arrangements and guidelines with a view to providing clear guidance and achieving a common understanding.

Recommendation 3

The Inquiry recommends that the provisions of Part 1C of the *Crimes Act 1914* in relation to terrorism offences and the association of those provisions with s. 3W of the Act be reviewed in the light of the discussion in Chapter 5 and relevant provisions of the United Kingdom's *Terrorism Act 2000*.

Recommendation 4

The Inquiry recommends that consideration be given to the appointment of an independent reviewer of Commonwealth counter-terrorism laws.

Recommendation 5

The Inquiry recommends that consideration be given to amending s. 102.7 of the *Criminal Code Act 1995* to remove the uncertainties discussed in Chapter 5.

Recommendation 6

The Inquiry recommends that the Minister for Immigration and Citizenship be added to the distribution list for security intelligence reports produced by ASIO, in addition to senior departmental officers.

Recommendation 7

The Inquiry recommends that the National Counter-Terrorism Committee develop for the *National Counter-Terrorism Handbook* and the National Counter-Terrorism Plan procedures specifying operational protocols for an investigational structure and a Major Incident Room structure to be implemented for counter-terrorism investigations.

Recommendation 8

The Inquiry recommends that a review of Joint Counter Terrorism Team arrangements be conducted with a view to establishing nationally consistent arrangements under the National Counter-Terrorism Committee governance framework.

Recommendation 9

The Inquiry recommends that a national case management system for major police investigations be developed and adopted as a matter of urgency.

Recommendation 10

The Inquiry recommends that the National Counter-Terrorism Committee facilitate exercises that specifically respond to the problems involved in investigating and prosecuting terrorist offenders in Australia.

1 The Inquiry

The Attorney-General, the Hon. Robert McClelland MP, announced this Inquiry into the Case of Dr Mohamed Haneef on 13 March 2008. I was appointed from that day, and my terms of reference were to examine and report on the following:

> (a) the arrest, detention, charging, prosecution and release of Dr Haneef, the cancellation of his Australian visa and issuing of a criminal justice stay certificate;
>
> (b) the administrative and operational procedures and arrangements of the Commonwealth and its agencies relevant to these matters;
>
> (c) the effectiveness of co-operation, co-ordination and interoperability between the Commonwealth agencies and with state law enforcement agencies relating to these matters; and
>
> (d) 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.

I was asked initially to present a report by 30 September 2008 (see Appendix A).

From the outset it was made clear that the Inquiry was not to be a further investigation of the actions of Dr Mohamed Haneef. Its main focus was to be the handling of Dr Haneef's case by Commonwealth departments and agencies, within the relevant legislative framework and the current administrative and operational procedures. The period to be covered by the Inquiry was from 2 July 2007, when Dr Haneef was arrested, to 29 July 2007, when he left Australia.

It was anticipated that the Inquiry would traverse matters of national security and that it could cut across investigations that were under way and trials that were pending in Australia and overseas. I readily gave assurances that I would conduct the Inquiry in such a way as to protect any information that might jeopardise national security or other sensitivities. Notwithstanding these limitations, the hope was that most of the Inquiry's business could be managed in such a way as to allow the public to be informed and to gain some understanding of and have input to the Inquiry's proceedings.

1.1 Independence

The Inquiry was not established under any statute, so I had no powers to compel the production of documents or attendance at interview, to impose sanctions, or to offer any form of protection at law to any person assisting me with the Inquiry.

I understood this when I agreed to the task and considered it would not be an impediment to conducting a proper inquiry. The Attorney-General gave me an assurance of complete independence from any government influence or interference, and I received categorical assurances of cooperation from all government departments and agencies.

Had the circumstances been different, I would not have agreed to conduct the Inquiry. The Inquiry's independence was maintained throughout.

1.2 Establishment of the Inquiry

The Inquiry was conducted in Canberra. Immediately it was announced, work began on recruiting staff, acquiring and outfitting premises, and establishing information-management systems. The Attorney-General's Department performed the initial set-up tasks until the Secretary to the Inquiry was appointed. Thereafter the Inquiry managed its own operations, although it continued to receive administrative support in connection with financial and other operational matters from the department. Details of the personnel and administration of the Inquiry are presented in Appendix B.

By mid-April the Inquiry was fully established and investigations began. On 19 April 2008 newspapers in all states and territories carried advertisements giving notice of a preliminary hearing to be held on 30 April and calling for submissions from people who considered they had an interest in the subject, as described by the terms of reference, or had information that might assist the Inquiry.

1.3 The preliminary hearing

One of the purposes of the preliminary hearing was to provide a public forum in which I could describe the way I intended to conduct the Inquiry and make comment on a number of things that had been raised directly with me in correspondence and in the media. The other purpose was to afford those government departments and agencies with an involvement in the matters under review and the representatives of Dr Haneef an opportunity to announce their interest and intentions in relation to the Inquiry.

I delivered an opening statement making it clear that I was confident the Inquiry could be conducted effectively, without the need for statutory authority, particularly given the assurances of cooperation I had received. I also said I would not hesitate to seek powers from the Attorney-General if at any stage I felt I did not have the level of assistance necessary to complete my task.

Broadly stated, my plan was to consider submissions from all interested parties, to examine relevant documents, and to conduct interviews (in private) with individuals who might be able to assist the Inquiry in relation to the terms of

reference. I also said that, as far as possible, material provided to the Inquiry and transcripts of interviews would be published, subject to considerations of national security and other sensitivities. I issued Practice Note No. 1, which set out this agenda, on that day. The note advised that the practices and procedures outlined might change in the light of circumstances, as proved to be the case.

The preliminary hearing was held at the premises of the Australian Industrial Registry in Canberra. It was open to the general public and the media. The transcript of proceedings and my opening statement, as well as Practice Note No. 1, were subsequently published on the Inquiry's website.

1.4 Submissions to the Inquiry

The Inquiry asked that submissions to it be presented by 16 May 2008.

All government departments and agencies tried to meet this deadline, but a number of difficulties (see Sections 1.5 and 1.6) arose and prevented the provision of full submissions and relevant documents by that date. With the exception of the Queensland Police Service, which had requested an extension of time, all Inquiry participants provided an interim statement and some documents by the due date.

Maurice Blackburn Lawyers presented a thorough submission on behalf of Dr Haneef in May, and this was supplemented by two further submissions received in October.

A number of other organisations and individuals requested relatively short extensions of time to make their submissions. All extensions were granted, and no submission was rejected on the basis of late presentation or for any other reason. Submissions were received from 35 entities, those being government departments and agencies, interest groups and individuals; these are listed in Appendix C. Several people asked that their submissions be treated confidentially: these are not listed.

It was my intention to publish all relevant submissions received. On 9 July 2008 I issued a statement saying that a number of submissions had been posted on the Inquiry's website. The number published was fewer than had been submitted for various reasons: in some cases the substance of the submission fell outside my terms of reference; in others the person making the submission asked that it not be published; in a few instances I determined that publication would be inappropriate.

Where submissions from Commonwealth agencies were withheld from publication it was because they contained material that either carried a national security classification or were regarded as potentially prejudicial to the trials pending in the United Kingdom. In these cases I asked that a submission in a publishable form be provided. The Australian Security Intelligence Organisation met this request on 25 July with a much abbreviated submission, and the

Commonwealth Director of Public Prosecutions provided an extensive publishable submission on 14 August. The Australian Federal Police, despite considerable effort on its part, was unable to comply with my request until 23 October. This situation overall was criticised quite strongly in some sections of the media and by Dr Haneef's representatives, but I am satisfied that the agencies affected by the restrictions gave me full information and were not seeking to conceal material from the public without sound reasons.

Some government departments and agencies produced documents to the Inquiry but did not see a need to make a submission. The Department of the Prime Minister and Cabinet, the Department of Foreign Affairs and Trade and the Australian Customs Service fell into this category, as did the Australian Secret Intelligence Service and the Defence Signals Directorate. I agreed with their assessment. The Department of Immigration and Citizenship initially provided documents but did not make a substantive submission; it subsequently revised this position and provided a full submission in late July.

In early October I gave the main departments and agencies and Dr Haneef's representatives an opportunity to make final submissions to the Inquiry: with the exception of Maurice Blackburn on behalf of Dr Haneef, none chose to do so. Despite that, at various times I received supplementary submissions and information, either at my request or on their own initiative, from the Australian Federal Police, the Commonwealth Director of Public Prosecutions, ASIO, the Department of Immigration and Citizenship and the Attorney-General's Department.

1.5 Production of documents

Examination of documents—among them written correspondence and email, minutes of meetings, diaries, file notes, reports, and primary source documents relating to Dr Haneef and the terrorist attacks in London and Glasgow in June 2007—was a fundamental part of the Inquiry's process of discovery. In late April the Inquiry wrote to all interested departments and agencies, seeking the provision of information, documents, and so on, as well as advice about the methods used to find and produce this material.

Timely and comprehensive production of material immediately became a problem across the board and continued to be so throughout the Inquiry. The difficulty stemmed largely from the fact that much of the material the Inquiry needed to see carried a security classification—relating to national security, cabinet-in-confidence or non–national security but otherwise protected matters. Classification of the documents placed restrictions and obligations on both the providers of the information and the Inquiry. Agreements had to be reached on access, handling, storage and further use of the material by the Inquiry. This took time and greatly hampered the Inquiry's progress.

1.5.1 Protection of classified information

After discussions with several agencies the Inquiry decided to develop and promulgate arrangements for the protection of national security and other classified information provided to it. All affected departments and agencies were consulted and given the opportunity to comment on the proposed arrangements. The Inquiry was assisted in this by the Attorney-General's Department, which undertook to coordinate the Commonwealth response. On 21 May these arrangements—which were in accordance with the prescriptions of the *Australian Government Protective Security Manual*[1] and the relevant legislation—were finalised and circulated. The arrangements did not cover the disclosure or publication of classified material, which remained contentious but was deferred in the interests of progressing the production and examination of documents.

As part of this process the Inquiry had systems and equipment installed to upgrade its premises and storage facilities to meet the standards required for classification as a 'secure area'. All Inquiry staff had security clearances at Top Secret or Secret level. Despite this degree of security, it was still necessary for Inquiry staff to view some documents at the premises of particular agencies. For a time, some ASIO documents were delivered to and removed from the Inquiry daily. Although the agencies made every effort to facilitate access to their documents, the situation was extremely inconvenient both administratively and operationally.

I was disappointed by the lack of rigour in the discovery process undertaken in some departments and agencies. On many occasions counsel and solicitors assisting me had to identify and request the production of particular documents that might reasonably have been identified by the agencies themselves and produced at a much earlier stage. In some cases the discovery process revealed deficiencies in record-keeping practices that meant that some documents referred to in other correspondence could not be produced despite best efforts. Surprisingly, in some instances this extended to routine briefings to ministers and matters relating to court proceedings: I understand that steps to rectify this have been taken in at least one agency.

I also formed the view that many documents were 'over-classified'. Initially they might have warranted the protection of the security marking, but in many cases that point was well past. It would, however, be a major exercise to review volumes of documents for the purposes of declassification, and I understand that the pressures of current work seldom allow this to occur.

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[1] Attorney-General's Department, *Australian Government Protective Security Manual*, rev. edn, AGD, Canberra, 2007.

1.6 Material related to pending trials in the United Kingdom

When the Inquiry was initiated it was recognised that it would, of necessity, deal with material that was potentially prejudicial to trials scheduled to commence in the United Kingdom in October 2008. I was aware that the Attorney-General had given assurances to his counterparts in the UK Government that this material would be protected, and I agreed to this condition. Access to UK-sourced or sensitive material proved a huge obstacle for all involved in the Inquiry.

The case of Dr Haneef arose from intelligence the UK Metropolitan Police Service provided to the Australian Federal Police in late June 2007. As a result, a high proportion of AFP documents were communications received from the MPS during the relevant period or contained information based on those communications. This had a flow-on effect as the material was passed to other Australian departments and agencies with responsibility for aspects of counter-terrorism. Some of the important documents of these departments and agencies incorporated UK material and had caveats on their use without the authority of the originating body.

From the start of the Inquiry the AFP had foreseen some of the problems that might emerge and invited MPS officers, including the Police Liaison Officer posted at the British High Commission in Canberra, to help them determine which of the documents might be prejudicial to the coming trials. These officers took a broad view of the potential sensitivity of the information and prohibited use of many of the AFP documents—including some that originated in investigations conducted by Australian agencies in Australia. This placed both the AFP and the Inquiry in an unworkable position, to the point that the AFP was unable to make a full submission supported by documents and the only option available to the Inquiry was to view documents at AFP premises. Over some weeks efforts were made to reach agreement, through the AFP, with the MPS and the British Crown Prosecution Service on the handling and use of the documents, but these were unsuccessful. The terms insisted on would have severely compromised my independence and were simply not acceptable to me.

On 13 June 2008, at a meeting at the Inquiry's offices with AFP Commissioner Mick Keelty, I was given a redacted submission unsupported by documents. I agreed that Inquiry officers would examine the full submission and associated documents on AFP premises and under close supervision (the condition imposed by the British agencies), with a view to determining which documents the Inquiry required. We worked in this way during the following two weeks, until I advised the AFP that it was a totally impracticable situation and could not be continued. I said I wanted access to all the relevant documents, on Inquiry premises and without supervision, at the earliest possible time. The AFP decided to accede to my request. This was done at considerable cost to the AFP's relationship with the MPS and the Crown Prosecution Service since the action was counter to the terms of the AFP–MPS memorandum of understanding.

Full access to the AFP documents, and consequently to the UK-sourced material held by other departments and agencies, enabled the Inquiry to prepare for the next stage of investigation—interviewing people involved in the events. The question of disclosure and publication of information was crucial to this process and at that stage was still unresolved.

1.6.1 Deliberative documents and Cabinet confidentiality

One important area of investigation for the Inquiry was the role, knowledge and involvement of the responsible ministers at critical points in the case. Much had been made in the media of the part played by various ministers, and public interest in the subject remained high. To determine the facts surrounding the roles played by each minister and their advisers, I needed to examine the pertinent briefings, advice and submissions made to ministers and their responses.

The Department of the Prime Minister and Cabinet was first asked to produce this material on 13 May 2008. There followed some three months of negotiation about the conditions under which the documents could be released. Although the department was active in trying to resolve some of the problems, it was slow to respond to correspondence and to provide to me guidance on the difficulties confronting it and the Inquiry.

The difficulties arose because of the conventions that apply to the handling of the Cabinet-related papers of previous governments. The *Cabinet Handbook*, which sets out the principles and conventions under which the Cabinet system operates, advises ministers and officials:

> 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.[2]

It further states in relation to Cabinet confidentiality:

> Effective Cabinet confidentiality requires the protection of Cabinet deliberations not only at the time an issue was or is current but also in the future. Any attempt at publication (eg in memoirs) of contributions made by individual ministers in Cabinet, no matter how many years ago the debate took place, would amount to a breach of the personal confidentiality and loyalty owed to Cabinet colleagues.[3]

The department sought my assurance that if the documents were to be made available the Inquiry would respect these conventions. In practice, this meant I could discuss Cabinet matters with former ministers and they could comment if

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2 Department of the Prime Minister and Cabinet, *Cabinet Handbook*, 5th edn, PM&C, Canberra, 2004, par. 7.34.

3 ibid., par. 2.12.

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 staff members 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.

Initially, the department was only prepared to make limited Cabinet-related documents available to me personally and at the department's offices. After negotiation, however, and an understanding that the Inquiry would not be publishing witness statements and transcripts of interview, the relevant documents were delivered to the Inquiry in mid-August.

1.6.2 The statement of 25 July 2008

By mid-July the Inquiry was ready to start its interviews. On 9 July 2008 I issued Practice Note No. 2, which set out the procedures I intended to follow in the conduct of interviews, including procedures relating to the publication of transcripts of interview together with any documents referred to in interview. I made it clear that any material or evidence that had a bearing on national security or pending trials would not be published.

It was becoming increasingly evident that the extent of the classified material I would have to deal with in interviews, and the continuing resistance of the British authorities to the disclosure of any of the UK material, would inhibit reference to much of the material in interviews and prevent the subsequent publication of the Inquiry's proceedings in any meaningful way. I did not have the power to declassify documents produced by the Commonwealth departments and agencies: that may be done only by the originating agency. Nor did I have the authority to publish such documents. Unauthorised use of the UK-sourced material had the potential to severely damage Australia's relationship with the United Kingdom.

As a consequence, I advised the Attorney-General that I saw my prime task as being to conduct a full examination of the matters covered by my terms of reference and to prepare a report: to do that satisfactorily I would need to withhold publication of much of the Inquiry's proceedings. The Attorney-General acknowledged the difficulties I was facing and accepted my advice. On 25 July I issued a statement explaining my reasons for deciding to withhold publication of statements, the transcript of interviews and related documents.

In taking this step, I was aware that it would cause dissatisfaction, particularly on the part of Dr Haneef's representatives, who saw publication of the Inquiry's proceedings as a way of gaining further knowledge of the events involving their client, thus putting them in a stronger position to represent his interests. I was mindful of these concerns but considered I had no other viable option. My undertakings to treat all parties fairly were not diminished by the decision to withhold publication.

This change in approach necessitated the withdrawal of Practice Note No. 2 and the issue of a further note setting out the revised arrangements. I issued Practice Note No. 3 on 29 July 2008.

1.6.3 Extension of the Inquiry's reporting date

On 5 September 2008, in response to my request, the Attorney-General granted an extension of the Inquiry's reporting date to 14 November 2008. My reason for seeking the extended time was to compensate for the time lost in gaining access to documents and the consequent delays in the provision of submissions and witness statements. On 10 November 2008 the Attorney-General granted a further short extension until 21 November 2008.

1.7 Witnesses

From the outset it was my intention to interview people directly involved in the case of Dr Haneef in order to inform myself fully about the facts and events associated with him—the administrative and operational environment, the roles and responsibilities of the individuals involved, and the consequences of their actions and decisions.

Practice Note No. 3 set out the conditions under which potential witnesses would be asked for statements and invited to interview and the form interviews would take.

1.7.1 Statements

Having examined the documents and submissions received, Inquiry officers identified the individuals who would be able to provide relevant information. It was immediately apparent in the case of some people that the Inquiry would want to call them for interview, but there was also a group in relation to whom the need for an interview was less clear. Consequently, those assisting me sought statements from quite a wide range of individuals.

All people from whom a statement was sought were approached through their department or agency or, where the Inquiry had been advised, through their legal representative. If officers had changed their place of employment since the time under investigation, their involvement in the Inquiry sometimes necessitated the making of arrangements with their current employer.

Each person was asked to provide a statement that covered as accurately and fully as possible the events in question from that individual's perspective; this would form the basis of their evidence. Each department or agency was asked to facilitate the preparation of statements by allowing individual officers access to documents and other necessary facilities. The Inquiry stressed that each statement should be prepared and signed by the individual concerned. If the person was aware of their interview date, the statement was to be given to the

Inquiry no later than three days before the interview; in all other cases a due date was set.

Overall, the Inquiry found the provision of statements a frustrating process. Very few were received on the date set. Departments and agencies said the considerable work involved in the preparation of statements justified production of the statements according to their own timetable. Such an approach showed scant regard for the time pressures under which the Inquiry itself was working. It was particularly inconvenient for those assisting me to receive statements and supporting documents only shortly before, or on some occasions at, the interview. This left no time for thorough preparation, particularly for comparing statements and documents such as diary and other personal notes. The consequence was that the interviews took longer than might otherwise have been the case, and there was often a need for further statements. No witness suggested that their statement did not represent a correct record of their involvement, but a rather formulaic approach was noticeable in one instance, which I attributed to careful management of the process by the relevant organisation. Such was not the case for individuals who had their own legal representatives.

In total, the Inquiry received statements from 63 individuals. Only one person—Mr Michael Toby (former chief of staff in the office of the Hon. Kevin Andrews MP), who was contacted by telephone—declined to provide a statement. Mr Jamie Fox, currently an officer in the Department of Immigration and Citizenship but previously an adviser in the office of the then Prime Minister, the Hon. John Howard MP, did not receive permission from Mr Howard to make a statement. In accordance with the conventions relating to ministerial staff, as advised by the Department of the Prime Minister and Cabinet, I did not press the matter.

Appendix D lists the names of people who provided statements to the Inquiry.

1.7.2 Interviews

Interviews began on 22 July 2008 and were completed on 16 October 2008. All were conducted at the Inquiry's premises in Canberra; they were not open to the public or the media.

I was present at every interview. Generally, questioning was led by counsel assisting, although for several witnesses the senior solicitor assisting was the principal interviewer. The interviews were conducted in a non-adversarial way, and I often intervened to ask questions or clarify particular points. All interviews were transcribed in full but, in keeping with my statement of 25 July 2008, the transcripts were not published. No copies of the transcript were given to individuals or their organisations or to any other interested party.

The people to be interviewed were advised that they could be accompanied by a legal representative or an independent support person. Practice in this regard varied:

- In some cases counsel was briefed by a department or agency or staff association to represent the witnesses.
- Some witnesses were individually represented by a lawyer.
- In-house lawyers supported some witnesses.
- Some witnesses were accompanied by colleagues.
- The more senior officers, including heads of departments and agencies and former ministers, tended to appear without legal or other support, but this was not universal.

Each person attending for interview had to advise the Inquiry of the status of their security clearance and, where appropriate, that of their legal representative or supporter. In cases where representatives or supporters did not hold the necessary clearance, they were required to leave the interview room if classified material was discussed. Most people attending had the necessary security clearance status, so this situation arose only rarely.

Although there was no formal cross-examination, lawyers and other supporters were given the opportunity to query a point or express a concern when I felt this would be useful. The Inquiry did not allow other departmental or agency representatives or the representatives of other witnesses to observe the interviews in any capacity.

Overwhelmingly, the people invited to interview were residents of and working in Canberra; a small number of witnesses were based in Queensland or elsewhere and had to travel to prepare their statement and attend the interview; in one case, a witness, Detective Sergeant Adam Simms, was brought to Canberra from the United Kingdom, where he now lives.

In general, I was satisfied that witnesses were trying to assist the Inquiry. The passing of time since the events had blunted some witnesses' capacity to give as full an explanation of their participation as I would have liked, but at no time did I have a sense of a witness deliberately trying to mislead or confuse the Inquiry or misrepresent the facts as they knew them. Important witnesses were interviewed at length: Commander Ramzi Jabbour gave evidence over five days, for example.

Appendix E lists the witnesses and, where relevant, their legal representatives.

1.7.3 Interviewing Dr Haneef

The Inquiry did not interview Dr Haneef. When I was appointed I said I would make arrangements to meet him at a suitable time, and if it were not possible to do that in Australia I was prepared to meet him in another mutually acceptable location. Were this to occur it was understood that the associated costs, including the costs of Dr Haneef's representatives, would be met from Inquiry funds.

As with other potential witnesses Dr Haneef was asked to provide a statement. The request detailed specific matters to be addressed, among them his knowledge of the incidents in the United Kingdom and the experience of his arrest and detention. On 12 August 2008 the Inquiry received a relatively short statement from him. In forwarding their client's statement, Dr Haneef's representatives advised that he was unable to provide precise comment on the events in the terms the Inquiry requested because of the time that had elapsed and his lack of access to some documents he regarded as important for refreshing his memory of the sequence and detail of the events and specific communications with him. Mindful of the fact that his representatives had already provided a very extensive submission, I accepted Dr Haneef's position.

When asking Dr Haneef for a statement I also asked if he was prepared to be interviewed by the Inquiry. I was subsequently advised that he was willing to participate in an interview but, because he had recently taken up employment in the United Arab Emirates and was not able to leave his new place of work, his request was that the interview should take place in Dubai.

After reviewing Dr Haneef's statement and considering all the material before me that was directly relevant to my terms of reference, I concluded there was little more to be gained from interviewing him personally and conveyed that to his representatives. I also made it clear to them that I did not consider it part of my terms of reference to make any adverse comment about their client. Nevertheless, I assured them that if Dr Haneef still wanted to speak to the Inquiry we would meet him in Dubai. I was advised on 29 August 2008 that Dr Haneef had accepted my view that an interview was not necessary.

1.8 Consultation

My terms of reference require me to examine a number of matters relating to operational practices within and between Commonwealth and state agencies and any identified deficiencies in the relevant laws or administrative practices. These are areas that have been widely canvassed before and that fall within the roles and responsibilities of some statutory officers. To assist my investigation and the formulation of my findings and recommendations, I met with the following people:

- the Inspector-General of Intelligence and Security, Mr Ian Carnell
- Integrity Commissioner Philip Moss, from the Australian Commission for Law Enforcement Integrity
- the Commonwealth Ombudsman, Professor John McMillan
- the former Commonwealth Director of Public Prosecutions, Mr Damian Bugg AM QC.

I am grateful for the experience, views and insights these people shared with me.

1.8.1 Reports and reviews

The Inquiry also made extensive use of previous reports and other sources dealing, in whole or in part, with the matters covered by my terms of reference. Among other things, I referred to the findings and recommendations of the Street Review[4] and the action subsequently taken by the relevant agencies to implement the review recommendations.

1.8.2 A public forum

On 22 September 2008 the Inquiry convened a discussion forum in Sydney. The purpose was to meet a commitment to provide the opportunity for community input. The forum complemented the invitation for public submissions that had been made at the beginning of the Inquiry. In particular, I wanted to encourage debate about item (d) of my terms of reference, which relates to deficiencies in the relevant laws and the operational and administrative procedures of the Commonwealth and its agencies. The forum was open to the public and the media.

A panel of speakers—Sir Gerard Brennan AC, KBE; David Bennett AC, QC; Ross Ray QC (President of the Law Council of Australia); Dr Ben Saul (Director of the Sydney Centre for International Law); and Nicholas O'Brien, (Associate Professor of Counter-Terrorism at Charles Sturt University and formerly in charge of International Counter Terrorism in Special Branch at New Scotland Yard—addressed the forum. Participants were able to ask questions of the speakers and of others present and to submit papers.

The discussion allowed the Inquiry to hear arguments about the strengths and weaknesses of aspects of Australia's counter-terrorism laws and arrangements and to hear views that might not have come to notice through other processes. I appreciated and benefited from the thoughtful and robust contributions of the speakers and the others present.

The proceedings of the forum, including all papers received, were published on the Inquiry's website.

1.8.3 Preparation of this report

The nature of the Inquiry meant that I did not require formal submissions from counsel assisting and did not see a need to circulate my draft report for comment by the interested parties. I did ask for comment on some specific sections where I felt this would help me refine my findings and recommendations. I also informed some individuals of my findings before I completed this final report. I considered it necessary to do this because of the need to ensure procedural fairness. I did not seek comments widely: I had formed the view that in very extensive interviews

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4 Australian Federal Police, *The Street Review: a review of interoperability between the AFP and its national security partners*, AFP, Canberra, 2008.

any matters that gave rise to criticism were discussed with witnesses and that questions on the most crucial matters had been asked and answered. In dealing with the facts of this case and presenting my findings, I was careful to avoid any suggestion that I was exercising judicial powers.

There might have been some expectation that I would deal in this report with two matters related to the case of Dr Haneef that I have left aside. The first relates to a series of apparent leaks to the media, as reported in the Brisbane press on 8 and 22 July 2007. I was aware that these incidents had been referred to the Queensland Crime and Misconduct Commission and that an investigation was in progress. Although this is a very serious concern, I regard it as marginal to my terms of reference. Further, I consider it one area that I could not have examined satisfactorily without statutory powers to compel appearances or to offer protection to witnesses.

The other matter is the question of compensation for Dr Haneef. The Inquiry's views in relation to Dr Haneef are made clear in this report; the question of any compensation owing to him is outside my terms of reference.

1.9 Constitution of the Inquiry

One of the most contentious aspects of this Inquiry was the fact that it was established without any statutory powers—in particular, as a commission of inquiry under the *Royal Commissions Act 1902*. In establishing the Inquiry, the Attorney-General called it 'an effective and appropriate way to investigate the Mohamed Haneef case … The Clarke Inquiry will enable interested parties to have their say, establish the facts of the case and make appropriate recommendations to ensure Australia's security agencies are functioning as best as they possibly can—individually and collectively'.[5]

In my opening statement of 30 April 2008 I made my view clear:

> The Government has not established this Inquiry as a Royal Commission. This means that the Inquiry does not derive its authority from statute and does not have statutory powers or privileges conferred on it. If I encounter difficulties in conducting the Inquiry arising from a lack of co-operation from any person, the Attorney-General has indicated that he will consider any recommendation from me to reconstitute the Inquiry under the provisions of the *Royal Commissions Act 1902*. However, I have so far received assurances from each of the relevant government agencies that they will fully co-operate with the Inquiry. Each of those agencies will provide me with all relevant documents and information and with access to any personnel who I wish to interview. On that basis, I am confident that the Inquiry can be effectively conducted in its present form.

[5] Attorney-General, the Hon. Robert McClelland MP, News release 011/2008, 13 March 2008.

That view was tested on a number of occasions during the Inquiry—at certain points I gave serious consideration to approaching the Attorney-General—but, now that the Inquiry has concluded, I believe my approach was correct.

1.9.1 Public opinion

Throughout the Inquiry I received exhortations from interest groups (including the law societies and law reform bodies), as well as in the media, to seek statutory powers. Dr Haneef's representatives expressed their views on this to me directly and to the Attorney-General in the strongest terms: their concern was that I would not receive the promised level of cooperation to gain access to documents, that individuals would decline to give evidence, and that consequently they would not have access to information and their client would be disadvantaged.

I think that some making these assertions misunderstood what the differences to the proceedings of the Inquiry might have been had it been conducted under a royal commission. I certainly would have had the power to issue 'notices to produce' in relation documents and to summons witnesses to appear and give sworn evidence, and I would have been able to offer indemnity to witnesses if their cooperation with the Inquiry was likely to place them in an adverse situation. I would also have been able to impose sanctions for failure to comply with my directions.

Contrary, however, to some views or expectations, as a royal commissioner I would not have been under any obligation to conduct hearings in public or to publish the proceedings. There would have been no automatic right for parties to cross-examine witnesses or to see witness statements, exhibits or the transcript of interviews, subject, of course, to the requirement to ensure natural justice.

1.9.2 The options available

As explained, the difficulties besetting this Inquiry stemmed from the nature and source of the associated documents. The breadth of the difficulties was not foreseen at the start of the Inquiry, and statutory powers would not have redressed the problem. The UK Government is not bound to comply with the laws of the Commonwealth of Australia, and the indications were that even if they had been faced with a royal commission the UK agencies would not have changed their position in relation to their material. To press the Australian Federal Police to act would have put it in an untenable position and jeopardised other areas of international cooperation.

My responsibility for protecting national security and other classified information would not have been diminished and the conventions applying to Cabinet papers would still have been a consideration. When confronted with the realities of my ability to use and disclose classified and sensitive material, I took the position explained in my statement of 25 July 2008. Before taking that step I sought independent legal advice about whether the difficulties could be overcome with statutory powers. In short, this advice confirmed that having powers under the

Royal Commissions Act would not overcome the limitations under which I was operating.

At times I felt that my lack of coercive powers affected the timeliness of responses from some departments and agencies and individuals, but this was not sufficient to warrant seeking a change in the constitution of the Inquiry. One practical consideration influenced me in this regard. At my request and on their own initiative, departments and agencies had given me a vast amount of documentary material. Had the status of the Inquiry changed, I believe I would have been obliged to return that material and then issue notices for its production under the statute. In these circumstances it is likely that the most sensitive material would have been the subject of public interest immunity claims and possibly claims of legal professional privilege, which might have had to be settled in court. The implications of this for the cost of the Inquiry and in terms of the time it would have taken to resolve the situation militated against pursuing the option of changing the Inquiry's constitution.

1.9.3 A remedy

In many ways this Inquiry broke new ground. Its informal structure was, I believe, modelled on an earlier inquiry into a prominent case concerning immigration detention.[6] Although there were some similarities between the subject matter of the two inquiries—in that they both dealt with the treatment of individuals by various government agencies and demonstrated some failures of administrative practice—they were in fact quite different. The overlay of national security concerns, counter-terrorism activity and international cooperation made an examination of the handling of Dr Haneef's case much more complex.

I understand the general legal obligations departments and agencies have to protect the security of their documents and the additional specifications of particular pieces of legislation, such as the *Migration Act 1958* and the *Australian Security Intelligence Organisation Act 1979*. In effect, these conditions shifted the authority away from the Inquiry and to the bodies under examination, which was less that ideal. Undertakings of cooperation were not sufficient. As noted, the Inquiry had to promulgate its own arrangements for the protection of classified and sensitive material and eventually take the steps announced on 25 July 2008 and conduct the Inquiry in private. Only after these operational arrangements were put into effect was I able to make satisfactory progress. Notwithstanding these measures, the lack of procedural precision as to the basis of competing rights, interests and obligations limited the Inquiry's efficiency.

It is my view that, in future, inquiries similar to this one should not be conducted in the absence of suitable powers and protections. But nor should they be conducted as royal commissions. Rather, inquiries or independent reviews that involve national security and thus deal with sensitive documentation and

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[6] Mick Palmer AO APM, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau: report*, Commonwealth of Australia, 2005.

evidence should be covered by statutory provisions. At a minimum, these provisions would confer coercive powers in respect of the following:

- production of documents—which might override claims of public interest immunity or legal professional privilege
- appearances before an inquiry
- maintenance of confidentiality
- protection of witnesses.

The expectation is that inquiries established under these conditions would normally be conducted in private, and proceedings would remain confidential, although this would not necessarily preclude conducting hearings in public where circumstances allowed.

Recommendation 1

The Inquiry recommends that the government consider incorporating in legislation the special arrangements and powers that would apply to inquiries and other independent reviews and investigations involving matters of national security.

1.10 Costs

The direct cost of the Inquiry was in the order of $2.75 million from a budget allocation of $3.84 million. No additional funds were sought to cover the extended period of the Inquiry.

1.11 Acknowledgments

I am deeply grateful to the team of people who worked with me on this Inquiry. They displayed a high degree of professionalism and dedication in what were often difficult circumstances. Their willingness and commitment did not waver, and my job was made easier because I had such confidence in their ability and perseverance.

I also acknowledge the cooperation I received from all the government departments and agencies that were involved in the Inquiry. In every case the chief executives of those organisations treated me courteously. They were willing to deal frankly and objectively with the matters concerning their organisations, and they directed considerable resources to meeting the Inquiry's requests. The officers who acted as the contact point for the Inquiry were very helpful too: they were readily available to provide information and to facilitate the production of documents and the appearance of witnesses, and I thank them for their efforts.

Finally, I commend Dr Haneef's representatives. While looking after the interests of their client, they showed respect for the Inquiry and for my position. I appreciated their approach.

2 Departments and agencies: roles and responsibilities

This chapter introduces the main government departments and agencies that were involved in the Haneef matter and discusses their respective roles and responsibilities and the main personnel.

2.1 The Australian Federal Police

The Australian Federal Police is the Commonwealth's primary law enforcement agency. Under s. 8 of the *Australian Federal Police Act 1979*, the AFP's functions include the provision of police services in relation to laws of the Commonwealth, property of the Commonwealth and the safeguarding of Commonwealth interests.

Section 37(2) of the Australian Federal Police Act provides that the Minister for Home Affairs (previously the Minister for Justice and Customs) may give written directions to the Commissioner of the AFP with respect to the general policy to be pursued in relation to the performance of the AFP's functions.

The applicable ministerial direction at the time Operation Rain began was given on 31 August 2004 by the then Minister for Justice and Customs, Senator Chris Ellison. This direction set out 'special areas of focus' to which the Government expected the AFP to give special emphasis. Among these special areas was preventing, countering and investigating terrorism under Commonwealth legislation. They also covered transnational and multi-jurisdictional crime, illicit drug trafficking, organised people smuggling (including sexual servitude and human exploitation), serious fraud against the Commonwealth, 'high-tech' crimes involving information technology and communications, and money laundering. The direction referred to meeting Commonwealth interests by actively fostering relationships with other law enforcement agencies, government and private bodies in Australia and overseas, where the provision and exchange of information was consistent with AFP functions.

The 2004 ministerial direction was replaced by a direction issued in October 2007 by the then Minister for Justice and Customs, Senator David Johnston. The 2007 direction sets out the Government's expectation that the AFP will take a major role in whole-of-government approaches to dealing with crime and security and will work collaboratively with other law enforcement agencies, intelligence organisations, and other government agencies that require law enforcement support. Further, the Government expects that the AFP will continue to develop relationships with overseas law enforcement organisations to support international operational and general law and order outcomes that benefit

Australia's interests. Among the areas the Government expects the AFP to give special emphasis to is countering the threat of terrorism to the safety and security of Australians and Australian interests within and outside Australia and safeguarding the economic interests of the nation from criminal activities such as serious fraud, money laundering, corruption, intellectual property crime and technology-enabled crime.

The AFP is functional in structure, being divided into the following major operational areas:

- Border
- International
- Economic and Special Operations
- Intelligence
- International Deployment
- Counter Terrorism
- Forensic and Technical
- Protection
- Aviation
- ACT Policing.

Each area is managed by a National Manager at Assistant Commissioner level. The National Manager of Counter Terrorism during Operation Rain was Assistant Commissioner Frank Prendergast. Within this area, there were two managers—Manager Counter Terrorism Domestic Operations and Manager Counter Terrorism International Operations. The Manager Counter Terrorism Domestic at the time of Operation Rain was Commander Ramzi Jabbour, who became the Senior Investigating Officer of the investigation and temporarily relocated to the AFP's Brisbane office. During Commander Jabbour's absence from the AFP's Canberra office Federal Agent Luke Morrish acted in his position (Morrish's permanent position was National Co-ordinator Counter Terrorism).

Together with state and territory police forces, the AFP has established a Joint Counter Terrorism Team in each state and territory to prevent, respond to and investigate terrorist activities. The JCTT in Queensland is governed by a memorandum of understanding between the AFP and the Queensland Police Service and generally consists of five AFP members and two officers seconded from QPS. At the time of Operation Rain, the two seconded officers were Detective Sergeant Adam Simms and Detective Sergeant David Timms, each of whom was sworn as a special member of the AFP. The manager of the AFP Brisbane office, who had general supervision of the JCTT, was Federal Agent David Craig.

The AFP also maintains an international network; this includes dedicated counter-terrorism liaison officers posted in Washington DC, London and Bangkok. When Operation Rain began the Counter-Terrorism Liaison Officer at the AFP's London office (within the Australian High Commission) was Federal Agent Sue King; Liaison Officer Federal Agent Paul Morris and Senior Liaison Officer Federal Agent Chris McDevitt were also in the London office. The liaison officers in London received regular briefings from the Senior Investigating Officer for the UK investigation of the London and Glasgow incidents and from other senior officers of the Metropolitan Police Service Counter Terrorism Command. In addition, an AFP officer had been seconded to work with the Metropolitan Police Service in London and, similarly, an MPS officer, Detective Superintendent John Prunty, had been seconded to the AFP in Australia and was working as Senior Counter Terrorism Adviser. Mr Prunty joined Commander Jabbour in the AFP Brisbane office, where he was involved in most management meetings and provided advice and support to Commander Jabbour.

2.2 The Queensland Police Service

The Queensland Police Service is responsible for law enforcement and policing in the state of Queensland. In the context of the AFP-led Operation Rain investigation into Dr Haneef, QPS supported and acted in cooperation with the AFP by providing intelligence, forensic and investigative support in response to the AFP's requests.

QPS understood its role during Operation Rain to be as follows:

- to provide investigative support and specialist assistance in relation to Queensland-based inquiries
- to conduct investigations aimed at identifying and preventing any terrorism-related activity in Queensland—including a continuous assessment and analysis of the threat environment.

The QPS response was coordinated by State Crime Operations Command which had responsibility for investigating state-based terrorism offences. The contribution of QPS resources varied throughout the Haneef investigation but over the first six week period it basically amounted to more than 200 specialist investigators; intelligence, forensics, surveillance, security intelligence, intelligence analysis and forensic computer analysis personnel; forensic accountants; linguistics experts; and administrative support personnel.

At the time of Dr Haneef's arrest QPS had two officers seconded to the AFP's Joint Counter Terrorism Team in Brisbane—Detective Sergeants Adam Simms and David Timms. Although they remained employees of QPS, these officers were governed by and operated within the legislative, operational and administrative structure of the AFP. The secondment was subject to a memorandum of understanding between the AFP and QPS, which came into effect in 2003. The MOU acknowledges the need for collaboration and resource

sharing between agencies during major investigations, including terrorism-related matters. The provisions of the MOU were used by the AFP and QPS during Operation Rain.

Detective Sergeant Simms was one of the officers involved in the arrest of Dr Haneef at Brisbane International Airport on 2 July. Following his arrest, Dr Haneef was initially detained at the AFP's northern headquarters. At about 12.45 am on 4 July he was transported to the Queensland Police Service Brisbane Watchhouse. Apart from when he was being interviewed, Dr Haneef was held in custody at the watchhouse until 16 July; he continued to be held in QPS custody at that location at the direction of the Department of Immigration and Citizenship after his visa was cancelled. On 18 July he was transported to the Arthur Gorrie Correctional Centre and held by the Queensland Department of Corrective Services.

Detective Sergeant Simms was also involved in the formal recorded police interviews with Dr Haneef on 3 July and 13 to 14 July 2007. The second of those interviews was conducted at State Crime Operations Command, QPS headquarters, Brisbane. Detective Superintendent Gayle Hogan and Detective Inspector Robert Weir (both from QPS) were present in the adjacent monitoring room at varying times during the interview.

During Operation Rain, the Australian Federal Police used the structure and resources of the Queensland Joint Counter Terrorism Team, as well as other AFP national assets. The AFP was the lead agency, although the command structure during the investigation included QPS officer Detective Superintendent Hogan. Hogan initially supported the Investigation Coordinator of the AFP (who was the AFP Superintendent of the Joint Counter Terrorism Team in Brisbane), but after a few days she was appointed to the role of Investigation Coordinator in charge of all investigations in Queensland. This position reported to the AFP's Senior Investigating Officer of Operation Rain, Commander Ramzi Jabbour.

Detective Chief Superintendent Ross Barnett of QPS State Crime Operations Command was responsible for oversight of QPS activities during Operation Rain. They were managed by Detective Superintendent Hogan. From 6 July, Detective Chief Superintendent Barnett attended all significant briefings and decision-making forums and discussed operational developments and other matters with the AFP Senior Investigating Officer. Commander Jabbour regularly sought Barnett's input on operational strategies and priorities. On 13 July and in the early morning of 14 July, QPS officers Barnett, Hogan, Weir, Simms and Timms were involved in various discussions or meetings with Commander Jabbour and other federal agents to consider legal advice from a Commonwealth Director of Public Prosecutions senior prosecutor and whether there was sufficient evidence to bring a charge against Dr Haneef.

2.3 The Office of the Commonwealth Director of Public Prosecutions

The Office of the Commonwealth Director of Public Prosecutions was established on 5 March 1984 by the *Director of Public Prosecutions Act 1983*. The functions and powers of the Director, as set out in the Act, include the power to institute and carry on prosecutions for offences against the laws of the Commonwealth. The Prosecution Policy of the Commonwealth provides guidelines on when prosecutions should be instituted or continued. The CDPP does not have any investigative function but is responsible for the prosecution of criminal offences against the laws of the Commonwealth and for recovering the proceeds of crime. It depends on other agencies to investigate offences and prepare briefs of evidence, which are then referred to it for assessment and, if appropriate, prosecution. A large proportion of briefs referred to the CDPP come from the Australian Federal Police. Although some other agencies (such as the Australian Taxation Office, Centrelink and the Australian Securities and Investments Commission) also refer briefs of evidence to the CDPP, counter-terrorism matters are referred exclusively by the AFP. On 6 September 1999, the AFP and the CDPP signed a general memorandum of understanding to formally regularise arrangements between the two organisations.

One of the CDPP's primary functions is to determine whether a prosecution should be instituted or continued on the basis of the admissible and reliable evidence available. The powers granted to the Director by the Director of Public Prosecutions Act include a power to do anything incidental or conducive to the performance of any of his or her other functions. Regulations under the DPP Act authorise the CDPP to provide legal advice to an agency. In practice, legal advice or similar assistance is often provided to an agency during the course of an investigation and before any decision is made as to whether a prosecution should be initiated. For example, the CDPP regularly provides to the AFP and other agencies legal advice on whether an investigation is warranted; in relation to drafting applications for a surveillance device, listening device or telephone interception warrants; concerning the admissibility of evidence and the elements of particular offences, and; of a general nature unrelated to an actual investigation but intended to provide guidance for the conduct of future investigations. The counter-terrorism laws are relatively new and are complicated. Conduct that previously would not have attracted criminal liability might now amount to an offence under Part 5.3 of the Criminal Code. It will usually be desirable for the CDPP to be consulted about a counter-terrorism matter once a criminal investigation has begun and when there is a real prospect that the matter will be referred to the CDPP for consideration of prosecution action.

The CDPP has its head office in Canberra and regional offices in all states and the Northern Territory. At the time of Dr Haneef's arrest, 23 CDPP officers nationally (but not including executive and support staff) were directly involved in aspects of counter-terrorism work. The head of each regional office is a deputy director. There are also deputy directors in head office—they have responsibility for particular branches of the organisation. For example, there are separate branches

dealing with legal policy, general prosecutions, and the proceeds of crime. Counter-terrorism matters are the responsibility of the Deputy Director of the Commercial, International and Counter-Terrorism Branch. The counter-terrorism area of this portfolio was created in November 2004 following the introduction of Part 5.3 of the *Criminal Code Act 1995*. Regional counter-terrorism branches have been set up in the Sydney and Melbourne offices of the CDPP. In other regional offices, particular prosecutors are designated contact points for counter-terrorism matters.

Since the creation of a separate counter-terrorism portfolio within the CDPP, Mr Graeme Davidson has been the Deputy Director responsible for counter-terrorism prosecutions nationally. He is based in Canberra and has been employed with the CDPP since 1985. He reports to the Director and the First Deputy Director. In accordance with this role, Mr Davidson should be consulted on any CDPP advice in relation to counter-terrorism matters, especially a high-profile case such as the Haneef matter. In July 2007, the Deputy Director of the CDPP Brisbane office was Mr David Adsett. He was appointed to this position in May 2006 and was responsible for the Brisbane office and its officers as well as the Cairns and Townsville sub-offices. Mr Adsett began working with the CDPP in 1984 and has worked in the Brisbane, Sydney and Perth offices, including as Deputy Director of the Perth office between 2001 and 2004. Mr Clive Porritt was the senior contact officer for counter-terrorism matters in the CDPP Brisbane office. He began working with the CDPP in 1986 and has been continuously employed by the CDPP, apart for three-and-a-half years in the 1990s. From December 1994 until March 1997, Mr Porritt was the Acting Assistant Director of the Townsville sub-office. In 2001 he was appointed Assistant Director—General Prosecutions in the Brisbane office; he remained in that position until February 2007, when he transferred to Assistant Director—Tax Prosecutions in Brisbane, the position he held in July 2007. On 13 July 2007, Mr Porritt advised the AFP that in his opinion and on the basis of the material presented to him by the AFP there was sufficient evidence for the police to charge Dr Haneef with the offence of providing support to a terrorist organisation. It was appropriate for Mr Porritt to deal directly with Mr Davidson in counter-terrorism cases and to also keep Mr Adsett informed of any significant and high profile matters involving the Brisbane office. Ms Robyn Curnow was admitted as a solicitor in August 2002 and began work as a junior prosecutor in the CDPP Brisbane office in October 2002. She then worked in General Prosecutions in Brisbane and Darwin until May 2005, when she left the CDPP. In February 2007 she returned to the CDPP Brisbane office, and in July 2007 was working in the Tax Prosecutions Branch. Mr Porritt was her supervisor and she assisted him in reviewing the material provided by the AFP for the purpose of him providing advice on the sufficiency of the evidence.

Primary responsibility for investigating terrorism-related offences rests with Commonwealth and state police. The decision whether or not to arrest and charge an individual with any offence is an operational decision for police. The CDPP will advise only in relation to the initiation of a prosecution, in accordance with the Prosecution Policy of the Commonwealth, which requires that there be

reasonable prospects of obtaining a conviction. Any advice from a prosecutor that could be interpreted as an indication that there is sufficient evidence to initiate prosecution is to be given in accordance with the Prosecution Policy. The CDPP can advise police as to the elements of an offence or whether particular evidence might satisfy elements of particular offences, but it does not advise police as to whether or not an arrest should be made. If sufficient material has been provided to allow a CDPP prosecutor to conclude that the Prosecution Policy is satisfied, the CDPP can advise the police to start a prosecution. It remains for police to decide whether the individual is to be arrested and charged or proceedings are to be initiated by summons.

2.4 The Department of Immigration and Citizenship

International law recognises every country's sovereign right to determine who can enter and remain within its territorial borders. In Australia's case, the *Migration Act 1958* establishes the visa system as the sole legal basis on which non-citizens are entitled to travel to, enter and remain in Australia. The Department of Immigration and Citizenship is responsible for administering the Migration Act. Part of its role is to determine the visa and visa conditions on which non-citizens can enter and remain in Australia. This role necessarily entails a right to cancel a non-citizen's visa if the visa conditions are no longer being met.

In relation to the Haneef matter, throughout July 2007 DIAC participated in various government and interagency meetings and discussions about the 'whole-of-government' response to the terrorist incidents in the United Kingdom and Dr Haneef's alleged involvement. DIAC's initial focus was on preparing and exchanging information about border security issues and ascertaining Dr Haneef's visa status. As events progressed DIAC was mainly concerned with considering all possible options for action arising from Dr Haneef's visa status—specifically, cancellation, detention and removal—and preparing documentation to enable the Minister for Immigration and Citizenship to consider visa cancellation.

The Migration Act contains a number of powers which provide for cancellation of a non-citizen's visa. Dr Haneef's visa was ultimately cancelled on character grounds on 16 July 2007 under s. 501(3) of the Act. The Minister for Immigration and Citizenship at the time was the Hon. Mr Kevin Andrews MP. Mr Andrews held this position from 30 January 2007 to 3 December 2007. Mr Michael Toby was Mr Andrews' Chief of Staff. Mr Andrew Metcalfe was the Secretary of DIAC and maintained regular contact with the Minister's Office. With the exception of the period 6 to 16 July 2007, Mr Metcalfe was responsible for overall management, coordination and supervision of the different sections of DIAC that were working on the Haneef matter. Between 6 and 16 July Mr Bob Correll was Acting Secretary of DIAC in Mr Metcalfe's absence. Mr Correll played a central role in whole-of-government considerations—particularly through participation

in National Counter-Terrorism Committee[1] and other interagency meetings—and was in regular contact with Mr Toby about the Haneef case.

The cancellation of Dr Haneef's visa involved a number of areas in DIAC, among them the Compliance and Case Management Division and the Border Security Division.

The Compliance and Case Management Division (CCMD) had the role of ensuring that once a person had entered Australia they were entitled to remain in this country. The Character Assessment and War Crimes Screening Branch was part of the division and was responsible for management and policy matters relating to s. 501 visa cancellations and refusal processes. It was also responsible for all high-profile visa cancellation cases. Mr Peter White was Assistant Secretary of the Character Assessment Branch and Ms Zoe Clarke was Acting Director from 6 July 2007 to mid-August 2007. Mr White was responsible for attending whole-of-government meetings, liaising with the Australian Federal Police to obtain information to provide to the Minister, and preparing the briefing materials that went to the Minister for consideration in relation to cancelling Dr Haneef's visa. Ms Clarke was involved to a lesser extent.

The Detention Operation and Client Services Branch was part of the Border Security Division. Its role was to coordinate contingency planning for the potential immigration detention of Dr Haneef and to implement arrangements for this as required. The branch did not have operational responsibility for determining possible removal options or planning for the potential removal of Dr Haneef: this was the responsibility of the Compliance and Case Management Division, the Compliance Operations and Compliance Resolution Branch and the Removals Operations Section within the Border Security Division. The Detention Operation and Client Services Branch did, however, provide operational planning support and the integration of detention services to support the potential removal operations for Dr Haneef. Mr Steven Dreezer, Assistant Secretary of the branch, was ultimately responsible for coordinating the contingency plans for any detention and removal action if Dr Haneef's visa was cancelled.

2.5 The Australian Intelligence Community

Six intelligence agencies represent Australia's foreign and security intelligence collection and assessment interests and constitute what is referred to as the Australian Intelligence Community:

- the Office of National Assessments
- the Australian Security Intelligence Organisation

[1] The NCTC is an intergovernmental committee established by the National Counter-Terrorism Plan. See Chapter 4 for details.

- the Australian Secret Intelligence Service
- the Defence Intelligence Organisation
- the Defence Signals Directorate
- the Defence Imagery and Geospatial Organisation.

Of these agencies, ASIO played the most prominent role in the Haneef case. A detailed discussion of the security intelligence investigation conducted by ASIO is provided in Section 3.4. DSD and ASIS provided support roles, but this was in response to requests for assistance from other agencies. The unclassified details of their roles are provided in this section, together with a discussion of the role of the Inspector-General of Intelligence and Security, which oversees the Australian Intelligence Community agencies.

The discussion that follows does not deal with the other three agencies: they had no real connection to the events concerning Dr Haneef. Nor is there any substantial discussion of the part played by AUSTRAC (the Australian Transaction Reports and Analysis Centre). AUSTRAC's role in the Haneef matter basically consisted of searching its database and referring financial information to designated agencies such as the AFP. The information AUSTRAC can disclose is limited by the terms of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. In view of AUSTRAC's circumscribed role in the events relevant to the Inquiry's focus, I formed the view that it was unnecessary to seek further information and documents from AUSTRAC.

2.5.1 The Defence Signals Directorate

The Defence Signals Directorate is Australia's foreign signals intelligence agency. It forms part of the Defence portfolio, its principal function being to collect, analyse and distribute intelligence on foreign communications in support of Australia's national and defence interests. (Broadly, 'signals intelligence' is intelligence obtained from electronic communications.) The *Intelligence Services Act 2001* establishes the framework within which DSD is required to operate; the provisions of the *Telecommunications (Interception) Act 1979* also have application to DSD's activities.

DSD had no involvement in decisions associated with the arrest, charge and detention of Dr Haneef or the cancellation of his visa. DSD officers knew only what was told to them through ASIO and AFP reporting and through interagency meetings. The initial request for information came from ASIO and the AFP on 3 July 2007. DSD received the final request for information relating to Dr Haneef on 3 August 2007. During the period of the investigation of Dr Haneef, the primary dates of DSD activity were 5 July 2007 (DSD received five requests for information from ASIO and the AFP); 6 July 2007 (five requests); 8 July 2007 (12 requests); 9 July 2007 (six requests); and 23 July 2007 (five requests). A total of 71 requests were received by DSD during the whole investigation: 37 from the

AFP and 34 from ASIO. In response, DSD issued 58 reports, 55 of which were issued in specific response to requests for information; the other three were narrative reports. (DSD narrative reports are issued in the absence of a specific request and in accordance with national requirements for material found to be of intelligence value in the normal course of operations.) Some responses were a result of requests for name releases, which were answered by email. Some reports were issued in response to multiple requests. In all, DSD issued 15 reports to ASIO and 18 to the AFP; 22 reports went to both agencies. The three narrative reports were sent to both the AFP and ASIO.

In connection with the Haneef case, DSD considered it worked well with the AFP and ASIO and that it responded to requests promptly. In the initial stages of the investigation there was some duplication, but on 7 July it was agreed that any response to ASIO requests could be automatically forwarded to the AFP, without the need for consultation.

DSD representatives also attended interagency meetings with ASIO and the AFP. The purpose of these meetings was to coordinate effort, share information, avoid duplication of work, and align work to the 'customer's' requirements. The meetings covered updates on findings, developments and actions taken during the investigation. DSD regarded these meetings as useful for keeping up to date and for demonstrating how its information helped ASIO. The first interagency meeting was held at ASIO on Wednesday 4 July. DSD estimated that three such meetings were held, the last on Friday 6 July. During normal operations, meetings of this nature were held weekly at the analyst level, whereas during a crisis or other event of significance the meetings occurred more frequently.

From the evidence I saw, DSD acted in accordance with its statutory remit, and its officers performed their functions diligently and professionally in support of the parallel investigations being carried out by the AFP and ASIO. The Inquiry was greatly assisted by the detailed information DSD supplied and by its prompt production of documents.

2.5.2 The Australian Secret Intelligence Service

The Australian Secret Intelligence Service is Australia's agency for the collection of overseas human intelligence—that is, intelligence gained through contact between people. This intelligence focuses on the capabilities, intentions and activities of individuals or organisations outside Australia that affect Australia's security, foreign relations or national economic welfare. The *Intelligence Services Act 2001* covers the operations of ASIS. Some ASIS information is highly sensitive and cannot be included in this part of the report. Nevertheless, ASIS's role in connection with the Haneef matter was circumscribed, so this additional information is quite limited.

ASIS collects raw (meaning unassessed) intelligence and distributes it to customer agencies and departments. It is not responsible for assessment or detailed analysis of the intelligence it collects. In accordance with the Intelligence Services

Act, ASIS is not responsible for performing policing functions or for any other law enforcement activity. Rather, it provides foreign intelligence reporting in response to tasking by the Australian Government and its agencies. In correspondence with the Inquiry ASIS said it had established a crisis team to handle foreign intelligence reporting and requirements resulting from the terrorist incidents in London and Glasgow. Following the arrest of Dr Haneef, the crisis team changed its focus to providing foreign intelligence support to the Australian investigation. ASIS headquarters in Canberra supported its stations' collection efforts by managing tasking from other agencies.

ASIS was not involved in decisions associated with Dr Haneef's arrest, charge and detention or his visa cancellation. The Inquiry corresponded with ASIS and spoke to ASIS personnel. Inquiry personnel also attended ASIS headquarters and reviewed document holdings pertaining to the investigation of Dr Haneef.

2.5.3 The Australian Security Intelligence Organisation

The Australian Security Intelligence Organisation is, as the name suggests, Australia's security intelligence service. Its functions and powers are prescribed by the *Australian Security Intelligence Organisation Act 1979*; its primary role is to advise government on security threats to Australians and Australian interests, both within Australia and abroad. Unlike other Australian intelligence agencies, ASIO has a covert intelligence collection role and an assessment role.

The ASIO Act specifies ASIO's area of responsibility as 'security', which is defined in s. 4 of the Act as the protection of Australia and Australians from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia's defence system or acts of foreign interference whether directed from, or committed within, Australia or abroad.

Pursuant to s. 17 of the Act, ASIO's functions are as follows:

- to obtain, correlate and evaluate intelligence relevant to security
- to communicate any such intelligence for purposes relevant to security and not otherwise
- to advise ministers and authorities of the Commonwealth in respect of matters relating to security
- to furnish security assessments
- to advise ministers and authorities of the Commonwealth in respect of matters relating to protective security
- to obtain foreign intelligence within Australia.

In order that ASIO can carry out its functions, the ASIO Act and the *Telecommunications (Interception and Access) Act 1979* confer on ASIO special

powers.[2] Among these powers are the power to intercept telecommunications, search premises, use listening and tracking devices, inspect mail and, in certain circumstances, question or question and detain[3] individuals. These powers are exercised under warrant issued by the Attorney-General or, in the case of warrants enabling questioning or questioning and detention, by an 'Issuing Authority' (that is, a federal magistrate or judge appointed in writing by the Minister (s. 34AB of the ASIO Act). Warrants can be issued only if strict legislative tests are satisfied.

ASIO is not responsible for the enforcement of any laws of the Commonwealth or of the states or territories.[4] Its investigations are security intelligence investigations, which are unlike the criminal investigations carried out by the AFP and state and territory law enforcement agencies. In the case of the events concerning Dr Haneef, the AFP took the 'lead role' because the primary information presented as a police or criminal matter, with adjunct security intelligence considerations, as a result of terrorist or criminal offences having already been committed in the United Kingdom.

In view of the respective specialist functions of ASIO and domestic law enforcement agencies, ASIO works cooperatively with such agencies where investigations are relevant to both security and the enforcement of criminal laws. In these circumstances, ASIO may communicate intelligence relevant to security to the police. This is consistent with ss. 17(1)(b) and 18(3) of the ASIO Act. Because the definition of 'security' extends ASIO's responsibilities beyond Australia's borders, the organisation also liaises closely with international partners. Where foreign partners provide authorisation, ASIO communicates intelligence received from them to domestic law enforcement agencies, provided that the intelligence is relevant to both security and the functions of the receiving agency.

In addition to oversight by the Inspector-General of Intelligence and Security, ASIO is accountable to the Attorney-General, who is regularly briefed. Section 8A of the ASIO Act also requires ASIO to adhere to guidelines issued by the Attorney-General that are designed to ensure that privacy and personal rights are not infringed beyond the strict requirements of operational need. Further, ASIO is accountable to parliament.

Section 92 of the ASIO Act prevents disclosure of the identity of all ASIO officers (other than the Director-General), employees and agents. For this reason, the Inquiry uses throughout its report the terms 'Officer A', 'Officer B' and so on, as substitutes for the names of ASIO officers and employees.

ASIO began its security intelligence investigation of Dr Haneef on 2 July 2007. The investigation involved considerable resources and officers from various divisions and state and territory offices, as well as liaison with overseas partners.

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2 See Part III, Division 2, of the ASIO Act and Chapter 2, Part 2-2, of the TIA Act.
3 Detention is managed by the relevant police service.
4 *Australian Crime Commission v AA Pty Ltd* [2006] 149 FCR 540 at 32.

In essence, ASIO was responding to and analysing information passed from the AFP, as opposed to collecting its own information. The AFP did the collecting—searching premises, interviewing people of interest, arranging telephone intercepts, and so on—activities that might otherwise have come within the scope of an ASIO investigation. ASIO also supported the AFP's criminal investigation by exchanging information, assisting with the processing of information, and passing on its findings as advice to the AFP.

ASIO liaised closely with the AFP and other relevant government organisations in Canberra and Brisbane. In Canberra ASIO started meetings with organisations on 2 July and continued to liaise daily to share information, carry out trace checking, and discuss the progress of the investigation. In conducting its investigation, ASIO did not question or detain Dr Haneef. Its officers did not participate in and were not present during the interviews with Dr Haneef. Nor was ASIO involved in or consulted about the decision to arrest Dr Haneef on 2 July 2007, the decision to keep him in detention pending charges (although the AFP used some information provided by ASIO for that purpose) or the decision to charge him.

2.5.4 The Inspector-General of Intelligence and Security

The *Inspector-General of Intelligence and Security Act 1986* provides for the appointment of an Inspector-General of Intelligence and Security and regulates the exercise of the Inspector-General's powers. The function of the IGIS is to provide independent oversight of Australian intelligence and security agencies, to ensure that they conduct their activities within the laws of the Commonwealth and the states and territories, behave with propriety, comply with ministerial guidelines and directives, and have regard to human rights. The IGIS does not have jurisdiction over Commonwealth bodies such as the Australian Federal Police, the Commonwealth Director of Public Prosecutions or the Department of Immigration and Citizenship; nor does it have jurisdiction in respect of the actions of ministers.[5] The IGIS monitors the activities of the six Australian Intelligence Community agencies, conducts inquiries that are either self-instigated or requested by government, investigates complaints about the agencies, makes recommendations to government, and provides annual reports to parliament.

The current Inspector-General, Mr Ian Carnell, submitted to the Inquiry that he did have some involvement in Dr Haneef's case. This included asking for and receiving two briefings by senior ASIO officers (in August and November 2007) and a quick examination of selected ASIO records by an experienced IGIS officer (in December 2007). This was an administrative action, rather than a formal inquiry. Mr Carnell submitted:

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[5] Section 8(8)(b), *Inspector-General of Intelligence and Security Act 1986*. The exception to this is in s. 8(1)(d).

> There was nothing revealed by that administrative examination which, in my view, provided the necessary trigger to commence a formal inquiry under the IGIS Act into the relevant activities of ASIO. Nor did anything revealed in the public domain challenge this position. [6]

By letter dated 19 December 2007, the Inspector-General advised the Attorney-General that his examination focused on selected ASIO records. He noted:

> [ASIO] comprehensively documented its numerous investigative activities in close to real time, and appears to have commenced its investigation of Dr Haneef and various associates with a genuinely open mind about his possible connection to persons of security interest, or terrorist related-activities.

Mr Carnell also noted in his advice that, following its initial investigations, ASIO had formed a preliminary view that Dr Haneef was unlikely to have been engaged in activities prejudicial to security. He added, 'This preliminary view strengthened as the investigation progressed, and this [ASIO] assessment was regularly provided to agencies with which ASIO was in close collaboration'.

The Inquiry endorses the Inspector-General's assessment of the ASIO investigation of Dr Haneef. ASIO maintained comprehensive contemporaneous records of its activities and assessments and sought to engage in frequent communication with other agencies, particularly the AFP. It also regularly communicated (both orally and in writing) to government its assessment of Dr Haneef's relevance to security. As Mr Carnell commented to the Inquiry, ASIO 'showed good moral courage in expressing its views'.

On 18 September 2008 Mr Carnell attended the Inquiry; he discussed the parameters of his role and made some general observations about the relationship between agencies of the Australian Intelligence Community and 'customer' organisations, among them DIAC and the AFP. In Mr Carnell's opinion, it is necessary to pay more attention to facilitating the effective and efficient exchange of information between intelligence agencies and other Commonwealth and state and territory departments and agencies, including police forces. He said this means that intelligence agencies should seek legislative change where necessary and appropriate. He also maintained that intelligence agencies should continue to develop detailed documents such as memorandums of understanding with organisations and police forces with which they frequently interact and should provide written guidance to staff to ensure that they understand what they can and cannot do.

Further, Mr Carnell said he favoured the role of the UK 'Independent Reviewer', which is a fully independent role responsible for monitoring and scrutinising counter-terrorism legislation, operations and investigations. In the Australian context, he said, the IGIS monitors the activities of Australian intelligence

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[6] Letter to the Inquiry from the Inspector-General of Intelligence and Security, Mr Ian Carnell, 24 June 2008.

agencies and the Ombudsman provides oversight for the AFP. He argued, however, that a gap exists in the independent monitoring of the conduct of counter-terrorism operations—which regularly involve more actors than intelligence agencies and the police—and the effectiveness of counter-terrorism legislation. In my view, Mr Carnell's general observations have merit.

2.6 The Department of the Prime Minister and Cabinet

The Department of the Prime Minister and Cabinet is the main policy advice and coordination agency in the portfolio of the Prime Minister and Cabinet. It works with other departments and agencies to ensure that the Prime Minister and the Cabinet receive timely and coordinated advice from all areas of government. It also plays an important role in facilitating liaison, coordination and cooperation between the Commonwealth and state and territory governments. Additionally, it coordinates arrangements for meetings of the Council of Australian Governments and convenes meetings of the National Counter-Terrorism Committee and representatives of First Ministers' departments.

During the course of the Haneef matter PM&C played a lead role at the whole-of-government level by convening meetings of various government representatives and managing, or contributing to, the preparation of 'talking points', information briefs and options papers. The aim of this was to ensure that the actions of relevant government departments and agencies were coordinated and to keep government informed of developments and possible options for action in connection with the investigation.

The National Security Division of PM&C was the area most involved in responding to the UK terrorist incidents and the events concerning Dr Haneef. (The division was subsumed by the Office of National Security on 20 December 2007.) The Domestic Security Branch was the lead branch within the National Security Division; it was responsible for providing policy advice and support to the Prime Minister on national security matters, for coordinating the development of integrated national security policy, and for counter-terrorism and border security. The division also worked closely with the Attorney-General's Department to maintain and update the National Counter-Terrorism Plan. The International Division provided to the Prime Minister advice, briefings and support in connection with Australia's international relationships. The Government Division also assisted, administering the relevant legislation, helping the government manage its legislative program, and providing guidance to agencies on a range of whole-of-government processes. On 6 July 2007 the Immigration, Pandemic and Health Security Branch prepared for the Prime Minister a brief on security checking arrangements for overseas-trained doctors seeking to work in Australia. The branch also provided a representative at an interdepartmental committee that focused on visa and passport matters and had the lead in briefing the Prime Minister on the appeals to the Federal Court in relation to the cancellation of Dr Haneef's visa.

Mr Duncan Lewis, a Deputy Secretary in the department, was head of the three divisions that had the greatest involvement in the matters concerning Dr Haneef. He was responsible for national security and international policy advice and coordination, as well as a range of government support services. He also chaired the various government meetings and teleconferences concerning Dr Haneef that were held from Monday 9 July 2007. Mr Hugh Borrowman (First Assistant Secretary, International Division) chaired the meetings held in the week Monday 2 July to Friday 6 July. Mr Angus Campbell (First Assistant Secretary, National Security Division) and Ms Rebecca Irwin (Assistant Secretary, Domestic Security Branch) attended various meetings of government representatives and were involved in the preparation of several documents, including briefs and papers. Mr John Matthews (Assistant Secretary, Immigration Branch) and Mr Jose del Rio (Senior Adviser) were involved in the action taken by Immigration Branch.

Throughout July 2007 PM&C officers also had an important role in providing information and updates to the Office of the Prime Minister. This included, on occasion, the provision of briefs to the Prime Minister but mainly occurred through the conduit of the office's staff and advisers, among them Mr Jamie Fox.

2.7 The Attorney-General's Department

The Attorney-General's Department provides expert support to the Government in the maintenance and improvement of Australia's system of law and justice and its national security and emergency management systems. The department is the central policy and coordinating element of the Attorney-General's portfolio for which the Attorney-General and Minister for Home Affairs (formerly the Minister for Justice and Customs) are responsible.

AGD is also responsible for 'national security, protective security policy and coordination'. This role encompasses the development of legislation relating to national security, working with the public and private sectors on planning for critical infrastructure protection, and the coordination of protective security policies and arrangements. As part of this responsibility, AGD often takes the lead on national security matters and on some counter-terrorism cases that call for policy coordination, as distinct from individual agency roles. AGD did not, however, coordinate the case of Dr Haneef. Rather, its role had four facets:

- dissemination of information on the activities of the AGD Coordination Centre, which is part of the Protective Security Coordination Centre
- provision of legal policy advice on counter-terrorism legislation
- acting as the central authority for mutual assistance requests
- dealing with policy related to the Criminal Justice Stay Certificate.

Between 2 and 29 July 2007 three areas of AGD were involved in the events concerning Dr Haneef—the Protective Security Coordination Centre, the Security Law Branch, and the Mutual Assistance and Extradition Branch.

The Protective Security Coordination Centre played a limited role as a dedicated 'crisis' coordination centre—coordinating the dissemination of information across government and non-government, state and territory agencies about the attack at Glasgow Airport and the arrest, detention and charging of Dr Haneef. It did not have any analytical or decision-making role.

The Security Law Branch had responsibility for the administration of terrorism offences under:

- Part 5.3 of the *Criminal Code Act 1995*—and, in particular, preventative mechanisms available under the Act, such as control orders and preventative detention orders
- the *Australian Security Intelligence Act 1979*
- Part 1C of the *Crimes Act 1914*.

Administering legislation involves providing policy advice on the operation of the legislation and developing amendments to the legislation and its subordinate instruments as necessary. During July 2007 the Security Law Branch was also responsible for briefing the Office of the Attorney-General on any developments in the Haneef matter. Senior officers (usually Mr Geoff McDonald, then Assistant Secretary of the branch) also participated in a number of government meetings, including meetings of the National Counter-Terrorism Committee, a meeting of the Australian Government Counter-Terrorism Committee, interagency meetings, and telephone discussions.

Mr McDonald told the Inquiry this was done to ensure there was full awareness across government of what was happening in relation to Dr Haneef. Information was also transmitted through 'joint' or 'whole-of-government' talking points that the branch coordinated, drafted and disseminated. Additionally, Mr McDonald acted as the liaison point between the Protective Security Coordination Centre, the Security Law Branch and the Mutual Assistance and Extradition Branch as they performed their various tasks.

In submissions to the Inquiry the Security Law Branch's role was said to be to ensure that any discussions about legal aspects of the case—including periods of investigative detention and the policy objectives of the legislation—were properly dealt with. A number of emails from operational agencies (predominantly the AFP) contained questions that were asked of the branch about interpretation of the legislation relevant to the Haneef matter. Among the topics canvassed in these emails were whether questioning during 'dead time' (see s. 23CA(8)) had the effect of 'stopping the clock' and whether investigation periods expired as a result of the interviewee not answering questions or where a decision for extension was reserved by a court. There was also discussion about the need to

legislate to clarify what constitutes 'exceptional circumstances' in bail applications.

The Mutual Assistance and Extradition Branch was responsible for making a mutual assistance request on behalf of the AFP. The Office of the Commonwealth Director of Public Prosecutions drafted the initial request, having been asked to do so by the AFP. The CDPP then forwarded the draft request to the Mutual Assistance and Extradition Branch, which finalised it and submitted it to the Attorney-General, the Hon. Philip Ruddock MP, for approval and signature. The mutual assistance request was signed by Mr Ruddock on 11 July 2007. The Mutual Assistance and Extradition Branch's role also extended to the issuing and cancelling of Dr Haneef's Criminal Justice Stay Certificate.

2.8 Other organisations

More detail about the respective roles and activities of the departments and agencies already discussed is provided in succeeding chapters of the report. Although the Department of Foreign Affairs and Trade and the Australian Customs Service also had some involvement in the Haneef matter, their roles were not significant and did not raise any questions of substance. For this reason they are included in this chapter with comparatively greater commentary.

2.8.1 The Department of Foreign Affairs and Trade

The Department of Foreign Affairs and Trade provides foreign and trade policy advice to the government. It had no direct involvement in the decisions relating to Dr Haneef's arrest, investigation, charging and prosecution, the cancellation of his visa, or the issuing of the Criminal Justice Stay Certificate. Its involvement in events concerning Dr Haneef mainly involved attending meetings of the National Counter-Terrorism Committee, managing implications for the bilateral relationship with India, and facilitating the delivery of documents through diplomatic channels.

The DFAT divisions that had most involvement in the events concerning Dr Haneef were the International Security Division and the South and West Asia, Middle East and Africa Division. The former division's responsibilities include counter-terrorism and weapons non-proliferation. The involvement of the First Assistant Secretary of that division, Ms Jennifer Rawson, arose from the division's counter-terrorism responsibilities, its role in the distribution within DFAT of intelligence assessments and other material, and its role in coordinating departmental briefings for meetings of the National Security Committee of Cabinet and the Secretaries' Committee on National Security. The International Security Division also had responsibility for the memorandums of understanding on counter-terrorism that Australia has concluded with 13 countries.

The South and West Asia, Middle East and Africa Division is charged with promoting Australia's trade and foreign policy interests in South and West Asia, the Middle East and Africa. The First Assistant Secretary of the division, Ms Deborah Stokes, told the Inquiry that strengthening Australia's relationship with India is a priority for the Australian Government. Accordingly, managing Australia's relationship with India during the Haneef matter was very important.

DFAT's attendance at meetings

DFAT officers attended meetings of the National Counter-Terrorism Committee and Australian government representatives on 2, 3 (two meetings), 5, 6, 9, 11 and 12 July 2007. From 16 to 27 July DFAT also participated in the daily telephone hook-ups that were coordinated by the Department of the Prime Minister and Cabinet and involved specific Australian government departments and agencies.

DFAT was usually represented at meetings of the National Counter-Terrorism Committee by someone from the International Security Division. At the time of the events in question, the Ambassador for Counter-Terrorism, Mr Michael Smith, was the department's NCTC member, and the Assistant Secretary of the National Security and Intelligence Branch, Ms Zena Armstrong, was the Liaison Officer. The Director of the National Security Section, Ms Jenifer McAdam, was the alternative contact. Ms Susan Grace, Director of Counter-Terrorism Policy, Counter-Terrorism Branch, within the International Security Division, also attended at least one meeting of the NCTC. Ms Grace had responsibility for coordinating an officials-level Joint Working Group on Counter-Terrorism and Immigration with India. The Working Group was a bilateral forum led by DFAT and with representation from a number of Australian government agencies engaged in counter-terrorism cooperation with India, among them the Department of Immigration and Citizenship, the AFP and members of the Australian Intelligence Community; the forum is convened annually. Ms Grace attended the NCTC meetings because there was potential for the Haneef matter to have an impact on the Joint Working Group's meeting.

Because of the implications of the Haneef matter for Australia's relationship with India, it very soon became apparent that a representative from the South and West Asia, Middle East and Africa Division should also attend the NCTC meetings in order to stay abreast of developments and to convey information about the steps DFAT and the Australian High Commission in New Delhi were taking in relation to India. Ms Stokes or Ms Kathy Klugman, then Assistant Secretary of the South and West Asia Branch, generally attended the meetings. Depending on the agenda for a particular meeting, there was also capacity to arrange for other DFAT officers with relevant expertise to attend.

Participation in whole-of-government meetings allowed DFAT to stay informed of developments in the case and to inform other NCTC participants of its own actions—including its interactions with the Indian Government and the implications any contemplated action against Dr Haneef might have for Australia's relationship with India. The NCTC was generally regarded as an effective vehicle for the exchange of information among agencies. Following

meetings of the NCTC and Australian government representatives, a nominated person who had attended would draft and circulate an email report within DFAT, noting the main items of information obtained at these meetings. These emails were sent to the office of the Secretary, the relevant Deputy Secretaries and the relevant staff of the International Security and the South and West Africa, Middle East and Africa Divisions. The emails were also sent to the Australian High Commission in New Delhi and the Office of the Minister for Foreign Affairs.

In addition to the government meetings, officers occasionally spoke to senior officials in other departments and agencies—for example, the Department of the Prime Minister and Cabinet, the Attorney-General's Department, the Department of Immigration and Citizenship, the Australian Federal Police, and the office of Commonwealth Director of Public Prosecutions in Brisbane. Ms Stokes explained to the Inquiry that the purpose of these conversations was to clarify aspects of the legal and visa processes, so that the information DFAT intended to provide to the Indian Government was as accurate as possible. For example, on 15 and 16 July 2007 DFAT officers made contact with staff in the CDPP office in Brisbane, the AFP and Mr Geoff McDonald (AGD) in order to obtain information about the processes likely to be followed by the court in relation to the charge against Dr Haneef.

Specific tasks were also performed as required. For example, at the NCTC meeting of 6 July DFAT was asked to provide information about the memorandum of understanding between Australia and India and its relevance for facilitating cooperation with India in relation to Dr Haneef in the event that he returned to that country. Australia and India are parties to a bilateral MOU on Cooperation in Combating International Terrorism, signed on 23 August 2003. Under the MOU, the parties agree to cooperate on law enforcement matters, including the prevention and investigation of terrorist activities and the bringing to justice of criminal offenders and the perpetrators of terrorist acts. Advice was sought from, and subsequently provided by, the International Legal Branch within DFAT, and a report on the counter-terrorism MOU was later provided to NCTC members.

The bilateral relationship with India

Providing accurate information to the Indian Government was important. As soon as Dr Haneef was arrested, the South and West Asia, Middle East and Africa Division began assessing the implications of this for Australia's bilateral relationship with India. The arrest immediately became a major media story in India and for most of July received prominent coverage. Much of the coverage was critical of Australia's handling of the case. The Australian High Commission in New Delhi received a large number of inquiries from the Indian media.

The Indian Government took a close interest in Dr Haneef and made numerous requests to the Australian High Commission in New Delhi. These included requests about his treatment. The Indian Government also expressed its concern to the Australian Government. Two officials from the Indian Consulate visited

Dr Haneef on 4 July 2007. Through the consulate, Dr Haneef also had telephone contact with his family in India.

To keep channels of communication open and to mitigate any negative effects on the bilateral relationship, DFAT prepared for the Indian Government information about developments in the investigation. The Australian High Commission sent letters to India's Ministry of External Affairs and also received inquiries from India's Minister for External Affairs, the Indian Ministry of External Affairs and the Indian High Commission in Canberra. The South and West Asia, Middle East and Africa Division contributed to coordination of the exchange of information within the department (including to and from the High Commission in New Delhi) and with the Office of the Foreign Minister. For example, by 17 July 2007 the Indian Ministry of External Affairs had conveyed its concern about developments to the Australian Head of Mission in New Delhi. As a consequence, the then Foreign Minister, the Hon. Alexander Downer MP, indicated his readiness to call his Indian counterpart, the Minister of External Affairs, Mr Pranab Mukherjee. This conversation took place on 31 July 2007.

DFAT's involvement in legal and immigration options

In the context of a whole-of-government approach, DFAT expressed views or played a significant part in relation to three broad aspects of the possible legal and immigration actions to be taken in the Haneef case. The first concerned the possibility that Dr Haneef's passport could be seized or cancelled by the Foreign Minister. Passport and visa questions were also raised at an interagency meeting held at 12.30 pm on 4 July 2007 between PM&C, the AFP, ASIO, DFAT and DIAC. The purpose of the meeting was 'to clarify options for handling Dr Haneef's visa' and to ensure that 'all agencies were clear on current powers available for the cancellation of Haneef's visa should this have to be considered more closely later this week'. A paper titled 'DIAC–DFAT options' was discussed at this meeting. The paper and the discussion at the meeting focused primarily on the available DIAC powers to cancel a visa. Part of the paper and the interdepartmental discussion did, however, deal with the Foreign Minister's powers to seek cancellation of a visa on foreign policy grounds (Migration Regulation 2.43) or to seek the surrender or seizure of a foreign passport under the *Foreign Passport (Law Enforcement and Security) Act 2005*. It was noted that the option of the Foreign Minister exercising his powers was the preferred approach, and the department said that, if this was to be discussed further, a foreign policy interest would have to be clearly established. In an NCTC meeting on 5 July 2007 DFAT argued against the option of the Foreign Minister exercising his powers. At the end of this meeting there was broad recognition that passport seizure and cancellation was not a viable option because maintaining a good relationship with the Indian authorities was essential.

The second legal and immigration matter on which DFAT expressed views concerned the visa cancellation and deportation scenario. On 12 July Ms Armstrong and Australia's High Commissioner to India, Mr John McCarthy AO, communicated by telephone and email about a potential situation arising

wherein the AFP released Dr Haneef from detention and the Minister for Immigration made a decision to deport him. Mr McCarthy was adamant that deportation of Dr Haneef would be poorly received in India and would be perceived as 'flying in the face of ministerial comments about the presumption of innocence'. At the same time, the Minister for Foreign Affairs was firmly of the view that 'visa revocation and deportation should not be precipitate' and that Dr Haneef should be given an opportunity to return to India voluntarily. Ms Armstrong conveyed these views directly to the Department of Immigration and Citizenship (Mr Bob Correll) and to the Department of the Prime Minister and Cabinet. DFAT stressed that such action would need to be handled carefully in order to minimise bilateral tensions and not impinge on future police and intelligence cooperation with India. Ms Armstrong noted in an email dated 13 July that these concerns had been acknowledged by PM&C, DIAC and the AFP.

The third matter concerned forwarding formal documents such as the mutual assistance request through diplomatic channels.

In addition to DFAT's involvement in the whole-of-government discussions that focused on these three matters, officers were also involved in preparing briefing papers and talking points. For example, talking points were prepared for use by the Australian Foreign Minister in his phone call to the Indian External Affairs Minister; they were also prepared in response to media criticism that the Australian Government had not informed the Indian Government of vital information, as well as for possible use by the Prime Minister in any conversation with the Indian Prime Minister. A briefing paper was prepared for the Acting Minister for Foreign Affairs, who was participating in a meeting of the National Security Committee of Cabinet on 16 July 2007.

From the DFAT perspective, the National Counter-Terrorism Committee agreed that a central agency (initially the AFP and then the Attorney-General's Department) would prepare and update a single set of media talking points for use by all agencies involved in the case. DFAT thought, however, that the talking points were not prepared early enough to provide adequate support for ministers.

2.8.2 The Australian Customs Service

The Australian Customs Service manages the security and integrity of Australia's borders. It derives its authority mainly from the Constitution, which provides for the levying of customs duties and for laws associated with trade and commerce. Customs' constitutional authority is given legislative expression through the *Customs Act 1901*, the *Customs Tariff Act 1995* and related legislation. On behalf of other government agencies, Customs also administers legislation in relation to the movement of goods and people across the Australian border.

Customs was established in its present form on 10 June 1985 by s. 4(1) of the *Customs Administration Act 1985*. It became responsible to the Minister for Justice

and Customs (now Minister for Home Affairs) on 21 October 1998, as an agency within the Attorney-General's portfolio. Subject to Chief Executive Officer statutory powers, the Attorney-General has overall responsibility for the portfolio and its departments and agencies.

Customs works closely with other government and international agencies—in particular, the Australian Federal Police, the Australian Quarantine and Inspection Service, the Department of Immigration and Citizenship and the Department of Defence—to detect and deter unlawful movements of goods and people across Australia's border. It is a national organisation, having more than 5,500 employees in Australia and overseas. The central office is in Canberra.

Counter-terrorism and improved quarantine intervention are high on the Government's list of priorities. As Customs notes on its website, it plays an increasingly important role in contributing to the whole-of-government approach to protecting Australia from potential terrorist threats by 'undertaking cargo intervention and passenger screening'. Airlines provide Customs with advance notice of passenger details, which are analysed to identify risk factors. Customs also checks departing passengers and their baggage and has adopted innovative technologies to respond to the increasing numbers of international travellers.

Throughout July 2007 Customs was involved in a number of activities in support of the AFP-led investigation into Dr Haneef. Customs officers did not, however, make decisions concerning the arrest, detention and charging of Dr Haneef.

At about 5.30 am on 2 July 2007 Commander Ramzi Jabbour from the AFP contacted Mr John Valastro, who was the National Manager, Border Targeting, within the Intelligence and Targeting Division of Customs. Commander Jabbour asked Mr Valastro to provide Customs information about several people whom UK authorities had identified as being of interest in relation to the Glasgow terrorist incident. Mr Valastro contacted Mr Scott Curtis, Manager of the Counter-Terrorism Targeting Unit within the Intelligence and Targeting Division, to inform him of the request and asking him to provide the details of the people in question. The Counter-Terrorism Targeting Unit in Canberra responded to this and related requests from client agencies.

On the night of 2 July Customs officers assisted AFP officers in connection with the arrest of Dr Haneef at the Brisbane International Airport. This assistance involved monitoring Dr Haneef's movements at the airport, covertly examining Dr Haneef's checked baggage, providing information and material requested by the police, and enabling police officers to intercept Dr Haneef before he boarded his flight. The Customs Act empowers Customs to search goods, overtly and covertly, that become subject to Customs' control. Sections 186 and 189 of the Act relate to the authority to search goods in a Customs-controlled area.

On 5 July Commander Jabbour again contacted Mr Valastro and asked for a full-time Customs presence at the AFP offices in Brisbane. Mr Valastro phoned Mr Curtis and directed him to coordinate the provision of Customs analytical staff to the Joint Intelligence Group, set up in the AFP office in Brisbane, and

Customs involvement on a national basis. By 6 July officers from the Queensland office of Customs were co-located with the AFP office in Brisbane. Additional Customs support was provided from Canberra. In total, six Customs analysts were attached to the AFP investigation and worked around the clock. Customs officers provided analytical support to the AFP's Operation Rain and joined the combined intelligence team established in the AFP office in Brisbane.

As part of Operation Rain, Customs analysts worked continuous shifts from 6 to 13 July. From 13 July this was reduced to 16 hours a day (6.00 am to 10.00 pm) seven days a week. The Customs presence was scaled back in keeping with a reduction in the number of requests from the AFP. From 19 July Customs support to the AFP investigation was reduced to the provision of support through normal business activity. On 21 July Customs officers from Canberra and New South Wales were withdrawn from the Brisbane-based Joint Intelligence Group, although a senior analyst from the Queensland Customs office remained attached to the operation part time in order to respond to requests as they arose.

Although some interconnectivity problems arose with the sharing and transmission of information and data between Customs and the AFP, these were effectively resolved by the adoption of alternative and more rudimentary means. In supporting the AFP-led investigation, Customs analysts accessed and used several of the AFP's databases and systems daily. In providing assistance to the AFP, Customs staff, resources and airport facilities were used in accordance with usual practice in relation to passenger alerts and in accordance with the terms of the memorandum of understanding between Customs and the AFP. The MOU was signed on 19 September 2004; it includes the Counter Terrorism Annex, signed on the same date. There is currently no MOU between Customs and ASIO, but an MOU signed in 2002 exists between Customs and the agencies that have access to a database Customs maintains.

Mr Valastro forwarded briefs to the Customs CEO and other members of the Senior Executive Service on 6, 10, 13 and 20 July 2007. These provided high-level overviews of Customs activities in relation to the investigation. Mr Valastro said he 'had very limited contact with the AFP', largely because Customs involvement in the investigation was limited to the provision of analytical support. On-the-ground decisions about resources rested with Mr Curtis, although Mr Valastro approved the overall Customs resource commitment. Mr Valastro said he needed to know the day-to-day developments in the investigation only if they represented an escalation of risk and/or resource commitment, which he thought 'did not occur'. Mr Curtis managed and coordinated Customs resources during the 19 days of the operation. Mr Curtis said he was briefed on the operation by the AFP in the Joint Intelligence Group at one stage only. He said he was unable to be briefed further about the matter because the sensitivity and classification of the information were high level, and he did not have the requisite 'need to know'.

On the basis of evidence and material provided to it, the Inquiry formed the view that Customs support to Operation Rain was provided in a routine and efficient manner. The operational relationship between Customs and other agencies—in

particular, the AFP—was productive and professional. Apart from some low-level obstacles related to systems interconnectivity, no problems arose with the operations performed by Customs in the Haneef matter.

3 The case of Dr Mohamed Haneef

Dr Mohamed Haneef, an Indian national, arrived in Australia with his wife on 11 September 2006. He had been granted a subclass 457 business (long stay) visa and was sponsored by his employer, the Queensland Department of Health. The visa was valid from 30 August 2006 to 30 August 2010. Dr Haneef began work as a medical doctor at a Gold Coast Hospital on 18 September 2006, having taken up residence in Pohlman Street, Southport. In March 2007 his wife returned to India in order to have family support during the final months of her pregnancy. Dr Haneef continued working at the hospital. Their daughter was born in Bangalore on 26 June 2007.

In the last days of June 2007 and during July there occurred a series of extraordinary events that were to have profound impacts on Dr Haneef.

3.1 The arrest

3.1.1 The UK incidents

On 29 June 2007 at about 1.40 am UK local time (10.40 am AEST) a vehicle containing an improvised explosive device was found in central London. The Metropolitan Police Service subsequently found a second vehicle that contained an explosive device configured in a similar fashion and that had been parked about 400 metres from the first vehicle.

On 30 June 2007 at about 3.15 pm UK local time (1 July, 12.15 am AEST) a Jeep Cherokee was driven into the front doors of Terminal One at Glasgow International Airport. It burst into flames. One of its occupants, Dr Bilal Abdulla, was arrested at the scene; the other occupant, Mr Kafeel Ahmed, suffered severe burns and was taken to hospital, where he later died.

The MPS Counter Terrorism Command briefed Australian Federal Police officers stationed in London on the incidents. Information from these briefings was reported to the AFP in Canberra. The initial briefings noted that no link to Australia had been established at that point.

3.1.2 Initial investigations in Australia

The AFP in Canberra first became aware that there could be an Australian connection to the UK attacks when Commander Ramzi Jabbour received a phone call from Detective Superintendent John Prunty at 4.50 am (AEST) on Monday 2 July 2007. Commander Jabbour worked at AFP headquarters in Canberra as Manager Counter Terrorism Domestic; Mr Prunty was an officer of the MPS

Counter Terrorism Command who had been seconded to work with the AFP in Canberra. During this phone call Mr Prunty informed Commander Jabbour that the MPS CTC urgently wanted to learn the whereabouts of Dr Haneef. It considered that Dr Haneef had a possible connection with the incidents in London and Glasgow, and information suggested that he was in Australia. Prunty and Jabbour arranged to meet at AFP headquarters.

Mr Prunty gave Commander Jabbour a more detailed briefing when they met, at about 5.30 am. Jabbour was told that the MPS CTC thought a mobile phone subscribed in Dr Haneef's name was of significance to the UK investigation into the London and Glasgow incidents. Mr Prunty said the phone had been used during the planning of and preparations for the incidents and that one of the people arrested in the UK, Dr Sabeel Ahmed, had told police Dr Haneef had left the phone at his (Sabeel's) home. Commander Jabbour said Mr Prunty told him the MPS CTC considered Dr Haneef to be their 'number one most wanted person' in connection with the UK incidents and potentially a member of the group involved in the attacks. It was clear to Jabbour that locating Dr Haneef was a high priority for the MPS CTC at that time.

Commander Jabbour searched the AFP's PROMIS case management system and ascertained that Dr Haneef could be living in Southport, Queensland. Jabbour then telephoned Federal Agent David Craig, who was at that time responsible for supervision of the Joint Counter Terrorism Team in Queensland and was manager of the AFP Brisbane office. Commander Jabbour told Craig of the information received from the MPS CTC.

After speaking with Commander Jabbour, Federal Agent Craig left his home to travel to the AFP Brisbane office. On the way, he called Detective Sergeant Adam Simms and asked him to come to the office. (Simms was one of two officers from the Queensland Police Service who had been seconded to the Joint Counter Terrorism Team.) They met at about 6.30 am, and Craig briefed Simms on the information received from the MPS. Craig told Simms that the exact nature of the interest in Dr Haneef was unknown but that his whereabouts and movements were of high importance to the MPS.

Craig made arrangements for covert surveillance at Dr Haneef's residential premises in Southport; this began at about 7.40 am. At about the same time there was a conference call between Craig and Simms and AFP officers in Canberra, including Federal Agent Sue Thomas, who worked in AFP counter-terrorism intelligence. The discussion noted that the information available thus far was limited, but that Dr Haneef was of interest because of a SIM card that had been identified during the MPS investigation. It was agreed that the AFP would carry out national checks and the Joint Counter Terrorism Team in Brisbane would make local inquiries.

Commander Jabbour separately briefed Assistant Commissioner Frank Prendergast and Federal Agent Luke Morrish, National Coordinator Counter Terrorism, on the information received from the MPS. Prendergast then contacted

a First Assistant Director-General in ASIO to pass on the information. Federal Agent Craig provided further briefings to AFP officers and an ASIO officer based in Brisbane.

Later that morning Jabbour chaired a meeting at AFP headquarters in Canberra to discuss the information received from the MPS. In addition to AFP officers, those present included Detective Superintendent Prunty and an ASIO representative. Following this meeting, ASIO began its own intelligence investigation of Dr Haneef in order to determine whether he posed a threat to security and to provide advice on the matter to government.

During the day AFP and Queensland Police Service officers in Brisbane, including Detective Sergeant Simms and Federal Agent Neil Thompson, made a range of local inquiries and checks with a view to obtaining further information about Dr Haneef.

A meeting of the National Counter-Terrorism Committee was held at 3.00 pm on 2 July to update government representatives on the UK incidents; it was noted that there was a potential Australian connection. Very little was known about Dr Haneef at this stage. Two teleconferences were also held, at 2.00 pm and 5.30 pm, between representatives of the Department of the Prime Minister and Cabinet, the AFP and ASIO to discuss developments relating to the UK attacks and the possible implications for Australia.

At about 5.36 pm on 2 July Federal Agent Craig was advised that Dr Haneef's car had been located. He passed this information to the AFP in Canberra. At about 6.40 pm Assistant Commissioner Prendergast instructed Craig through Federal Agent Morrish that 24-hour surveillance should be maintained on Dr Haneef's address and vehicle.

3.1.3 Events at the airport

At about 8.10 pm on Monday 2 July 2007 the AFP saw a person fitting Dr Haneef's description waiting at the front of the Southport address. Shortly afterwards, a minibus arrived and the person was seen to board it. AFP inquiries revealed that the minibus was a 'door-to-door' service destined for Brisbane Airport. On receipt of that information, Simms and Thompson drove to Brisbane Airport, where they saw the minibus arrive at about 9.00 pm and followed it to the International Terminal. After entering the terminal, Simms and Thompson saw the person fitting Dr Haneef's description in the queue at the Singapore Airlines counter and covertly identified him as Dr Haneef.

Thompson phoned Federal Agent Craig and gave him an update. Craig then passed this information on to Federal Agent Morrish in Canberra. Craig and Morrish agreed that Dr Haneef would continue to be monitored while guidance on a suitable course of action was sought from Commander Jabbour and the MPS. Thompson also phoned the Customs Duty Manager at Brisbane Airport to inform him of the AFP's activities. While Simms and Thompson kept Dr Haneef under

surveillance in the departure lounge. A number of checks were arranged to be performed by Customs officers.

At about 9.45 pm Federal Agent Craig (in Brisbane) had a further phone conversation with Federal Agent Morrish (in Canberra) in which they discussed a number of options. Morrish advised Craig there was no need to intercept Dr Haneef at that stage. Craig then phoned Thompson at Brisbane Airport and told him the AFP in Canberra was prepared to allow Dr Haneef to leave the country, but they should proceed with the covert search of his luggage and try to find out the details of his travel arrangements.

At AFP headquarters in Canberra Federal Agent Morrish updated Assistant Commissioner Prendergast and Commander Jabbour by telephone and suggested that further advice be sought from the MPS CTC. At about 10.00 pm Jabbour informed Mr Prunty of Dr Haneef's imminent departure and sought clarification about the position of the MPS. Prunty advised Jabbour that the MPS was not opposed to the AFP approaching Dr Haneef and taking whatever overt action was considered appropriate. According to Jabbour's note of this conversation, Prunty said the MPS had 'downgraded' the direct threat posed by Dr Haneef, on the basis that he had not been in the United Kingdom at the time of the London and Glasgow incidents. Prunty also told Jabbour that the handling of Dr Haneef was a matter for the Australian authorities and reaffirmed that Dr Haneef remained a suspect in the MPS investigation.

In phone conversations Assistant Commissioner Prendergast advised Commander Jabbour and others that Dr Haneef should not be allowed to board the aircraft until he had been questioned. Prendergast said his advice was based on the need to protect the safety of the people on the aircraft, to ensure that there was no existing threat to Australia, and to collect and preserve any evidence relating to Dr Haneef's possible connection to the UK incidents. Morrish said he was directed by Prendergast to inform Craig that Dr Haneef should not be allowed to board the plane or leave the country. Morrish was also told by Jabbour that it might be appropriate to arrest Dr Haneef and execute search warrants to obtain further evidence.

At 10.05 pm Federal Agent Craig in the AFP Brisbane office received a voicemail message from Federal Agent Morrish in Canberra. The message said, 'Ramzi [Jabbour] thinks it may be appropriate to arrest Haneef and do a search warrant on his property'. Craig phoned Federal Agent Thompson at Brisbane Airport and advised him that the AFP in Canberra now wanted Dr Haneef to be arrested. Thompson told Craig he did not think he had sufficient grounds to arrest Dr Haneef because there was insufficient evidence that Dr Haneef had committed an offence; Thompson asked for further information.

At about this time Craig called Morrish, who relayed advice from Prendergast that Dr Haneef was not to board the plane or leave the country. Craig said Morrish told him Prendergast had instructed that Dr Haneef be arrested. (Morrish did not recall using these words but accepted it was a fair inference

from what had been said.) Craig told Morrish there was insufficient information to arrest Dr Haneef, and Morrish undertook to ask Jabbour to speak directly to Craig about the grounds for arrest since Jabbour had the greatest knowledge of the available information.

Commander Jabbour phoned Federal Agent Craig at about 10.23 pm and told him he considered there were reasonable grounds to believe that Dr Haneef had committed an offence against ss. 102.7(1) or 102.7(2) of the Criminal Code and there were therefore grounds to arrest him without warrant. According to Jabbour, Federal Agent Craig indicated he shared that belief. Craig maintained that the information given to him by Jabbour during this phone call had 'vastly increased [his] grounds for believing Dr Haneef had committed an offence', and it was at that time that he first formed a belief that Dr Haneef had committed an offence against s. 102.7 of the Criminal Code. Although the information was described by Craig as 'fairly generic', it carried weight in Craig's mind because it had come from a reliable source (Jabbour) who had had access to an MPS officer (Prunty) throughout the day. Both Jabbour and Craig had agreed that it was a matter for the arresting officers to form their own independent belief and to decide for themselves whether there were grounds to arrest Dr Haneef.

Craig summarised in a diary note the information Jabbour furnished to him. At 10.30 pm Craig phoned Federal Agent Thompson at Brisbane Airport and passed on Jabbour's information. Thompson made a record of this information in a handwritten note:

> 1023 hrs from Jabbour
>
> 1030 by CCT Craig to F/A Thompson
>
> UK intelligence service has been working on this group for quite some time. The group has been using a mobile phone SIM card in Haneef's name. One of the Glasgow airport bombers has told Metropolitan Police that he has been in e-mail contact with Haneef within the last week. There has been money sent to Liverpool which has been linked to group.

Both Craig and Thompson understood 'group' to refer to the group responsible for the Glasgow bombing. Craig told Thompson he and Simms would need to consider for themselves whether they believed there were grounds for arresting Dr Haneef. Thompson told Craig he believed there were grounds for arrest. As Craig described it, the situation had progressed 'from trying to locate a person to, within minutes, this guy is getting on an international flight and he could be a terrorist'. Craig and Thompson did not have a technical discussion about the specifics of any particular offence: in Craig's mind 'it was supporting a terrorist group, and it could be broadly financing, it could be provision of material support'.

According to Federal Agent Thompson, Craig had told him the information had come from Jabbour and originally from the MPS. Thompson was also aware that the AFP's inquiries during the day had revealed that Dr Haneef had sent money

overseas to the UK, which corroborated part of the information provided by the MPS. On the basis of the information originating from Jabbour and taking into account some ancillary reported information, Thompson formed the view that there were sufficient grounds to arrest Dr Haneef for providing support or resources to a terrorist organisation. At that time Thompson believed that the relevant support or resources provided by Dr Haneef related 'to the provision of the SIM card' and 'the fact that money was going overseas to various accounts'. Thompson said he informed Simms of his discussion with Craig and the advice he had received through him from Jabbour.

According to Detective Sergeant Simms, Thompson told him he had been advised that Dr Haneef should be arrested. Simms understood that this advice had come from Jabbour. But, even if a direction to arrest had been given, Simms knew that the arresting officer was still required to form the requisite reasonable belief before making any arrest. Simms formed an opinion that there were reasonable grounds to believe, and he did believe, that Dr Haneef had provided and was providing support to a terrorist organisation—namely, the organisation responsible for the UK incidents. He believed that such support could include the provision of funds and the provision of the phone or SIM card, but he had not turned his mind to the particulars of the offence. In forming his belief, Simms placed considerable weight on the advice from Jabbour, particularly in the light of Jabbour's position as Manager Counter Terrorism Domestic. Simms also formed his belief on the basis of the AFP inquiries conducted that day, including the information about the transfers of money overseas and ancillary reported details. Although Simms thought Dr Haneef appeared slightly nervous at the airport, he did not at that time think Dr Haneef might be leaving the country in a hurry.

Simms told Thompson he considered there were grounds to arrest Dr Haneef. Thompson agreed. Simms and Thompson then decided they would make the arrest just before Dr Haneef boarded his flight. A Customs officer escorted Simms and Thompson to the departure gate, where they approached Dr Haneef. At 11.05 pm Simms arrested Dr Haneef for the offence of providing support to a terrorist organisation contrary to s. 102.7 of the Criminal Code.

Shortly afterwards Thompson advised Federal Agent Craig that Dr Haneef had been arrested and that he appeared nervous. Craig then conveyed this information via text message to a number of people, including Commander Jabbour, Federal Agent Morrish and two ASIO officers.

3.1.4 Aspects of the arrest

Section 3W(1) of the *Crimes Act 1914* authorises a constable to arrest a person without warrant if the officer believes on reasonable grounds that the person has committed or is committing an offence and that proceedings by summons would not achieve one or more specified purposes, including ensuring the appearance of the person before a court in respect of the offence.

In the circumstances where Dr Haneef was about to board an international flight and leave Australia, it is open to conclude that there were reasonable grounds for Simms's belief that proceeding by summons would not have ensured the appearance of Dr Haneef before a court in connection with the offence for which he was arrested.

The more contentious question is whether there were reasonable grounds for Simms to believe that Dr Haneef had committed the offence of providing support or resources to a terrorist organisation contrary to s. 102.7 of the *Criminal Code Act 1995*.

Simms's belief was primarily based on information and advice he had received from Jabbour through Craig and Thompson. This information was to the effect that the group responsible for the incident at Glasgow Airport had used a mobile phone and/or a SIM card that was registered in Dr Haneef's name, that one of the people arrested in the United Kingdom had been in recent contact with Dr Haneef, and that Dr Haneef had sent to the United Kingdom money that was linked to the group responsible for the attacks. It appears that Simms attached greater weight to the information because it had come from Jabbour. Although Simms was aware of the need to form his own independent belief, he agreed that the fact that he was told Jabbour had advised that Dr Haneef should be arrested added support for his belief that there were grounds to arrest.

The belief Simms formed did not distinguish between the offences created by ss. 102.7(1) and 102.7(2) of the Criminal Code. In other words, at the time of the arrest neither Simms nor Thompson appears to have formed any particular belief in relation to the question of whether Dr Haneef had provided support or resources to an organisation knowing that it was a terrorist organisation (s. 102.7(1)) or been reckless as to whether it was a terrorist organisation (s. 102.7(2)). It does, however, appear to have been subsequently assumed that the offence in respect of which Dr Haneef was arrested was under s. 102.7(1).

Identification of the precise offence for which Dr Haneef was arrested could have significance for the application of s. 3W of the Crimes Act—in particular for s. 3W(2), which requires that an arrested person be released if the constable in charge of the investigation ceases to believe on reasonable grounds that the person committed the offence for which he or she was arrested. On the other hand, there might be an argument that Part 1C would authorise continued detention provided there remained reasonable grounds to believe, or perhaps even to suspect, that Dr Haneef had committed another terrorism offence. In the event, however, Jabbour acted on the assumption that s. 3W(2) imposed a continuing requirement that there be a belief on reasonable grounds in relation to the offence for which Dr Haneef was arrested, notwithstanding the provisions of Part 1C.

Simms identified the support or resources he believed Dr Haneef had provided to the organisation as the phone or SIM card and funds provided by way of financial transfers. His diary note appears to place more emphasis on the former:

'Support in form of mobile telephone which has been used & is in name of Haneef'. At that early stage, detailed information would not have been available concerning the time at which or the circumstances in which Dr Haneef provided his mobile phone or SIM card to the people involved in the UK incidents.

At the time of the arrest very little was known about Dr Haneef's activities during 2 July 2007. Neither Simms nor Thompson was aware until after the arrest that Dr Haneef was travelling on a one-way ticket he had bought on the day of his departure. Nor did they know anything about the timing of Dr Haneef's leave arrangements with his employer or any phone calls or internet conversations Dr Haneef had been involved in during the day. Accordingly, when forming their belief about whether Dr Haneef had committed an offence against s. 102.7 of the Criminal Code, it appears that Simms and Thompson did not consider that Dr Haneef might be trying to flee the country in order to escape the attention of law enforcement authorities. Such matters might subsequently have been taken into account in the AFP investigation, but they did not play any part in the decision to arrest Dr Haneef.

This is not to say that Dr Haneef's attempted departure was irrelevant to his arrest. I consider it almost certain that Dr Haneef would not have been arrested on the night of 2 July 2007 if he had not been about to leave the country. In this sense, Dr Haneef's actions in booking and attempting to board an international flight were such as to 'force the hand' of the AFP. Were it not for those actions, the AFP would probably have placed Dr Haneef under surveillance and continued its investigation into his association with the people detained in the United Kingdom and his possible involvement in the terrorist incidents in London and Glasgow.

Jabbour relied to some extent on a notice circulated by Merseyside Police in the United Kingdom on 1 July 2007, advising that Dr Haneef should be arrested pursuant to s. 41 of the *Terrorism Act 2000* (UK) on suspicion of being a terrorist. There is nothing to suggest that Simms or Thompson were aware of this notice when considering the grounds for arrest. Further, notwithstanding the existence of the notice, the initial interest of the MPS CTC was to obtain help with locating Dr Haneef. Once it was ascertained that Dr Haneef was not in the United Kingdom and had not been there at the time of the incidents, the UK authorities did not appear to express any immediate interest in his arrest. The weight to be given to the notice to arrest must therefore be viewed in the light of the advice subsequently provided by Detective Superintendent Prunty—that the MPS CTC had no immediate interest in Dr Haneef and that it was a matter for the AFP whether or not to arrest Dr Haneef.

3.1.5 Reasonable grounds

The crucial question under s. 3W(1) of the Crimes Act is whether there were reasonable grounds for Simms's belief that Dr Haneef had committed the offence of providing support or resources to a terrorist organisation contrary to s. 102.7(1), or possibly s. 102.7(2), of the Criminal Code. A requirement of

reasonable belief presents a higher threshold than a requirement of reasonable suspicion. Nevertheless, s. 3W(1) does not require proof in relation to each element of the offence in question. Accepting for present purposes that Simms formed a subjective belief that Dr Haneef had committed an offence against s. 102.7, the question is whether he had reasonable grounds for that belief in all the circumstances.

I note that analogous matters were recently dealt with by the English Court of Appeal in *Commissioner of Police of the Metropolis v Mohamed Raissi* [2008] EWCA Civ 1237 (12 November 2008), although in that case the applicable statutory power of arrest without warrant was based on reasonable suspicion rather than reasonable belief. The Court of Appeal in *Raissi* considered and applied an earlier decision in *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286, where the House of Lords held that an instruction or order to arrest given by a superior officer was not itself sufficient to afford reasonable grounds for the necessary suspicion on the part of the arresting officer. The constable who exercises the power of arrest may rely on information provided to them by other officers and may form a suspicion (or belief) based on what they have been told. The question whether the information provides reasonable grounds for suspicion (or belief) 'depends on the source of the information and its context, seen in the light of the whole surrounding circumstances'.[1] The information must be known to the arresting officer at the time of the arrest. The arresting officer therefore cannot rely on an assumption that his superior officers had other information justifying the arrest but did not tell him what that information was.

At the time of the arrest, Simms was in possession of information that a group responsible for terrorist incidents in the United Kingdom had been using a mobile phone that was subscribed or registered in Dr Haneef's name and that Dr Haneef had sent to the United Kingdom money that had been linked to that group. Simms also took into account information that Dr Haneef had been in recent contact with one of the members of the group and that Dr Haneef was associated with a person who had attracted the suspicions of the Australian Customs Service when he was on a recent visit to Australia—despite those suspicions not being directly linked to the UK incidents or, indeed, to any terrorist activities. Dr Haneef was about to board a flight to leave the country, so it was necessary to make an immediate decision on whether to arrest using the information then available to Simms. Simms took into account the fact that superior officers such as Jabbour had formed the view that it was open and appropriate to arrest Dr Haneef, although he did not treat such a view as determinative.

The Inquiry does not exercise judicial power, and I do not consider it appropriate for me to reach a definitive conclusion or to make a finding on the question whether the arrest of Dr Haneef was lawful. I consider, however, it is at least arguable that there existed reasonable grounds for a belief that Dr Haneef had

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1 *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286 at 298 per Lord Hope.

committed an offence against s. 102.7(1) or s. 102.7(2) of the Criminal Code at the time the arrest was made.

The question of whether there continued to be reasonable grounds for maintaining such a belief throughout the subsequent investigation raises separate matters.

3.2 Detention

3.2.1 The airport interview

After Dr Haneef was arrested, Detective Sergeant Simms and Federal Agent Thompson escorted him to an interview room at Brisbane Airport, where they searched his property and asked him some questions; this lasted about 45 minutes. Simms and Thompson said the questions were designed to advise Dr Haneef of his rights, to ensure his and others' safety, to preserve any evidence, and to obtain general background information.

During the interview Simms informed Dr Haneef that he had a right to have a lawyer present during questioning. Dr Haneef said he wanted to have someone present. Simms and Thompson gave evidence that it was not practical at that time and in that location to give Dr Haneef access to a lawyer and that they were not conducting a formal interview in relation to the offence for which Dr Haneef had been arrested.

At about 12.05 am on 3 July 2007 Simms and Thompson drove Dr Haneef from Brisbane Airport to the AFP office at Wharf Street, Brisbane. On their arrival, at about 12.25 am, Dr Haneef was placed in an interview room while Simms and Thompson attended to various administrative tasks. Shortly before 3.00 am arrangements were made for Dr Haneef to be taken to a room where he could sleep.

No arrangements had been made to allow Dr Haneef to contact a lawyer. Simms said this was an unintentional oversight brought about by the 'rapid escalation' of the situation and the pressing need to compile information, prepare documents and attend briefings. Dr Haneef later declined legal representation when the option was raised during his interview on 3 July and in relation to several applications made under Part 1C of the *Crimes Act 1914*.

3.2.2 Detention under Part 1C of the Crimes Act

Under Part 1C of the Crimes Act a person arrested for a terrorism offence may be detained for a reasonable investigation period, to a maximum of four hours. Section 23DA of the Act provides that an application can be made to a magistrate to extend the investigation period by up to 20 hours.

When determining the investigation period for such purposes, specific periods are disregarded under s. 23CA(8). Section 23CB provides for an application to a magistrate to specify a period during which the questioning of the arrested person may be reasonably suspended or delayed. This is one of the categories of 'dead time' under s. 23CA(8), when the investigation period does not run.

In the early hours of 3 July 2007 Simms was instructed to draft applications under ss. 23DA and 23CB of the Crimes Act. Commander Jabbour, who at this time was still at AFP headquarters in Canberra, sent some information about Part 1C of the Act to Simms, drawing his attention to the provisions for dead time pursuant to s. 23CA(8)(m)(ii). Jabbour suggested the grounds to be used in an application for a specified period under s. 23CB in the following terms: 'o/s inquiries with [named foreign countries] and UK and need to execute [search warrant] to determine level of involvement in UK plot'. Morrish seems to have thought the dead time application under s. 23CB would be made in addition to an application for an extension of the investigation period under s. 23DA.

3.2.3 The first s. 23DA application to extend the investigation period

Detective Sergeant Simms prepared draft applications under ss. 23DA and 23CB and emailed them to Commander Jabbour at 6.34 am on 3 July. Simms had not had any experience of or training in preparing such applications and used a template application obtained from the AFP's computer system. In his email he noted that the drafts had been 'slapped together', and he sought further advice on what was required. Jabbour forwarded Simms's email and the attached draft applications to Mr Michael Rendina (Senior Lawyer, AFP Legal), who considered that the applications were generally consistent with the requirements of the Crimes Act.

At 9.17 am Simms and Federal Agent Thompson had a conversation with Dr Haneef; they informed him that an application would be made to a magistrate for an extension of the investigation period. Simms told Dr Haneef he had a right to have a lawyer present when the application was made. Dr Haneef said he did not want a lawyer at that stage and was happy to answer their questions. The written application presented to the magistrate said Dr Haneef was informed at 9.35 am that he or his legal practitioner could make representations regarding the application and that Dr Haneef had declined to have representation in relation to the application.

The application for the extension provided a brief summary of Dr Haneef's connection with the incidents that had taken place in the United Kingdom:

> HANEEF was previously associated with the persons responsible for the recent terrorist attacks in Glasgow and attempted attacks in London. He shared the same residential premises in the UK with two of the persons arrested in the attacks and provided these persons with his mobile phone prior to departing the UK for Australia September 2006. This mobile

> telephone was implicated in the recent attacks in London and Glasgow and further information is being provided by overseas agencies.

The application said extension of the investigation period was necessary 'to assist with and enable completion of the investigation into the terrorism offence for which [Dr Haneef] is detained'. After referring to urgent inquiries being conducted overseas, including in the United Kingdom, and the continuing need to collate and analyse information obtained from international partners in those countries, the application went on:

> Police are approaching the four hour time limit in relation to the detention for investigation time of HANEEF with a considerable amount of down time also being incurred with rest required by HANEEF. An 8 hour extension is requested for the investigation period because the terrorist offence is still being investigated.

At about 10.05 am Simms made the application to extend the investigation period before Magistrate Gordon in the Brisbane Magistrates Court. At 10.15 am, after reading the written application, the magistrate signed an instrument extending the investigation period by eight hours. The instrument stated that the magistrate was satisfied the investigation into the offence was being conducted properly and without delay and that Dr Haneef had been given the opportunity to make representations about the application—see ss. 23DA(4)(c) and 23DA(4)(d) of the Act. The magistrate was satisfied that extension of the 'questioning period' was necessary for the reasons given in the application.

3.2.4 The first interview

At 11.01 am on 3 July Simms and Thompson started to formally interview Dr Haneef, this being recorded by both video and audio. The interview ran for about six-and-a-half hours (from 11.01 am to 5.31 pm); this included seven periods during which the interview was suspended.

3.2.5 The second s. 23DA application to extend the investigation period

At about 4.30 pm on 3 July, during a break in the interview, Federal Agent John Matus told Simms and Thompson that an application would be made for another extension of the investigation period pursuant to s. 23DA. Simms said he spoke to Dr Haneef at this time, asking him whether he thought he needed a legal representative for this application, and that Dr Haneef said he did not. This exchange between Simms and Dr Haneef was not recorded.

Shortly before 5.20 pm Matus made the s. 23DA application before Magistrate Gordon. The substantive paragraphs in the application were in a form almost identical to that of the paragraphs in the earlier s. 23DA application, with minor amendments to update the details on time in custody. The application said police were approaching the 12-hour time limit for the investigation period and that an

eight-hour extension was sought 'because the terrorist offence is still being investigated'. Once again, the application said Dr Haneef had been told he or his legal practitioner may make representations regarding the application and that he had declined to have representation in relation to the application.

At 5.20 pm Magistrate Gordon signed an authority granting a 'further and final' extension of the investigation period for 12 hours, bringing the period to the maximum limit of 24 hours. In the signed authority the magistrate said he was satisfied that the extension was necessary for the reasons set out in the written application to extend. The reasons for granting an extension of 12 hours, rather than eight hours, as requested in the application, are not immediately apparent.

At the time Federal Agent Matus made the second s. 23DA application Simms and Thompson were still conducting the interview with Dr Haneef. Simms gave evidence that they were under the impression the application was not going to be made until after the interview had concluded. Accordingly, immediately after the termination of the interview at 5.31 pm, Simms again raised with Dr Haneef the question of whether he wanted legal representation in relation to the s. 23DA application. On this occasion the conversation between Simms and Dr Haneef was recorded.

Simms told Dr Haneef they had to go before a magistrate to seek a further extension of the investigation period and that 'once again I have to allow you the opportunity to provide a lawyer if you wish to at that application'. Dr Haneef asked about the length of the extension, and Simms told him they would be seeking 'at least another four hours'. Dr Haneef confirmed that he did not want a lawyer present at the application—which by that time had already been made by Federal Agent Matus.

3.2.6 The first s. 23CB application for specified time

On the morning of 3 July Commander Jabbour decided it would be appropriate to apply for specified time under s. 23CB of the Crimes Act, 'given the global nature of the investigation and the fact that a large portion of relevant material was being sourced from offshore'. Jabbour consulted Mr Rendina about the length of the specified period that should be sought. They agreed to seek additional time in small increments, in order to allow for more frequent review by a judicial officer. Taking into account that this was the first occasion on which the specified time provisions had been used, they decided to apply for 48 hours initially, to ensure a suitable level of oversight. They also agreed that the application should be made to a magistrate. The application was ultimately made to Magistrate Gordon, the duty magistrate who had heard and granted the two s. 23DA applications.

Mr Rendina finalised the written application under s. 23CB, in conjunction with Simms and Matus. The final application was made and signed by Matus, who said he believed 48 hours should be specified for the purposes of s. 23CA(8)(m) for the following reasons:

- to assist with and enable completion of the investigation into the terrorism offence for which Dr Haneef was detained
- to collate and analyse information being obtained from overseas authorities, including in the United Kingdom
- to allow authorities in Australia to collect, collate and analyse material relevant to the investigation from a variety of sources
- to enable the collection of information relevant to the investigation from places outside Australia that were in different time zones—including the United Kingdom (nine hours behind).

The application set out some details about Dr Haneef's connection to the UK incidents and the inquiries that were being made in Australia and other countries, including the United Kingdom. It stated that it would take a considerable amount of time to analyse the information collected in the UK investigation. In relation to the Australian investigation, the application referred to interrogation of computer hard drives that were seized in the execution of search warrants and examination of call charge records for phones linked to Dr Haneef. It further stated that, as at 9.15 pm, Dr Haneef had been in custody for 22 hours and 10 minutes, and 11 hours and 43 minutes of the investigation period had elapsed.

At 9.10 pm on 3 July Simms had a further conversation with Dr Haneef in relation to the proposed application under s. 23CB. He informed Dr Haneef the police would be making an application to the magistrate for 'a suspension … of questioning which delays our investigation period another forty eight hours or two days', the effect of which would be to keep him in custody for another two days. Simms told Dr Haneef he was able to have a lawyer present at the application and he was not required to attend himself. Dr Haneef confirmed that he did not want to have a lawyer present at that time. The written application stated that Dr Haneef had been informed at 9.10 pm on 3 July 2007 that he or his legal practitioner may make representations regarding the application and that Dr Haneef had thus far declined legal representation.

Some time after 10.30 pm on 3 July Federal Agent Matus and Mr Rendina met Magistrate Gordon at his home to make the s. 23CB application. It is possible that Simms accompanied them. Rendina offered to discuss with the magistrate the relevant provisions of Part 1C of the Crimes Act, but the magistrate said he had already considered the provisions. According to Rendina, the process before the magistrate took about 15 to 20 minutes but did not involve questioning or discussions of any significance. He said, 'The majority of time was spent in quiet, because Magistrate Gordon was just sitting there and reading and contemplating'. Rendina observed that the magistrate had 'seemed generally comfortable and familiar with the application process'.

At 11.20 pm, after considering the written application, Magistrate Gordon signed an authority that specified a period of 48 hours pursuant to s. 23CB of the Crimes Act. In the signed authority the magistrate said he was satisfied that detention of

Dr Haneef during the specified period was necessary, among other things, to assist with and enable completion of the investigation into the terrorism offence for which he was detained. He stated that he was satisfied that the investigation into the offence was being conducted properly and without delay and that Dr Haneef had been given the opportunity to make representations about the application.

In a briefing paper subsequently prepared by Rendina and Jabbour on 4 July, it was noted that the magistrate:

> appeared supportive of the application in the circumstances and we are confidant [sic] that further downtime may be available if sought. We consider this to be the most appropriate vehicle for the ongoing detention of the subject in the current circumstances whilst the investigation continues with overseas law enforcement partners.

The specified period granted by the magistrate was due to expire at 11.20 pm on Thursday 5 July (48 hours from the time the authority was signed). At about 12.45 am on 4 July Dr Haneef was taken from AFP headquarters to the Brisbane City Watchhouse.

3.2.7 The second s. 23CB application for specified time

By the evening of 4 July consideration was being given to making a further application for dead time under s. 23CB. On 5 July Commander Jabbour consulted with and assisted Mr Rendina in the preparation of the application. Jabbour told the Inquiry he considered that 96 hours (or four days) was reasonable and appropriate, based on the volume of material that was being analysed in Australia and the United Kingdom. Although his experience was that such matters can take weeks and months to conclude, he 'believed it was reasonable to seek a further 4 days at that time to enable the magistrate to be fully informed of the progress of the investigation'.

The second s. 23CB written application followed a format similar to that of the first one. Although signed by Detective Sergeant Simms, it was substantially drafted by Mr Rendina on the basis of material provided to him by investigators and after consultations with Simms and Matus.

In setting out why a further period should be specified under s. 23CB, the second application repeated most of the information in the s. 23CB application made on 3 July and advanced much the same reasons. There was 'continual dissemination' of information from UK authorities, in respect of which the 'significant task of analysis' was progressing. It was noted that time-zone differences 'continue to impact on the timeliness of any responses to Australian requests'. Some of the information that had been provided from the UK investigation was summarised. The application also elaborated on the progress of various domestic inquiries in Australia—including the examination of computer hard drives and call charge records in relation to the phones linked to Dr Haneef—and foreshadowed that

further overseas inquiries might arise from that information. The position was summed up as follows:

> The investigation is progressing however the enormity of domestic and overseas material and information collected remaining to be analysed is significant. There is a considerable amount of forensic analysis required. Having regard to the circumstances set out above, I believe it necessary and request that the specified period be 96 hours. It is not possible to question HANEEF during this period.

The application gave assurances that the investigation remained the 'highest priority' for the AFP and that substantial resources were being committed to ensure that the investigation progressed expeditiously. It was asserted that Dr Haneef's detention during the specified period was 'necessary to assist with and enable completion of the investigation into the terrorism offence' for which Dr Haneef was detained.

At 4.15 pm on 5 July Detective Sergeant Simms and Federal Agent Thompson told Dr Haneef the period of detention would expire that evening and a further extension would be sought to enable the police to complete their inquiries. Simms explained that it was crucial for the police to determine whether or not Dr Haneef was involved with the UK incidents and that it was proving difficult to analyse computer material and to conduct overseas inquiries in the available time. Simms again told Dr Haneef he had a right to have a legal representative present while the application was made. On this occasion, Dr Haneef said he did 'need someone' because it was 'just going on, extending and extending'.

Simms told Dr Haneef the AFP would be seeking an additional four days to complete its inquiries and he would not be interviewed during that period. There ensued a discussion about how Dr Haneef would be given access to a lawyer. Simms made arrangements for Mr Peter Russo, a solicitor with the law firm Ryan & Bosscher, to assist Dr Haneef. Mr Rendina called Mr Russo at around 5.25 pm to discuss the proposed application and explain the provisions of Part 1C of the Crimes Act. After attending the watchhouse and speaking to Dr Haneef, Russo told Simms he would represent Dr Haneef on the s. 23CB application.

The application was made in Magistrate Gordon's chambers at the Brisbane Magistrates Court some time after 6.30 pm. Detective Sergeant Simms and Mr Rendina represented the AFP; Commander Jabbour and Federal Agent Michelle Gear were also present but waited outside the magistrate's chambers. Mr Russo attended on behalf of Dr Haneef. Because the written application contained sensitive information, Mr Russo was asked to leave the room while the magistrate read the application. When he returned, Mr Russo was asked whether he had anything to say in relation to the application. Mr Russo told the magistrate that Dr Haneef wanted to be back in the community and was prepared to continue cooperating with the police. It is worth noting that at this stage Mr Russo had had limited time to obtain instructions from Dr Haneef and to consider his client's

position and had not yet had provided to him any of the materials on which the AFP had relied in support of the application.

At 7.05 pm on 5 July Magistrate Gordon signed an authority under s. 23CB for a further specified period of 96 hours. The signed instrument was in a form similar to that granted on 3 July.

3.2.8 The third s. 23CB application for specified time

By letter dated 6 July 2007 Dr Haneef's solicitors made a number of requests for information and materials relevant to Dr Haneef's detention and questioning. The letter advised that Dr Haneef was prepared to cooperate with the AFP investigation but that he wished to be released from custody and to be allowed to contact his wife.

At about 4.30 pm on 8 July Commander Jabbour decided that a third application would be made under s. 23CB; he advised Mr Rendina to liaise with the magistrate in relation to the application. Jabbour contemplated an extension of seven days but noted that a shorter period could be sought if the magistrate was not comfortable with that and wanted greater oversight. Jabbour noted that one of the main things would be to give 'a realistic estimate of what we have left to examine'.

During 8 July Mr Rendina had been preparing a further s. 23CB application, using materials provided to him by investigators, including updates on the progress of the investigation. As with the previous application, the third application was based on the continuing need to collect, collate and analyse material from within Australia and overseas. Mr Rendina was instructed to prepare an application for a specified period of 120 hours because of the large volume of material being analysed. Commander Jabbour decided that Dr Haneef would not be interviewed before the third s. 23CB application was made: he thought more time was needed to prepare an interview plan.

At 6.50 pm on Sunday 8 July Mr Rendina had a phone conversation with Magistrate Gordon concerning the further s. 23CB application. Magistrate Gordon inquired about Dr Haneef's wellbeing considering the circumstances of his detention, and Mr Rendina said the AFP would provide further information on that the following day.

Shortly after this phone conversation, at about 7.00 pm, Mr Rendina and another AFP legal officer met with Mr Russo and discussed the matters raised in the 6 July letter from Mr Russo's law firm. Mr Russo expressed concern about the suitability of the detention facilities at the watchhouse and about details of the investigation being reported by the media. Mr Russo was given copies of the tapes and the transcript of the interview with Dr Haneef on 3 July, a list of the property seized from various searches, and a copy of the signed authority made on 5 July.

At about 1.00 pm on Monday 9 July Mr Rendina met with Detective Sergeant Simms to review the accuracy of the information contained in the draft s. 23CB application. Members of the Operation Rain management team also reviewed the application. The Inquiry did not receive a signed copy of the final application, but it was able to obtain an unsigned version that had been circulated as an attachment to an email.

The application followed a format similar to that used for the previous s. 23CB application, made on 5 July, and reproduced much of the content of that application. It again relied on the continuing need to collate and analyse information obtained from overseas authorities and to collate and analyse material relevant to the Australian investigation. The supporting detail in relation to each of these reasons built on the material in the earlier application (much of which had in turn been reproduced from the initial application dated 3 July 2007). Additional information was included about both the UK investigation and the Australian investigation. For example, the application stated that Dr Bilal Abdulla had been charged in the United Kingdom with conspiracy to cause explosions. There were references to police suspicions arising from chat log conversations involving Dr Haneef. Further details were provided about the analysis of electronic material obtained from the laptop computers belonging to Dr Haneef and Dr Asif Ali—about 95 per cent of the material had been examined—and the analysis of forensic samples that had been obtained as a result of the execution of further search warrants on 8 July.

The concluding paragraphs of the application were almost identical to those in the 5 July application: the investigation was 'progressing however the enormity of domestic and overseas material and information collected remaining to be analysed [was] significant', and the investigation remained the 'highest priority' for the AFP, which continued to commit 'substantial resources' to ensure the investigation progressed 'expeditiously'. A further specified period of 120 hours (five days) was sought.

The third s. 23CB application was brought before Magistrate Gordon at the Brisbane Magistrates Court some time after 4.00 pm on 9 July. Simms and Rendina attended on behalf of the AFP and Dr Haneef was represented by counsel, Mr Stephen Keim SC. Mr Keim opposed the application and submitted that Dr Haneef and his legal representatives were entitled under the rules of natural justice to be made aware of the material the AFP was placing before the magistrate. Mr Rendina argued that Part 1C of the Crimes Act did not contain a requirement to provide material to the arrested person and that public interest immunity would be claimed to prevent disclosure of the material.

Magistrate Gordon decided to specify a further period of 48 hours. He accepted that the AFP was working urgently on the matter but directed that the matter be brought back before him at 10.00 am on 11 July, at which time he would consider whether to specify a further period, up to the 120 hours the AFP sought.

Accordingly, at 6.05 pm on 9 July Magistrate Gordon signed an authority under s. 23CB for a further specified period of 48 hours.

3.2.9 The fourth s. 23CB application for specified time

Following the application on 9 July, the AFP engaged the Australian Government Solicitor to advise on questions arising from the hearing and to represent it in future hearings.

On Tuesday 10 July Commander Jabbour formed the view that the AFP needed the balance of the five-day period to be specified under s. 23CB 'as we are not finished analysing the material we hold'. The Australian Government Solicitor was instructed to prepare material for a further s. 23CB application. It was agreed that Dr Haneef's lawyers should receive as much information as possible, subject to public interest immunity. Accordingly, the Australian Government Solicitor settled an application and an 'unclassified' statutory declaration by Detective Sergeant Simms, both of which were provided to Dr Haneef's lawyers on the morning of 11 July. In addition, two statutory declarations containing confidential material were prepared. The AFP sought to prevent disclosure of the two confidential declarations to Dr Haneef and his lawyers on public interest grounds.

The Inquiry received a copy of one of the confidential statutory declarations signed by Commander Jabbour; it set out the grounds for withholding disclosure of the confidential information—on the basis that disclosure would prejudice police investigations, reveal police methodology, and prejudice the AFP's foreign law enforcement liaison relationships. The AFP was unable to locate a signed copy of the other confidential statutory declaration, which set out the 'classified', or sensitive, information, but made available an unsigned version. Mr Rendina's recollection was that both declarations were provided to the magistrate. In a submission to the Inquiry, however, Dr Haneef's current legal representatives said they proceeded on the assumption that the confidential declarations were not given to the magistrate and that Dr Haneef's lawyers at the time 'were given no reason to believe that what was tendered to the Magistrate was different to what they had received'—namely, the unclassified application and statutory declaration by Simms.

The application was for a further specified period of 72 hours (that is, the balance of the 120 hours that had been sought on 9 July). The application discussed the reasons why the investigating official (Simms) believed that a period should be specified under s. 23CB; the detailed facts relating to the status of the investigations were this time included in the supporting statutory declaration made by Simms. Among the reasons advanced in the application were the need to collate and analyse a large amount of information provided by overseas authorities and obtained in Australia, the impact of time-zone differences on the provision of information from overseas, and the need to translate information written in Urdu. The application also asserted that the detention of Dr Haneef was necessary in order to preserve and obtain evidence and to complete the

investigation (which included further questioning of Dr Haneef), given the risk that Dr Haneef might seek to flee Australia or interfere with continuing investigations. The application repeated the assurance that the investigation into the alleged offence had been accorded the highest priority and had involved substantial resources from both the AFP and the Queensland Police Service.

Simms's unclassified statutory declaration said the sought-for specified period of 72 hours would 'enable authorities to pursue further vital investigative avenues concerning Dr Haneef's involvement in the alleged offence'. Referring to 'the increasingly significant volume of multi-jurisdictional electronic, telephony, forensic and financial information as well as the expanding number of possible associates in Dr Haneef's network (in Australia and overseas)', the declaration stated that 'analysis and verification of information is not expected to be complete, so as to enable resumed questioning of Dr Haneef for at least 72 hours'.

At the hearing of the application Dr Haneef's lawyers relied on a further written outline of submissions and made an application for Magistrate Gordon to disqualify himself on the ground of apprehended bias: that is, there was a reasonable apprehension that the magistrate was unable to bring an impartial and unprejudiced mind to determining the application. This bias application was based on the magistrate's involvement in the previous AFP applications that had been made in the absence of Dr Haneef.

The application was argued before Magistrate Gordon during the late afternoon of 11 July. After hearing arguments in relation to the disqualification application, the magistrate said he would reserve his decision in order to give further consideration to the applicable case law on that question. It was noted that adjournment of the application would be treated as dead time under s. 23CA(8)(h) of the Crimes Act. The magistrate adjourned the application until 2.15 pm on Friday 13 July.

3.2.10 Withdrawal of the s. 23CB application for specified time

Just after 3.00 pm on 12 July counsel for the AFP sent an email to the Brisbane Magistrates Court Registrar, providing references to some authorities dealing with apprehended bias and a further statutory declaration by Mr Rendina concerning information and material the AFP had provided to the magistrate in support of the various search warrant applications. The email also forwarded a further written submission by Mr Keim, on behalf of Dr Haneef, that responded to the material provided by the AFP. Mr Keim submitted that the reasonable apprehension of bias arising from the private contact between the magistrate and the AFP's representatives was not removed by reassurances given by the magistrate or by the AFP as to what took place at those hearings.

At about 10.15 am the following day Assistant Commissioner Prendergast spoke to Commander Jabbour, saying the AFP should not pursue a further application for dead time, subject to advice to be provided by the Commonwealth Director of Public Prosecutions. The AFP began to make preparations to resume the

investigation period. At 1.50 pm, following a discussion with the CDPP about the progress of their review of evidentiary material, Jabbour advised Mr Rendina that the s. 23CB application would be withdrawn. Jabbour told the Inquiry that 'the investigation had reached a point where it did not appear likely that further periods of specified time would yield additional relevant information in the short term'.

At about 2.00 pm solicitors from Australian Government Solicitor appeared before the magistrate to withdraw the fourth s. 23CB application. It appears that before the application was formally withdrawn the magistrate said he would have disqualified himself from continuing to hear the application. At about 2.10 pm Mr Rendina advised Mr Russo that Dr Haneef would be interviewed later that afternoon. Mr Russo asked to be present during the interview.

3.2.11 The second interview

On 13 July Dr Haneef was taken from the Brisbane Watchhouse to an interview room at QPS headquarters. At 4.15 pm Simms and Thompson began to interview him in the presence of his solicitor, Mr Russo. A number of other police officers monitored the interview, watching closed-circuit television in an adjacent room.

The interview ran from 4.15 pm to 7.00 am on 14 July; this included a number of breaks. The interview was recorded by both audio and video, although it appears that the recording ceased after the penultimate suspension, at 4.42 am. The recording equipment did not capture the resumption of the interview, from 5.01 to 5.57 am, or the conclusion of the interview, between 6.58 and 7.00 am (during which Dr Haneef was advised that he would be charged).

3.2.12 Consideration of a preventative detention order

From early in the investigation consideration had been given to the possibility of applying for a preventative detention order pursuant to Division 105 of Part 5.3 of the Criminal Code.

Commander Jabbour and Mr Rendina decided, however, that the requirements for obtaining a preventative detention order would be difficult to satisfy. In particular, they considered there was no information to suggest that such an order was reasonably necessary for the purpose of preserving evidence of or relating to the incidents in the United Kingdom, given that Dr Haneef had been arrested and detained and that search warrants had already been executed at all known relevant premises. Jabbour considered that 'the more pressing issue is the collection, collation and analysis of information/evidence' obtained from law enforcement authorities and from the execution of search warrants and that the provisions of Part 1C, including s. 23CB, were more appropriate for that purpose.

On 5 July Assistant Commissioner Prendergast told Jabbour that he wanted an application for a preventative detention order to be 'ready to go' in the event that the investigation period under Part 1C came to an end and Dr Haneef was

released. To this end, an overseas liaison communication was sent to the AFP's London office, asking the UK authorities to provide any information that suggested a likelihood of a terrorist act occurring in the United Kingdom and that might assist in meeting the criteria for the grant of a preventative detention order in relation to Dr Haneef.

During the following week Federal Agent Kylie Weldon prepared a draft application for an initial preventative detention order, under the supervision of Federal Agent Morrish. On 11 July at 5.49 pm Weldon sent a 'new' version of this draft application to Morrish and Paul Marshall (AFP Co-ordinator Legal), inviting comments 'asap, pending the outcome of the court decision'. (At that time a decision on the fourth application for further specified time was imminent.) On 12 July Mr Marshall provided comments in relation to the draft application, in which he drew attention to some weaknesses in the argument that Dr Haneef's detention was reasonably necessary to preserve evidence of a terrorist act: Dr Haneef had been in custody for 10 days, and search warrants had already been executed. Mr Marshall noted, 'We need to consider what can be reasonably said in terms of there being evidence out there that would be lost if [Dr Haneef] was not detained for 24 hours'.

3.2.13 The basis of the applications

The s. 23DA applications

The material provided in support of the two s. 23DA applications was fairly limited. Mr Rendina said extension of the investigation period under s. 23DA was regarded as a 'bread-and-butter process' for investigators, in contrast to the s. 23CB applications, which were more complicated and required considerable thought.

Each of the s. 23DA applications ultimately asserted that an extension of the investigation period was necessary because the limit on the investigation period was about to be reached and the terrorism offence for which Dr Haneef had been arrested was 'still being investigated'.

The applications contained a brief identification of the alleged links between Dr Haneef and the people responsible for the incidents in London and Glasgow and referred succinctly to 'urgent' overseas inquiries to establish Dr Haneef's relationship with the people who had been arrested in the United Kingdom. They also noted the need to collate and analyse information from such inquiries.

On the basis of this material, the magistrate was required to satisfy himself that, among other things, further detention of Dr Haneef was necessary in order to preserve or obtain evidence or to complete the investigation and that the investigation was being conducted properly and without delay, as provided for in ss. 23DA(4)(b) and 23DA(4)(c) of the Crimes Act.

An application for an extension of the investigation period under s. 23DA will usually be made at a relatively early stage after a person is arrested. For example,

subject to any allowance for dead time under s. 23CA(8), it will be necessary to seek an extension before the initial limit of four hours has been reached. The nature of the material that can be provided in support of the application must be assessed in that context. Nevertheless, any extension of the period for which the arrested person may be detained without charge should not be approached lightly or treated as a mere formality. Proper attention should be given to demonstrating the need for the extension, including why further time is required to question the arrested person about the offence for which they were arrested or about another terrorism offence they are reasonably suspected to have committed.

Insofar as an extension of the investigation period is sought to be justified by reference to the time required to obtain or analyse evidence or material, there could be an overlap with the current provisions for specified time under ss. 23CA(8)(m) and 23CB. In that regard, the criteria for extending the investigation period under s. 23DA(4) are reproduced in terms almost identical to those in the criteria for specifying a period under s. 23CB(7).

This gives rise to some uncertainty about the relationship between these two statutory mechanisms for extending the period for which the arrested person may be detained.

The s. 23CB applications

Each of the s. 23CB applications was based on inquiries that were being conducted in Australia and overseas and on the analysis of information already collected. Although each application requested a finite period of dead time, no concrete indication was given concerning the time the inquiries and analysis were expected to take. Instead, the time estimates provided were general and open ended—for example, that it would take a 'significant' or 'considerable' amount of time to obtain or analyse the relevant information. On each application it was stated that the investigation was 'progressing' but there remained an enormous amount of material to be analysed.

Thus each application sought to enable the AFP to suspend or delay the further questioning of Dr Haneef for a specified period in order to make and await the results of wide-ranging inquiries with overseas authorities, mainly in the United Kingdom, and to examine and analyse phone records and electronic data from computer hard drives. The nature and volume of this material meant that progress would probably be slow.

In providing examples of the reasons for which a period may be specified, s. 23CB(5)(c) does not contemplate that an arrested person may be held for such time as the police require to carry out their investigation. For example, the reasons do not encompass the need to allow the organisation of which the investigating official is part (in this case, the AFP) time to collect information—see s. 23CB(5)(c)(ii). Although the reasons can include the need to collate and analyse relevant information, or to allow other authorities time to collect relevant information on request, this does not necessarily justify an open-ended approach

based on broad overseas inquiries or indeterminate examinations of electronic data or call charge records.

Operation Rain developed into an extremely large and time-consuming investigation that involved, but was not confined to, the investigation of Dr Haneef's links with the incidents in London and Glasgow. The UK Metropolitan Police Service provided to the AFP a considerable amount of information derived from its investigation of the incidents and by 6 July made available to the AFP the entire holdings of that investigation (Operation Seagram). There was no end to the receipt and analysis of such information from the United Kingdom as part of a continuing search for information that might show whether Dr Haneef, among others, had any involvement in terrorist activities.

Similarly, the collation and analysis of material collected in Australia was a slow process. Examination of the material had led to the identification of a number of other people who became the subject of investigation in their own right and not merely as part of the investigation of Dr Haneef. This gave rise to investigative activities in at least two other states, New South Wales and Western Australia.

It might be accepted that investigations into terrorism offences will often involve complex matters requiring detailed examination and analysis of a large volume of material and requests for the provision of information from authorities in overseas jurisdictions. But this will not necessarily provide a justification for the detention of an arrested person under Part 1C of the Crimes Act for as long as it takes to conduct such an investigation with a view to establishing whether or not the person has committed a terrorism offence.

In order for a period to be specified under s. 23CB, the magistrate or other issuing officer must be satisfied that, among other things, the detention of the arrested person for that period is necessary in order to preserve or obtain evidence or to complete the investigation into the offence for which the person was arrested or another terrorism offence that the investigating official reasonably suspects the person to have committed. The reference to the completion of the investigation should not be read as allowing the police to delay questioning an arrested person and to keep them in detention solely on the basis that the investigation is continuing, even if assurances are given that the investigation is a high priority. There should usually be some demonstrable connection between the specified investigative activities and the ability to begin or resume questioning the arrested person about the relevant offence or offences. Further, a fairly clear indication should be given as to the likely time frame of those investigative activities.

In the case of Dr Haneef, senior officers of the AFP, such as Commander Jabbour and Mr Rendina, appear to have treated Part 1C—and s. 23CB in particular—as providing a basis on which Dr Haneef could be detained for successive periods while the investigation was conducted, until such time as sufficient information was obtained to establish the extent of Dr Haneef's involvement and to question him fully about the relevant offences. In this regard, the AFP noted that it

consulted with the Attorney-General's Department to obtain legal and policy advice on the operation of Part 1C, and that the magistrate was prepared to grant the applications on the material before him. It appears that the AFP readily obtained the specified periods requested on the first and second s. 23CB applications on 3 July and 5 July: one of those applications was ex parte and the other one was effectively unopposed. The AFP met greater resistance in relation to the third application, made on 9 July, and the fourth one, made on 11 July, but nevertheless managed to obtain the benefit of most of the period it sought.

The requirement for 'judicial' oversight under s. 23CB was intended to operate as a legislative safeguard in relation to the length of pre-charge detention under Part 1C. The circumstances of Dr Haneef's detention suggest that this safeguard might not have been as effective as was envisaged. The AFP adopted a fairly liberal approach in its applications for specified periods. The magistrate appears to have granted such periods willingly, at least until Dr Haneef's lawyers opposed those applications. The result was that Dr Haneef was kept in detention under Part 1C for more than 11 days while the AFP conducted its investigation, before it finally decided to charge him.

Although the investigation was continuing, a significant amount of information had been collected and analysed by 9 July. The s. 23CB application dated 9 July said about 95 per cent of the electronic material had been examined. Situation reports issued on 7 July said the bulk of the computer material had been processed and the collation of property details had been completed; examination of documents and assessment of evidentiary value was continuing. By 8 July the computer forensic team had completed its analysis of the original data seized but had received some additional material that was still being analysed. It was expected that the analysis and summary of electronic material and compilation of an investigative spreadsheet would be completed on 8 July (although the assessment of that material by investigators would continue beyond that date).

In relation to physical evidence, seized documents had been analysed and 'property sheets' and 'evidentiary/exhibit sheets' had been completed subject to cross-checking. The intelligence team was in the process of compiling a comprehensive intelligence advisory report on Dr Haneef, providing a summary of the information obtained to date. Additional property was seized on the execution of further search warrants at the premises in Southport on 8 July, which was in the process of being analysed.

It does not appear that there was much information collected or analysed after 9 July that had any great significance for the further questioning of Dr Haneef. Most of the matters raised with Dr Haneef in the interview conducted on 13 and 14 July had been identified by the investigation before 9 July. As was stated in a written submission to the Inquiry on behalf of Dr Haneef, 'The questioning appears to have gained nothing by keeping Dr Haneef detained for a further 5 days'.

In hindsight, it was probably unnecessary for the AFP to seek additional specified periods under s. 23CB and to suspend or delay the questioning of Dr Haneef beyond the evening of 9 July 2007. Notwithstanding the scale of the investigation, the period of almost seven days from the time of the arrest of Dr Haneef should have been sufficient for identifying any material it was necessary to question Dr Haneef about and for determining whether or not to charge him with the offence for which he had been arrested or any other terrorism offence.

The effect of the adjournment of the fourth application on 11 July was unfortunate. Although the adjournment was basically brought about by the application made on behalf of Dr Haneef for the magistrate to disqualify himself, the effect was to give a de facto extension of the detention period by reason of dead time pursuant to s. 23CA(8)(h). This outcome might not have been contemplated by parliament when it made provision for 'the time (if any) that is reasonably required in connection with making and disposing of an application under section 23CB'. Ideally, an application should be disposed of promptly, after any representations have been made by the investigating official and the arrested person. It should be in exceptional circumstances only that a magistrate or other issuing official should reserve their decision on the application or adjourn the application for any lengthy period.

Reliance on time-zone differences in circumstances such as these also raises difficult questions. The AFP applied for specified periods that were far in excess of the relevant time-zone differences between Australia and the United Kingdom. It might be accepted that a time-zone difference could have a cumulative effect in delaying the passage of information back and forth between Australian authorities and overseas authorities. But if the investigating official is seeking a specified period of 120 hours (five days) after having already been granted successive periods amounting to 144 hours (six days) the additional impact of any time-zone differences on the collection of information from a place outside Australia might be expected to be minimal.

3.2.14 Inaccuracies in the material presented to the magistrate

Each of the applications made under ss. 23DA and 23CB referred to Dr Haneef having resided with Kafeel and Sabeel Ahmed. Each of the s. 23DA applications said Dr Haneef shared the same residential premises in the United Kingdom with two of the people arrested in the attacks—which may be taken as referring to Kafeel and Sabeel. The first, second and third s. 23CB applications said it was believed that Dr Haneef had shared the same residential premises in the United Kingdom with Kafeel and Sabeel. The fourth s. 23CB application asserted that Dr Haneef had said during his interview on 3 July 2007 that he had resided with Kafeel and Sabeel at 13 Bentley Road, Liverpool.

In addition, the first, second and third s. 23CB applications, and the confidential statutory declaration in support of the fourth s. 23CB application, said it had been ascertained that Dr Haneef had provided his 'mobile phone' to both Kafeel and Sabeel before leaving the United Kingdom. The second and third s. 23CB

applications stated that the mobile phone handset of which Dr Haneef was the 'registered owner' had been found in the possession of Sabeel and that UK authorities had provided information to suggest that the SIM card that originated in this handset was found in the possession of Kafeel, who suffered extensive burns in the Glasgow incident.

The sources and accuracy of these statements are discussed in greater detail in Section 3.3.2. The statements appear to have originally derived from information provided to the AFP directly or indirectly by the UK Metropolitan Police Service. But the statements about Dr Haneef's residence in the United Kingdom and the provision of his mobile phone to Sabeel and Kafeel were not entirely consistent with other information in the possession of the AFP, including the record of interview with Dr Haneef on 3 July 2007. The extent to which attempts were made to cross-check and update information when preparing each application under Part 1C is not clear.

3.2.15 The right to make representations

Part 1C of the Crimes Act confers on an arrested person a statutory entitlement to make representations in relation to an application for an extension of the investigation period and in relation to an application for specified time during which a suspension or delay in questioning may be disregarded—see ss. 23CB(6) and 23DA(3). Where such an application is made by telephone, telex, fax or other electronic means, the investigating official must inform the person of this entitlement—see ss. 23CB(4) and 23E(2).

Dr Haneef was not told he had a right to personally make representations to the magistrate about the applications. He was told only that he had the right to have a lawyer present when the applications were made. Dr Haneef said he did not want a lawyer to be present at the applications that were made on 3 July—the two s. 23DA applications and the first s. 23CB application.

There is an important difference between a right to have a lawyer present when an application is made and a right to make representations about the application, whether personally or through a legal representative. Not only was Dr Haneef unaware of his right to make representations: he was led to believe he was not required or expected to attend or to take any part in the application.

In his statement to the Inquiry Detective Sergeant Simms said he had understood from their conversation that Dr Haneef was concerned about the prospect of having to answer questions from the magistrate and did not want to do so. Nevertheless, Simms acknowledged that he did not offer Dr Haneef the opportunity to present himself to the magistrate, adding 'that entitlement did not cross my mind'. At the time, Simms thought he had satisfied the requirements by offering Dr Haneef the opportunity to have a legal representative present when the application was made. Federal Agent Thompson conceded that the failure to inform Dr Haneef of his right to make representations was an 'oversight' but

noted that Dr Haneef declined legal representation and 'was quite happy to go ahead'. He also noted that the magistrate had not asked to speak to Dr Haneef.

When interviewed by the Inquiry, Mr Rendina pointed out that Part 1C of the Crimes Act does not impose an express requirement on the investigating official to inform the arrested person of their entitlement to make representations about applications made under ss. 23CB or 23DA, other than in the circumstances of an application made by telephone, telex, fax or other electronic means. Nevertheless, before signing an instrument or authority under those provisions, the magistrate or other issuing officer must be satisfied that the person or his or her legal representative has been given the opportunity to make representations about the application—see ss. 23CB(7)(e) and 23DA(4)(d). In practical terms, it would be difficult for the issuing officer to reach this state of satisfaction unless there was material before him that showed the person had been given the opportunity to make representations. It is implicit in giving such an opportunity that the person must be made aware of the nature of the statutory entitlement.

In the case of Dr Haneef, the magistrate gained an incorrect impression from the written applications made on 3 July, which stated that Dr Haneef had been informed that he or his legal practitioner may make representations in relation to the application and that he had declined to have representation. It might have been true that Dr Haneef had declined to have legal representation, but he had not been told *he* could make representations about the application. Acting on the material before him, the magistrate was satisfied that Dr Haneef had been given the opportunity to make representations. It is a matter of speculation as to what the magistrate might have done had he been aware that Dr Haneef had only been given the option of having a lawyer present when the application was made. The magistrate might have asked to speak to or hear from Dr Haneef before signing the relevant instrument or authority.

I accept that Simms did not deliberately misinform Dr Haneef about his rights under Part 1C of the Crimes Act. Insofar as Simms was unaware of the detailed requirements prescribed by Part 1C, including the entitlement to make representations about the applications, this suggests a deficiency in the AFP's training of its officers. Training programs should ensure that officers are aware of the existence of a person's right to make representations about applications under Part 1C of the Crime Act and the impact of that right on the procedures for making applications under Part 1C.

In relation to the written application incorrectly stating that Dr Haneef had been informed 'that he or his legal practitioner may make representations regarding the application', this phraseology appears to have derived from the pro forma application on the AFP system. When preparing the initial draft of the application, Simms said he overlooked the significance of the words 'he or' and was not alerted to the fact that Dr Haneef himself had a right to make representations. Rendina does not appear to have been directly involved in the s. 23DA applications but did assist with finalising the first s. 23CB application. He said he understood from Simms and Matus that Dr Haneef did not want to make

any representations in connection with this application. Given Simms's misunderstanding of the nature of the statutory entitlement, it is unlikely that he would have specifically told Rendina that Dr Haneef himself did not want to make any representations—as opposed to not wanting to obtain legal representation in relation to the application. It is possible Rendina assumed Dr Haneef had been properly informed of his rights and did not wish to make any representations. The misunderstanding might have become apparent if Rendina had specifically asked Simms whether Dr Haneef had declined to make representations himself about the application.

3.2.16 The right to communicate with a friend, relative or legal practitioner

Section 23G of the Crimes Act imposes on an investigating official the obligation to inform an arrested person, before starting to question that person, of two things:

- that he or she may communicate or attempt to communicate with a friend or relative to inform that person of his or her whereabouts
- that he or she may communicate or attempt to communicate with a legal practitioner and arrange or attempt to arrange for a legal practitioner to be present during the questioning.

The investigating official must defer the questioning for a reasonable time to allow the person to make any such communication and must give the person reasonable facilities to do so. If the person has arranged for a legal practitioner to be present, the investigating official must defer the questioning for a reasonable time to allow the legal practitioner to attend the questioning and must allow and provide facilities for the person to consult with the legal practitioner in private.

These requirements are subject to limited exceptions set out in s. 23L of the Act. In particular, they do not apply if the investigating official believes on reasonable grounds that compliance is likely to result in, among other things, the concealment or destruction of evidence or that the questioning is so urgent having regard to the safety of other people that it should not be delayed. In the case of the right to communicate with a legal practitioner, application of the exceptions must be authorised by a senior police officer, at the rank of superintendent or higher, and a record must be made of the investigating official's grounds for belief. In addition, the exceptions to the right to communicate with a legal practitioner are applicable only in exceptional circumstances.

During the airport interview on the night of 2 July 2007 Dr Haneef clearly said he wanted someone to be present during any questioning—'someone should be there with me'. When Simms sought to clarify who Dr Haneef wished to have with him while he was questioned, Dr Haneef said he did not have any relatives in Australia, but he mentioned that he had a friend who worked at Gold Coast

Hospital (presumably referring to Dr Asif Ali). Simms then suggested that they could arrange for a lawyer to be present, and Dr Haneef responded, 'Yeah, I wish someone should be there with me, I suppose'.

Although this exchange is equivocal in some respects, it appears that Dr Haneef made it clear that he wanted someone, most probably a legal practitioner, to be present during any questioning. It is of note that s. 23G contemplates having only a legal practitioner present during questioning, not a friend or relative. Under that section, Simms was required to defer the questioning for a reasonable time to allow Dr Haneef to communicate with a legal practitioner and to allow the legal practitioner to attend the questioning. Simms and Thompson proceeded to conduct a search of Dr Haneef and his property, during which they asked him a number of questions. While most of these questions were directed to matters of general background or were incidental to the search, they elicited from Dr Haneef some information that was potentially relevant to their investigation of the offence for which Dr Haneef had been arrested. The conduct of such questioning does not sit comfortably with the terms of s. 23G. Nor does it fall within the exceptions set out in s. 23L: there is nothing to suggest that Simms or Thompson formed a belief on reasonable grounds in relation to the matters set out in s. 23L(1), and there was no record of the grounds for any such belief or the authorisation of a senior police officer.

No arrangements were made for Dr Haneef to communicate with a legal practitioner (or a friend or relative) on his arrival at AFP headquarters in Brisbane. As noted, Simms conceded that the failure to make such arrangements was an oversight, in circumstances where he and Thompson were occupied with a number of other pressing administrative tasks. Dr Haneef subsequently said, however, he did not require legal representation on each occasion it was offered during the interview on 3 July and in relation to the s. 23DA applications. In Simms's view, Dr Haneef was simply interested in answering any questions put to him by police. Simms stressed that he would have provided legal representation for Dr Haneef as a matter of priority had it been requested or had Simms formed a view that Dr Haneef required representation or was unsure of his rights.

On the following morning, at the start of the interview, Simms reminded Dr Haneef of the 'warnings' he had given in the interview room at the airport—that he had a right to have a lawyer, friend or relative present. There was no mention or recognition of the fact that Dr Haneef had at that time (at the airport) expressed a wish to have someone present when he was questioned. In response to Simms's reminder, Dr Haneef said he was happy to proceed with the interview and did not want a lawyer, friend or relative to be present at that time.

Although it does not necessarily absolve any previous failure to comply with the requirements of s. 23G, the requirements relating to communication with a legal practitioner were observed in relation to the interview conducted on 3 July.

Dr Haneef had told Simms he did not want a friend or relative to be present, but he did express some concern about letting his family know what had happened to him. When indicating that he wanted Simms to contact the Indian consular office, Dr Haneef said, 'Yeah. Just to, I mean let, let them know. Um and my ah family as well. Because they are worried about, I mean I was supposed to be going there tonight, to Bangalore. So if I'm not there then they will be very worried'.

Although this was said in the context of contacting the consular office, it does show that Dr Haneef might have wanted to communicate with members of his family in order to tell them where he was—see s. 23G(1)(a). Arrangements were made for Dr Haneef to contact the Indian consulate, but no steps were taken at that time to facilitate contact with a member of his family.

The question of communication with relatives was raised more directly on 5 July, when Simms spoke to Dr Haneef about the second application for specified time under s. 23CB. During that conversation, Dr Haneef was clear: 'I just want my family to I want to speak to my family and I feeling very lonely actually and um that's what I want you to request, that's my request to you so that I get in touch with them and speak to them please'.

Simms did not respond directly to this request until it was repeated later in the conversation:

> Haneef: Is there any chance, I mean that I could speak to my family, my wife, my mother at least?
>
> Simms: Look at this point no. I have to be honest with you. I will make some enquiries, but look at this point, that s unlikely. Once again, given the nature of our enquiries, um the nature of what's under investigation, okay?

The first occasion on which Dr Haneef was permitted to contact his wife was 8 July 2007. An attempt was made to phone Dr Haneef's wife on a number that had been provided by the Indian High Commission, but the call was not answered. The AFP declined to make further attempts to call Dr Haneef's wife on alternative phone numbers suggested by Dr Haneef, because those numbers had not been verified. He was eventually able to speak to his wife on 11 July 2007.

The sequence of events described raises questions about whether the investigating officials acted on the requests made by Dr Haneef to communicate with a relative in order to inform them of his whereabouts and whether Dr Haneef was given reasonable facilities to do so as soon as practicable after he expressed his wishes. On 5 July Simms said it would not be possible for Dr Haneef to contact his family because of 'the nature of what's under investigation'. It could be that this was a reference to the exception in s. 23L(1)(a) relating to the likelihood that such contact would result in an accomplice taking steps to avoid apprehension or in the concealment, fabrication or destruction of evidence or the intimidation of a witness. There is, however, no evidence that

Simms or any other investigating official formed such a belief or that there were reasonable grounds for that belief.

3.2.17 Procedural fairness

The provisions of Part 1C of the Crimes Act do not deal with the disclosure to an arrested person of any material or information that is relied on in support of an application to extend the investigation period under s. 23DA or to specify a period under s. 23CB.

The AFP did not provide to Dr Haneef or his lawyers a copy of the written applications that were provided to the magistrate on 3, 5 and 9 July. On 5 July, when Dr Haneef had obtained legal representation, Mr Russo was asked to leave the room while the written application was read by the magistrate. On 9 July Mr Keim appeared before the magistrate and submitted that Dr Haneef was entitled to be made aware of the material placed before the magistrate. The AFP opposed the provision of any material to Dr Haneef. By 11 July the AFP was prepared to provide some 'unclassified' material to Dr Haneef but also sought to rely on a confidential statutory declaration setting out facts that should not be disclosed to Dr Haneef or his legal representatives. It appears, from written submissions presented to the Inquiry on behalf of Dr Haneef, that his lawyers were not told the AFP was relying on any additional confidential material.

It is obviously desirable that an arrested person be provided with some details of an application made under s. 23DA or s. 23CB, including the reasons for making the application and, as far as possible, the information relied on in support of the application. It is arguable that disclosure of the material on which an application is based may be required in order to afford procedural fairness to the arrested person, subject to any justifiable limitations (for example, for reasons of national security), and to ensure that the right to make representations is effective and meaningful.

It can be accepted for the present purposes that the AFP will have legitimate reasons to withhold disclosure to an arrested person of some information in situations where national security or another public interest is threatened. But that should not prevent the AFP from providing to the arrested person material or information relating to the basis of the application. Dr Haneef and his legal representatives found themselves in a position where they were unable to respond effectively to the successive applications brought by the AFP, at least the applications before 11 July 2007.

The lack in Part 1C of the Act of any explicit statutory direction or statutory process governing the provision of information to an arrested person could have exacerbated the problems that arose in Dr Haneef's case. In the absence of statutory guidance, there is likely to be much uncertainty in any particular case about the information that should be provided and the information that should be withheld, even though it is made available to the magistrate or other issuing

officer. It would be of some benefit both to police and to the arrested person if these matters were explicitly dealt with in the provisions of Part 1C.

3.2.18 The length of the specified periods

According to the evidence of Commander Jabbour, Mr Rendina and Detective Sergeant Simms, a decision was made to apply for specified time under s. 23CB of the Crimes Act in increments, in order to ensure an appropriate level of oversight over the investigation and the continued detention of Dr Haneef. The magistrate had been informed of this approach at the time of the first s. 23CB application. As Rendina explained:

> The concept was that, irrespective of whether the management team considered that there might be sufficient material to justify a specified time of, say, seven days, it was deemed appropriate at the time, certainly by me, and it seemed to be agreed quite widely, that we would apply for a period less than what might otherwise have been available.

This approach does not sit comfortably with the subsequent s. 23CB applications made by the AFP, where the period sought progressively increased from 48 hours (two days) to 96 hours (four days) and then to 120 hours (five days). On the face of it, the successive applications made for progressively longer periods under s. 23CB might suggest that the management team was gaining in confidence as each application was granted by the magistrate. Thus, after the success of the initial application for a specified period of 48 hours, Rendina observed in the briefing paper he prepared on 4 to 5 July that the magistrate had 'appeared supportive of the application in the circumstances' and that they were confident further periods of dead time would be available if sought.

The successive applications also reflected the growing scale of the investigation, the number of avenues of inquiry being pursued, and the volume of information being collected. A decision to apply for a specified period under s. 23CB should, however, be based on an assessment of the amount of time it is expected will be needed to obtain or to analyse evidence, so as to be able to resume the investigation period and complete the questioning of the arrested person. An application for a shorter period than is expected to be required for that purpose could lead to a lack of transparency in the application process. Even if the magistrate is told that the investigators might ultimately need a period longer than that being sought, it could be difficult for the magistrate to determine whether it is appropriate to specify a period and, in particular, to determine whether the detention of the arrested person for that period is necessary to preserve or obtain evidence or to complete the investigation.

3.2.19 Training and materials

Following the amendments made in 2004 to Part 1C of the Crimes Act, the AFP adjusted its training courses in order to accommodate the new powers that had

been introduced in relation to the detention of people arrested for terrorism offences. It appears that Commander Jabbour had identified a gap in the training programs in this area in late 2005. As a member of the Legal Division, Mr Rendina had been involved in the development and delivery of a training package to AFP and state police officers dealing with the new powers. The AFP, in conjunction with the Attorney-General's Department and the Commonwealth Director of Public Prosecutions, had also produced pro forma applications under Part 1C and other materials that were accessible to investigators on the internal computer system.

Notwithstanding these training programs and materials, neither Simms nor Thompson had received any specific instruction on the preparation of applications under Part 1C in relation to terrorism offences—in particular, applications for specified time under s. 23CB. Simms said he had done an 'advanced' counter-terrorism investigator's course, but this had not included any coverage of Part 1C applications.

Throughout the investigation Commander Jabbour kept notes on 'areas for improvement', which included one point about the limited knowledge of counter-terrorism powers on the part of investigators and especially the 'minimal capability' to complete applications.

The structure and content of the applications made under ss. 23CB and 23DA clearly suggest that greater attention could be given to the drafting of forms and the training of investigators in the use of those forms—in conjunction with instruction on the operation of Part 1C of the Crimes Act more generally. In this regard, the fourth s. 23CB application, made on 11 July 2007, clearly benefited from the involvement of external legal advisors from the Australian Government Solicitor.

3.2.20 Review of continued detention

The power to detain an arrested person under Part 1C of the Crimes Act is qualified by a requirement of reasonableness. The investigation period under s. 23CA(4) 'begins when the person is arrested, and ends at a time thereafter that is reasonable, having regard to all the circumstances', subject to a maximum limit. On one view, the reasonableness requirement continues to apply even where the period has been extended under s. 23DA, although it is also arguable that extension of the investigation period operates independently (effectively leaving it to the magistrate or other issuing official to determine what period is reasonable). Under s. 23CA(5) the number and complexity of matters being investigated are taken into account in ascertaining any period of time for the purposes of s. 23CA.

In relation to dead time, the specification of a period under s. 23CB is not of itself sufficient to ensure that the period is disregarded for the purposes of ascertaining the investigation period. To establish that the time was covered by s. 23CA(8)(m), the prosecution must also show that the time was a 'reasonable' time during

which the questioning of the arrested person was 'reasonably' suspended or delayed. Although the fact that a magistrate or other issuing official specified a period under s. 23CB might assist in showing reasonableness, there could be circumstances within a specified period where it is no longer reasonable to suspend or delay questioning or to disregard the time when ascertaining the investigation period—for example, if the outstanding inquiries or investigative activities are completed sooner than was anticipated when the period was specified.

In addition, there is the question of whether 'the constable in charge of the investigation' continues to believe on reasonable grounds that the person committed the offence for which he or she was arrested—see s. 3W(2)(b)(i). As discussed in Chapter 5, the relationship between s. 3W(2) and s. 23CA(2) is uncertain. For present purposes, though, Commander Jabbour accepted that he had been required to maintain a reasonable belief for the purposes of s. 3W(2) for the entire period that Dr Haneef was held in detention pursuant to Part 1C.

Both Commander Jabbour and Mr Rendina stressed that the senior management team continually reviewed the existence of reasonable grounds for the belief that Dr Haneef had committed the offence for which he had been arrested. Nevertheless, there is little concrete evidence recording the conduct or results of any such regular review, apart perhaps from a note entitled 'SIO review of evidence—Operation Rain', which was prepared on 10 July. In this note Commander Jabbour stated that he did not believe there was sufficient evidence to charge Dr Haneef but that he believed 'that the grounds for his continued detention based on the application of the 9 July 2007 remain current given the outstanding enquiries' and that he would 'continue to review this up to the end of his current detention authorisation on Wednesday 11 July at 6.05 pm'. It is possible that Jabbour was referring to the grounds for detention under Part 1C of the Crimes Act, rather than expressing the opinion that there remained reasonable grounds to believe that Dr Haneef had committed an offence against s. 102.7, despite there being insufficient evidence to charge him with that offence.

There does not appear to have been any systematic process for recording and updating the information received in the course of the investigation and for keeping track of significant avenues of inquiry for the purposes of assessing the grounds for the belief that Dr Haneef had committed an offence against s. 102.7. In the absence of such a process, any review by Jabbour of the reasonableness of his belief was likely to have been an impressionistic exercise. Further, it is not clear to what extent any review took into account potentially exculpatory material or the explanations provided by Dr Haneef in his interview on 3 July.

In submissions to the Inquiry on behalf of Dr Haneef, it was suggested that following his interview on 3 July there were no longer reasonable grounds to believe that Dr Haneef had committed an offence. This overlooks the fact that the AFP was not necessarily required to accept everything Dr Haneef said in this interview at face value and had not by that time collected or analysed all relevant information. Nevertheless, the belief that Dr Haneef had committed an offence

would need to be supported by some positive information, rather than simply a disbelief of Dr Haneef's account or a suspicion about his truthfulness during the interview.

As the investigation progressed, and no further information that contradicted Dr Haneef's story had been found, the existence of reasonable grounds for any belief that Dr Haneef had committed an offence against s. 102.7 of the Criminal Code might have become more difficult to sustain. In particular, the reasoning underlying Commander Jabbour's belief that Dr Haneef had committed such an offence rested on a premise that, at the time Dr Haneef gave his SIM card to Sabeel Ahmed in July 2006, Sabeel and Kafeel had been members of a terrorist organisation and that Dr Haneef had either known or been reckless as to that fact. The 'evidence' supporting this premise consisted largely of Commander Jabbour's asserted experience in counter-terrorism, by reason of which he considered that the radicalisation of Sabeel and Kafeel must have developed over a period extending back to mid-2006 and that Dr Haneef must have been aware of their extremist inclinations. However, apart from a prospect of a potential witness statement from the United Kingdom that might provide evidence of Sabeel's radicalisation, there does not appear to have been much, if any, information to suggest that Dr Haneef had given his SIM card to Sabeel in the knowledge that Sabeel was part of a terrorist organisation or being reckless as to whether Sabeel was part of a terrorist organisation.

I stress that Part 1C of the Crimes Act does not contemplate that an arrested person should be detained until it can be disproved that they committed the offence for which they were arrested. When he spoke to Dr Haneef on 5 July in relation to the second s. 23CB application, Detective Sergeant Simms might have revealed an incorrect understanding of the operation of Part 1C. In the course of their conversation, Simms told Dr Haneef:

> The importance of the investigation in terms of what has happened … make it vital that our investigations are complete, um, which is why we will be seeking another extension … We have to be sure one way or the other … of either your involvement in any of those incidents … or your non involvement, ok.
>
> …
>
> It's absolutely vital and, given what's happened, it's crucial that we determine, like I said, one way or the other, whether you're involved with these people in the United Kingdom or whether you're not.
>
> …
>
> If it comes to a point where we obviously investigate things to a point that we can say Mohamed's definitely not involved, and we are happy and can categorically state that, you will be released prior to that four day period.

It would, however, be unwise to attach too much importance to these comments. First, Simms was not the officer in charge of the investigation and was not directly responsible for making decisions on applications under Part 1C. Second, in making the comments, Simms appears to have been trying to reassure Dr Haneef that he might be released sooner if it became apparent that he had not committed any offence.

3.3 The AFP investigation

3.3.1 Operation Rain

Operation Rain was an investigation conducted jointly by the AFP and the Queensland Police Service. The investigation arose from information provided to the AFP by the UK Metropolitan Police Service Counter Terrorism Command in relation to the incidents in London and Glasgow on 29 and 30 June 2007. In its submissions to the Inquiry, the AFP described the investigation as consisting of two distinct elements:

- to determine the alleged involvement of Dr Haneef and others in the terrorist incidents in London and Glasgow
- to identify any people involved in criminal activity who may pose a threat to Australia's national security.

It is apparent from this description that Operation Rain was not confined to the investigation of whether Dr Haneef had committed the offence of providing support or resources to a terrorist organisation contrary to s. 102.7 of the *Criminal Code Act 1995* or some other terrorism offence.

From its beginning on 3 July 2007 Operation Rain quickly developed into an extremely large and resource-intensive investigation. It is not intended here to provide a comprehensive account of the investigative activities engaged in by the many officers involved in Operation Rain; rather, what is offered is a broad overview of the course of the investigation, particularly during the period of Dr Haneef's detention.

3 to 5 July 2007

In the initial days of the investigation the AFP executed a number of search warrants at premises connected with Dr Haneef and Dr Asif Ali and started examining property seized from those premises. Dr Haneef was formally interviewed on 3 July. Investigators were engaged in the examination and analysis of call charge records in relation to phones linked to Dr Haneef and pursued inquiries in relation to financial transactions, including money transfers by Dr Haneef to accounts in the United Kingdom and India. Statements were taken from a number of people—in particular, employees at the Gold Coast Hospital, where Dr Haneef had been working.

At about 5.15 am on 3 July Magistrate Gordon issued search warrants under s. 3E of the *Crimes Act 1914* in respect of four premises—Dr Haneef's apartment, Dr Asif Ali's apartment, their respective offices at the Gold Coast Hospital, and Dr Haneef's vehicle. These search warrants were executed from about 7.15 am, resulting in the seizure of a range of items of property, including laptop computers belonging to Dr Haneef and Dr Asif Ali.

The forensic examination of the laptop computers began almost immediately. The examination of Dr Haneef's computer revealed records of several internet 'chat log' conversations of interest—including conversations between Dr Haneef and Dr Sabeel Ahmed on 17 June and 30 June and a conversation between Dr Haneef and his brother Mohammed Shuaib on 2 July (the day of Dr Haneef's attempted departure from Australia). The chat log conversations were conducted in a foreign language, so it was necessary to make arrangements for them to be translated into English. They were forwarded to the AFP's London office in order to obtain assistance from an interpreter available to the Metropolitan Police Service, although the AFP subsequently arranged for its own translation of the conversations. In addition, investigators discovered contact details for Dr Bilal Abdulla (one of the people arrested in the United Kingdom), which had been uploaded in the 'Outlook' contacts on Dr Haneef's computer on 16 December 2006. (Dr Haneef explained in his second interview that Sabeel had sent him a contacts file after his mobile phone had been damaged in water.)

An examination of Dr Asif Ali's computer revealed a number of images that investigators regarded as suspicious. There were some images of firearms and ammunition and drawings of bullet wounds; when interviewed, Dr Asif Ali claimed not to have seen these images before. Further investigations later indicated that the images might have been contained in study materials Dr Asif Ali had borrowed from another doctor and downloaded onto his computer. The investigators also discovered images of the boot compartment and interior rear floor space of motor vehicles. Subsequent analysis of these images was consistent with Dr Asif Ali's explanation that they were probably stored on his computer when he was viewing car sales websites on the internet.

Dr Haneef was interviewed by Detective Sergeant Adam Simms and Federal Agent Neil Thompson for about six hours on 3 July. On that evening, Simms completed a 'synopsis' of the interview, using his notes. Transcribing of the interview began on 4 July but does not appear to have been completed until 6 July.

Dr Asif Ali had been at his apartment when the search warrant was executed on the morning of 3 July, although he did not open the door to the police, who were obliged to use force to enter. Dr Asif Ali was cooperative during the search of his apartment and agreed to accompany officers to AFP headquarters for a voluntary interview, which began at about 4.30 pm. He was released without charge at about 12.15 am on 4 July. The AFP kept him under surveillance.

On the morning of 5 July an MPS Counter Terrorism Command officer, Detective Inspector Anne Lawrence, arrived at the AFP's Brisbane office to assist with the investigation. At about 10.15 am she briefed Operation Rain investigators on developments in the UK investigation. She also provided copies of a variety of documents relating to the UK investigation, including transcripts of several MPS interviews with Dr Sabeel Ahmed on 1 July.

On 5 July the Joint Counter Terrorism Team conducted inquiries in Perth in relation to a doctor employed by the Western Australian Department of Health who was a friend and associate of Dr Asif Ali. On the night of 2 July, while he was at Dr Haneef's apartment, Dr Asif Ali had received a phone call from this doctor, who at the time was working at Kalgoorlie Hospital. Search warrants were obtained and executed at residential and work premises of the doctor in Kalgoorlie and Perth. The applications for these search warrants were reviewed by AFP Legal in Canberra and by Commander Ramzi Jabbour in Brisbane.

An AFP intelligence advisory report dated 4 July 2007 summarised the position at that time:

> At this point enquiries are continuing for the purpose of establishing whether there are any links to those persons identified as being involved with the terrorist incidents in London. During the interview of Haneef, plausible answers were disclosed regarding his personal relationship with those persons identified as being involved in the attacks. A successful prosecution of Haneef in Australia will need to rely on extensive collateral evidence and information form [sic] the UK to refute Haneef's claims.

On the following day, an intelligence advisory report stated that 'whilst we continue to explore local links to Haneef it is increasingly apparent that proving Haneef's involvement with the UK terrorist plot will need to draw extensively from holdings within the UK'.

As the AFP submitted, these reports were prepared by AFP intelligence specialists in order to inform decision making and do not necessarily provide a definitive assessment of the state of the investigation.

6 to 9 July 2007

On 6 July AFP officers connected with the Joint Counter Terrorism Team in Sydney approached a doctor at Kingsford Smith Airport as he and his wife were about to board a flight to Launceston. The doctor had been nominated by Dr Asif Ali as his emergency contact when he arrived in Australia and had been placed under surveillance by the AFP. The doctor and his wife were cooperative, and consented to an interview and to a search of their luggage, car and house.

The AFP's Brisbane Client Liaison and Evaluation Team received a phone call on 6 July from Dr Haneef's wife, who asked to speak to Dr Haneef. A letter was also received from the Indian High Commission, saying that Dr Haneef's wife and brother-in-law were trying to contact him. An attempt was made on 8 July to

facilitate a call by Dr Haneef to his wife on a number the Indian High Commission had supplied to the AFP. The call was not answered. Dr Haneef suggested several other phone numbers on which his wife might be reached, but the AFP was not prepared to make any further attempts without first verifying the phone numbers. A call between Dr Haneef and his wife was subsequently successfully arranged on 11 July.

At about this time the AFP received a 'dump' of call charge record data from the UK Metropolitan Police Service, along with access to all intelligence holdings from the UK investigation. Further information was provided about the use of the SIM card Dr Haneef had left in the United Kingdom and the time at which Dr Haneef had ceased making payments for the phone service connected with that SIM card.

Surveillance of Dr Asif Ali continued. Applications were made for warrants under the *Telecommunications (Interception and Access) Act 1979* and the *Surveillance Devices Act 2004*.

Analysis of telephone records for Dr Haneef and Dr Asif Ali continued. The AFP identified a number of calls to and from mobile phone services that were subscribed in false names. On further investigation and analysis, it appeared that the false-name phones were associated with 'SIM-boxing' arrangements, which are often used as a means of making cheap international phone calls. The result of such arrangements is that the identity of the parties to particular phone calls cannot be ascertained.

On 7 July inquiries were conducted in response to information about two Indian doctors who had allegedly departed their residence in suspicious circumstances on 3 July. It was found, however, that the doctors had made their travel arrangements before the incidents in London and Glasgow.

Early on 8 July the AFP's London office forwarded a copy of an email that had been drafted by Kafeel Ahmed before the attack at Glasgow Airport. Attached to the email were two documents containing messages and instructions from Kafeel to members of his family, including Sabeel Ahmed. Shortly before the Glasgow attack Kafeel had sent Sabeel an SMS message with instructions on how to access the email and documents, but Sabeel did not access and read the documents until shortly after the Glasgow attack had taken place.

Further search warrants were executed at the Southport premises of Dr Haneef on 8 July and Dr Asif Ali's premises on 9 July. The purposes of these searches were the collection of forensic samples and location of any documentation relating to the purchase of material that could be used to construct improvised explosive devices. From about 9 July Queensland Police Service officers were engaged in conducting inquiries with retail outlets and real estate agents in geographical areas frequented by Dr Haneef and Dr Asif Ali in order to ascertain whether there had been any purchases of materials that could be used to construct improvised explosive devices or the rental of premises to be used for the construction of such devices.

As the investigation progressed, as many as 47 'persons of interest' were identified on the basis of their educational and social background and their relationship to Dr Haneef or Dr Asif Ali. Some of these were colleagues of Dr Haneef and Dr Asif Ali at the Gold Coast Hospital; others were doctors located outside Queensland. Most of these people were interviewed or provided statements. With the exception of one doctor, all of them were ultimately determined not to be of any interest to the investigation.

Arrangements were made for the translation of the chat log conversations and other material obtained from the examination of Dr Haneef's and Dr Asif Ali's laptop computers. In particular, the chat room conversation of 2 July 2007 between Dr Haneef and his brother Mohammed Shuaib was 're-translated' to ensure accuracy. The bulk of the electronic data from the laptop computers had been processed by 8 July. At this time Detective Sergeant Simms noted in his official diary, in reference to the examination of Dr Haneef's laptop computer, 'Assessment at this stage is that no evidence to support Haneef's implication in terrorist related activity or support. Still outstanding CFT [computer forensic team]'. In relation to the latter, Simms identified chat logs that were being translated, a number of photographs that were being further examined, and 'Skype details' that were being looked at.

10 to 16 July 2007

Dr Asif Ali participated in further voluntary interviews on 10 July (from 9.55 am to 8.42 pm) and 11 July (from 12.44 pm to 7.22 pm). On 12 July the Western Australian doctor agreed to be interviewed by AFP officers in Perth.

The process of obtaining statements from doctors and nurses at the Gold Coast Hospital continued. In particular, one witness told police he had spoken to Dr Haneef on 1 July and that Dr Haneef had not mentioned that he intended to travel to India to visit his wife and child.

Surveillance and monitoring of Dr Asif Ali and the Western Australian doctor continued. Inquiries were made in relation to access to the internet by Dr Haneef and Dr Asif Ali using computers at the Gold Coast Hospital.

The examination and analysis of seized property continued. Investigators also pursued inquiries in relation to financial transactions and banking records. Requests made of Indian law enforcement authorities for information encountered difficulties in the absence of a formal mutual assistance request. Further information continued to be provided by UK authorities in relation to their investigation.

Inquiries were conducted in relation to a possible link between the registration of the Jeep Cherokee vehicle that was involved in the Glasgow Airport incident and the name of an Australian citizen whose father lived in Sydney.

On about 12 July the AFP received from the UK Metropolitan Police Service information in relation to potential witness statements that were relevant to the

question of Sabeel Ahmed's involvement and possible association with extremist ideologies.

The Commonwealth Director of Public Prosecutions was briefed to provide advice on the evidence and potential criminal charges. Dr Haneef was interviewed again from the afternoon of 13 July through to the morning of 14 July, at which time he was charged with an offence under s. 102.7(2) of the *Criminal Code Act 1995*. A bail application made on 14 July was adjourned to the morning of Monday 16 July, when Dr Haneef was granted conditional bail.

After 16 July 2007

In the weeks following 16 July the Commonwealth Director of Public Prosecutions was engaged in a review of the evidence and the charge that had been brought against Dr Haneef. This review culminated in the CDPP's decision to withdraw the charge on 27 July.

Meanwhile, the investigation continued. On 18 July Detective Sergeant Adam Simms and Federal Agent Michelle Gear travelled to the United Kingdom to conduct further inquiries and interview potential witnesses. Between late July and early September Simms and Gear spoke to a wide range of associates of Dr Haneef and Dr Sabeel Ahmed in Liverpool and Cambridge, and took statements from many of them. In his statement to the Inquiry Simms explained, 'The essence of these inquiries was that Dr Haneef was a somewhat introverted individual and of genial personality. He was a well respected doctor and friend of many of the persons spoken to'. Many of the people interviewed said they were not aware of any extremist ideologies being held by either Dr Haneef or Dr Sabeel Ahmed. Among those interviewed were several doctors who had founded the 'Mufeed' organisation; they confirmed that the group had been established to assist Indian doctors working in the United Kingdom, including with provision of accommodation and limited financial support. The investigators were left with 'no doubt that the organisation existed to purely assist disadvantaged Indian Doctors' and that 'extremism and radical religious ideology would never be supported by this group'.

Simms said they had also ascertained from their inquiries that 'the acquisition of SIM cards was not a difficult process in the UK and that it did not require identification to be produced and or a registration process to utilise the SIM card' and that the handing over of SIM cards by people leaving the United Kingdom to those remaining there was a 'common occurrence'. In relation to the ease with which SIM cards could be obtained in the United Kingdom, Simms observed in his interview with the Inquiry that he wished that 'someone had come forward and said that a lot earlier', noting that it 'begs the question as to why terrorists would want to use SIM cards that are registered in the names of affiliates, associates or relatives. It just doesn't stand to reason'.

A transcript of the interview with Dr Haneef on 13–14 July was prepared, and a review and analysis of all records of interview was conducted, along with completion of an evidentiary time line. A review of intelligence holdings was

conducted in order to identify links with the premises at 13 Bentley Road, Liverpool, in the United Kingdom, which is where Sabeel and Kafeel Ahmed had been living.

On 18 July a review of material that had been seized from Dr Haneef's residential premises on 8 July identified a brochure from an organisation called Hizb ut-Tahrir; the brochure was described in an AFP intelligence advisory report as 'a generic pamphlet outlining the perceived demonization of Islam in the media; as well as how it is the highest duty of Muslims to speak the truth about perceived injustices against Muslims around the world'. The intelligence advisory report noted that, while the organisation was banned in a number of countries, it was not proscribed as a terrorist organisation in Australia. Possession of the brochure did not of itself suggest that Dr Haneef held extremist views, but it was regarded as significant because it potentially indicated an ideology held in common with some of the suspects in the United Kingdom who possessed similar material. A similar view was taken in relation to audio files located on Dr Haneef's laptop computer containing lectures from a radical Islamic scholar.

In August and the following months further requests for information were made to overseas authorities; this included the preparation of further mutual assistance requests.

The Major Incident Room for Operation Rain closed on 10 August, and its functions were taken over by the Joint Counter Terrorism Team in Brisbane. Commander Jabbour returned to Canberra on 9 August.

On 17 August Dr Asif Ali left Australia after the AFP returned his passport. On 24 August Queensland Health dismissed him from his employment at the Gold Coast Hospital on the basis that he had provided false information in his curriculum vitae to cover gaps in his work history. In dismissing Dr Asif Ali, Queensland Health stressed that there was no question about his medical qualifications or competence as a doctor. On 31 August a delegate of the Minister for Immigration and Citizenship cancelled Dr Asif Ali's subclass 457 visa as a result of the termination of his employment by his sponsor.

Further investigations were conducted into the phones subscribed in false names that Dr Haneef had contacted. Many of these phones were used in 'SIM-boxing' arrangements, it emerged, and they were assessed as being of no further interest to the investigation.

In August and November the AFP provided to the Department of Immigration and Citizenship updated information in relation to Dr Haneef and Dr Asif Ali, for use in any further consideration of visa cancellation.

In successive situation reports produced between September 2007 and April 2008 the following 'current operational synopsis' was provided:

> There are currently outstanding lines of enquiry to be pursued overseas and limited enquiries in Australia. Subsequent to the CDPP withdrawing the

> charge, while significant enquiries have been undertaken, there has been little material evidence supporting an offence being committed by any person contrary to sections 102 or 103 of the Criminal Code Act 1995 (Cth).
>
> …
>
> Pursuit of the remaining avenues of enquiry continues with the intention of identifying any evidence which may establish HANEEF recklessly (or otherwise) provided support to a terrorist organisation contrary to the Criminal Code Act 1995.

During the course of this Inquiry, on 29 August 2008, the AFP informed the Attorney-General that Dr Haneef was no longer a person of interest. In his interview with the Inquiry AFP Commissioner Keelty said the AFP's investigation of Dr Haneef was largely completed towards the end of 2007, when the AFP was 'reaching a stage where there was no new information coming forward', but that the AFP was still awaiting the outcome of several requests for information and assistance from overseas authorities. Although those inquiries were not finalised, the decision was ultimately made to bring the investigation of Dr Haneef to an end in August 2008.

3.3.2 Specific matters arising in the investigation

As is evident from the summary just provided, the investigation conducted by the AFP and the Queensland Police Service was wide-ranging. There are, however, several factual matters that are of particular importance for the present purposes and that were raised in the material relied on in support of various applications or provided to the Commonwealth Director of Public Prosecutions or the Minister for Immigration and Citizenship.

It is not possible in this report to provide an exhaustive account of the inquiries and information relating to each of these factual matters, but the following discussion identifies them and explains their relevance.

Activities on 2 July 2007

The AFP regarded the circumstances leading to Dr Haneef's attempted departure from Australia on 2 July as a significant avenue of inquiry. The investigation focused on the nature and timing of Dr Haneef's travel arrangements, his arrangements for leave from his employer, and conversations he engaged in during that day. In broad terms, the AFP suspected that the 'trigger' for Dr Haneef's sudden departure was his awareness of law enforcement interest arising from his association with people who had been arrested in the United Kingdom in connection with the terrorist incidents in London and Glasgow.

At about 10.00 am on 2 July Dr Haneef phoned the human resources area at the Gold Coast Hospital and inquired about parental leave entitlements. In response to this inquiry, shortly after 10.30 am Dr Haneef received an email attaching some information about parental leave. In his statement to the Inquiry, Commander

Jabbour said he 'suspected the initial inquiry by Dr Haneef regarding his leave entitlements was a legitimate general query probably based on his intention to return to India at a future point to visit his wife and child'.

Some time around 1.00 pm Dr Asif Ali phoned Dr Haneef, telling him he had received a phone call from Dr Haneef's brother in India, Mohammed Shuaib, who had been trying to contact Dr Haneef about a 'problem with a card' that had been left by Dr Haneef in the United Kingdom. Dr Haneef told investigators he had phoned his brother after talking to Dr Asif Ali, and his brother told him there was some problem with the SIM card and that Sabeel Ahmed's mother wanted to speak to him.

At about 1.50 pm Dr Haneef received a phone call from Ms Zakia Ahmed, the mother of Sabeel and Kafeel Ahmed, in India. Ms Ahmed said there was a problem with a SIM card and that Sabeel had been taken into custody, and she told Dr Haneef to contact Tony Webster to explain about the SIM card. Ms Ahmed said Tony Webster might be an investigator in the United Kingdom and gave Dr Haneef a phone number for him. Detective Inspector Webster was later identified as a Metropolitan Police Service police officer who had been making some local inquiries in Liverpool following the incidents in London and Glasgow.

At some time between 2.00 and 2.51 pm Dr Haneef went to hospital administration at the Gold Coast Hospital and submitted an application for leave. (Information provided to the AFP on 5 July erroneously stated that the application had been made between 4.15 and 4.30 pm; this was corrected on 11 July.) In making the application, Dr Haneef said his wife had recently given birth to a baby by emergency caesarean and the baby had jaundice. The AFP subsequently confirmed on 7 July that Dr Haneef's wife had indeed given birth to a daughter by caesarean section in India on 26 June 2007.

After his leave application was approved, Dr Haneef called his father-in-law in India to make arrangements for the purchase of his plane ticket to Bangalore. Dr Haneef told the AFP he did not have enough money to buy the ticket himself. His father-in-law arranged through a local travel agent for the purchase of a one-way ticket from Brisbane to Bangalore, and the agent emailed an itinerary to Dr Haneef.

There is some uncertainty about the precise order of the events just described. For example, in his interview on 13 and 14 July Dr Haneef suggested that Sabeel's mother did not call him until after he had applied for leave and arranged with his father-in-law for the purchase of his ticket. In any event, it is clear that Dr Haneef had been told about the problems with his SIM card before he submitted his leave application and that he submitted that application and made travel arrangements promptly after being informed of those problems.

In his interview on 13 and 14 July Dr Haneef denied that he made the leave application because he found out about the problems with the SIM card. Nevertheless, the inference is open that the timing of the application was

influenced by the information provided to Dr Haneef by his brother or by Sabeel Ahmed's mother.

During the afternoon following his phone conversation with Sabeel Ahmed's mother, Dr Haneef made a number of unsuccessful attempts to call Detective Inspector Webster. Commander Jabbour told the Inquiry he 'did not consider Dr Haneef's apparent attempts to contact UK Special Branch member, Tony Webster, on 2 July 2007 to be significant'. Based on his experience, he said, he believed these calls 'may have been an attempt [by Dr Haneef] to ascertain the extent of police awareness regarding his criminal activity'. The fact that Dr Haneef had tried to call Webster was not referred to in the material provided to the magistrate for the applications made under Part 1C of the Crimes Act; nor was it referred to in the material the AFP provided to the Department of Immigration and Citizenship for use when considering visa cancellation.

Considering that the AFP was seeking to rely on an inference that Dr Haneef was trying to 'flee' the country after being made aware that he had come to the attention of law enforcement authorities, the information about his attempts to contact a UK police officer before his departure should, as a matter of fairness, have been included in any summary of facts and evidence prepared by the AFP. Notwithstanding Jabbour's rather cynical view, the information was at least potentially consistent with an innocent explanation of Dr Haneef's attempted departure. A proper assessment of the significance of the attempts to call Detective Inspector Webster might have been hampered by delays on the part of the UK Metropolitan Police Service in providing to the AFP information about the identity of Mr Webster and the manner in which his details had come to be passed on to Sabeel Ahmed's mother in India. It appears that on 13 July the AFP was given the results of the inquiries made by the Metropolitan Police Service—namely, that Detective Inspector Webster had interviewed and provided his details to three men in Liverpool who knew both Dr Haneef and Dr Sabeel Ahmed and that it was likely that one of these men had passed on Webster's details directly or indirectly to Sabeel's mother.

Beginning at about 4.15 pm, Dr Haneef engaged in an internet chat room conversation with his brother in India, Mohammed Shuaib. The conversation concluded shortly before 6.00 pm, but it had not been continuous and there were several lengthy periods in which no conversation was taking place. Both the translation of this chat log and the inferences to be drawn from it are contentious. The AFP viewed the chat log as highly suspicious and as giving rise to an inference that Dr Haneef was leaving the country in order to avoid the attention of law enforcement authorities under cover of a story about wanting to visit his wife and child.

Dr Haneef later approached Dr Asif Ali in the emergency ward; he told Dr Asif Ali that he had spoken to his brother, that his daughter was ill and that he was going to India to see his wife and daughter and to sort out some problems with a card in the UK. Dr Haneef later approached Dr Asif Ali for a second time in the

emergency ward, gave him his house keys and car keys, and asked him to look after his laptop computer and some jewellery.

When interviewed by the AFP on 3 July, Dr Haneef said his primary reason for travelling was to visit his wife and newborn child, who had recently been re-admitted to hospital. He said he was planning to return to Australia in seven days. When asked why he was travelling on a one-way ticket, he said his father-in-law had booked the ticket and he was going to arrange the return ticket after he arrived in India. Dr Haneef's luggage contained some documents the AFP regarded as inconsistent with short-term travel, such as original copies of professional qualifications, Dr Haneef's marriage certificate, and a copy of the purchase agreement for the SIM card Dr Haneef had given to Dr Sabeel Ahmed.

I accept that the AFP had grounds to suspect that Dr Haneef's travel was not planned before 2 July and was in response to the receipt of information about the arrest of Dr Sabeel Ahmed in the United Kingdom and the questions raised about the SIM card Dr Haneef had provided to Sabeel. Nevertheless, even if the timing of Dr Haneef's departure was influenced by the events of 2 July 2007, this did not necessarily mean Dr Haneef had any involvement in or foreknowledge of the incidents in London and Glasgow.

Shared residence in the United Kingdom

Initially, the UK Metropolitan Police Service thought Dr Haneef had lived 'for an unspecified time' with Sabeel and Kafeel Ahmed in Liverpool.

In his interview on 3 July Dr Haneef mentioned that he and Sabeel had each lived at 13 Bentley Road, Liverpool, but he did not directly say they had lived there at the same time. When he was asked who was living with him at the Liverpool address, he named several doctors but not Sabeel. He later said Sabeel was staying at 13 Bentley Road 'after I left there probably' and that he didn't know exactly how long Sabeel lived there 'because I wasn't staying there then'. Subsequently, in his interview on 13–14 July 2007, Dr Haneef confirmed that he was not living at 13 Bentley Road when Sabeel moved there.

Nevertheless, a 'brief synopsis' of the 3 July interview prepared by Detective Sergeant Simms stated that Dr Haneef 'was living with [Sabeel Ahmed] at the Bentley Road address just before he left the UK for his return to India and then onto Australia' and that Dr Haneef had said that he left excess baggage there. Dr Haneef was not in fact living at 13 Bentley Road immediately before leaving the United Kingdom and had provided details of the other addresses at which he had lived. He had also stated in the interview that Sabeel had subsequently moved to 'some other place in Liverpool' (Hatherley Street), which is where he left his property (some books and clothes).

The confusion might have been resolved by an analysis of the transcripts of interview, which were available at least from 6 July, or perhaps even by putting the question directly to Dr Haneef for clarification. Instead, the assertion that Dr Haneef had lived with Sabeel and Kafeel Ahmed was repeated in each of the

AFP's applications under Part 1C of the Crimes Act, and was ultimately made to the Magistrates Court in oral submissions on the bail application of 14 July. The fact of shared residence was highly significant to the nature and extent of Dr Haneef's association with Sabeel Ahmed, including his exposure to any extreme or radical ideologies Sabeel was alleged to have adhered to.

In a letter to DIAC on 23 July 2007 the AFP stated that it still believed that Dr Haneef resided at 13 Bentley Road with Sabeel Ahmed, although the UK Metropolitan Police Service and the AFP were still 'confirming exact timeframes' when each of Dr Haneef and Sabeel Ahmed resided at relevant addresses, including 13 Bentley Road.

The AFP stated in a written submission to the Inquiry, 'Comprehensive analysis of all relevant material shows Dr Haneef, [Dr] Ali and Sabeel Ahmed all resided at this address [13 Bentley Road], however, it does not appear they all resided at the premises together at any one point in time'. In particular, it does not appear that there is any evidence to show that Dr Haneef resided with Sabeel Ahmed for any period, including at the Bentley Road address.

Location of the SIM card and handset

The initial information provided to the AFP by the Metropolitan Police Service was that Dr Haneef had left his mobile phone, and the SIM card, with Dr Sabeel Ahmed. When Detective Inspector Anne Lawrence arrived in Brisbane from the United Kingdom, she provided information that the phone handset had been found in Sabeel's possession when he was arrested in Liverpool and that the SIM card was found in the possession of Kafeel Ahmed at Glasgow Airport.

This information was repeated in a number of documents as the prevailing position, until it was eventually corrected by the Metropolitan Police Service on 12 and 13 July. On 12 July Detective Superintendent Prunty informed the AFP that both the phone handset and the SIM card had been in the possession of Sabeel Ahmed when he was arrested—that is, the SIM card had not been in Kafeel's possession at the time of the incident in Glasgow. On 13 July the information was further corrected by the MPS, which revealed that Dr Haneef had given to Sabeel a SIM card only and not his mobile phone handset, which he had brought with him to Australia.

In fact, both Dr Haneef and Dr Sabeel Ahmed had clearly stated during their interviews that Dr Haneef had provided only a SIM card and not a mobile phone handset. There was no apparent reason for this account to have been concocted. Accordingly, the AFP could have itself corrected one mistaken aspect of the information by conducting a proper analysis of the transcripts of interview, which were available from at least 6 July. Insofar as the AFP had been led to believe that the SIM card had been found with Kafeel Ahmed at Glasgow Airport, however, it appears that the AFP relied on the information provided to them by the Metropolitan Police Service.

The Kafeel email

The email and attached documents that were written by Kafeel Ahmed before the incident at Glasgow Airport are discussed and analysed in Section 3.5.

These documents have become important because they have been relied on as demonstrating that Dr Sabeel Ahmed did not have prior knowledge of the plot to carry out the attacks in London and Glasgow. This would have significant consequences for any case against Dr Haneef, which alleged that giving his SIM card to Sabeel constituted the provision to a terrorist organisation of resources that would help that organisation engage in terrorist activity.

In his statement to the Inquiry, Commander Jabbour said in relation to the Kafeel email and attachments:

> I reviewed the document in conjunction with other available evidence and concluded that the documents did not have any exculpatory value regarding Sabeel Ahmed. The documents purport to indicate Sabeel Ahmed had no prior knowledge of the plot. However, upon closer analysis and analysis of other evidence, particularly telephone call data, I formed a contrary view.

Jabbour concluded that Kafeel had prepared the documents with a view to concealing Sabeel's knowledge. In his interview, Jabbour did not accept the possibility that the documents when read in the light of other evidence could be regarded as potentially exculpatory of Dr Sabeel Ahmed (and as a consequence Dr Haneef). I note that the public submission the AFP ultimately provided to the Inquiry conceded that 'an uncritical face value acceptance of the documents would suggest that Dr Sabeel Ahmed had no prior knowledge of the attacks because Kafeel Ahmed had actively kept them a secret from Dr Sabeel Ahmed'.

Without excluding the possibility that the documents had been contrived to provide an alibi for Sabeel Ahmed in the wake of the London and Glasgow incidents, the AFP should have taken account of the alternative possibility it suggested—that Sabeel did not have prior knowledge of those incidents—and considered the implications of that possibility for the investigation into whether Dr Haneef had committed a terrorism offence. To the extent that the Kafeel email was assessed by investigators, it appears that its only significance was identified as an illustration of the use of the word 'project' in connection with planned terrorist activities. Any possible exculpatory value or significance appears to have been either overlooked or disregarded. In my view, this was the primary explanation for the failure to refer to the documents in material the AFP provided to the magistrate in support of the Part 1C applications (although there was a brief reference in a confidential statutory declaration by Commander Jabbour for the fourth application on 11 July 2007) or the material provided for consideration by the Minister for Immigration and Citizenship or the material provided to the Commonwealth Director of Public Prosecutions. While the documents were clearly considered highly sensitive and were subject to restrictions on their distribution, Jabbour did not consider it was necessary to refer to them, regardless of their classification or sensitivity.

Financial transactions

Early in the investigation, the AFP uncovered a number of financial transactions involving the transfer of funds by Dr Haneef to accounts in the United Kingdom and India. This ultimately gave rise to lengthy and detailed investigations to identify relevant financial transactions and ascertain the recipients of the funds and the purpose of the transfers. Some of these investigations led to requests to overseas authorities for assistance and information.

Some of the most significant transactions were put to Dr Haneef in his interviews. In relation to several transfers of money to the United Kingdom, an intelligence advisory report dated 4 July 2007 noted that Dr Haneef 'had provided plausible responses as to the nature of these transactions' and the 'AFP enquiries thus far have not identified any further transactions that significantly challenge the responses provided by [Dr Haneef]'. A subsequent intelligence advisory report on 21 July concluded, 'There has been no indication that [the accounts] have been used to fund terrorist activity'.

Without detracting from the need to investigate fully any financial transactions between people of interest in the investigation, I note that those transactions do not at any stage appear to have provided concrete support for any belief that Dr Haneef had committed a terrorism offence. Referring to the transfer of funds from Dr Haneef to Dr Asif Ali, Commander Jabbour said in his statement to the Inquiry that he 'was not able to positively exclude that the payments were connected to the UK incidents' and that the transfer of funds to India 'remained worthy of further investigation'. Even so, having provided his explanation of the transactions, Dr Haneef should not have carried the burden of disproving any possible suspicion that those transactions were connected to terrorist activities.

The 'Mufeed' photographs

As noted, the examination of Dr Asif Ali's laptop computer identified several photographs of men wearing T-shirts bearing the word 'Mufeed'. Both Dr Haneef and Dr Asif Ali were identified in these photos. Mufeed was an organisation formed to provide support to Indian doctors in the United Kingdom.

On 9 July 2007 the MPS Photographic Identification Cell confirmed to the AFP that the photographs also included Dr Bilal Abdulla, who was arrested following the incident at Glasgow Airport. In their interviews, Dr Haneef and Dr Asif Ali had each said the person identified as Bilal was another person.

In a letter from the AFP to the Department of Immigration and Citizenship dated 23 July 2007, it was noted that subsequent inquiries had revealed (as of 16 July) that the person in the Mufeed photograph might not be Bilal Abdulla but instead might be the person who was mentioned by Dr Haneef and Dr Asif Ali. It was stated that the MPS Counter Terrorism Command was 'yet to confirm who is in this photograph with Dr Haneef'.

The Photographic Identification Cell subsequently advised on 6 August that it could not positively identify the male in the photo as Dr Abdulla and that facial

recognition examination had proved inconclusive. On 7 August the AFP Counter-Terrorism Liaison Officer in London advised that an MPS Counter Terrorism Command police officer had confirmed that the person in the photograph was definitely not Dr Abdulla.

3.3.3 Management of the investigation

As the AFP submitted to the Inquiry, terrorism investigations are often complex and demanding, involving large volumes of information that must be collected, processed and analysed in a limited time frame. Such investigations can also involve multiple jurisdictions, both in Australia and abroad. Given the risks to public safety, police might be required to intervene (for example, by apprehending a suspect) early, while substantial resources are still occupied in the continuing tasks of gathering information and evidence.

Operation Rain was conducted from the AFP's Brisbane office. The investigation was initially managed by Federal Agent David Craig, who was acting as the Manager of the Brisbane office and was responsible for supervision of the Joint Counter Terrorism Team in Brisbane, reporting to Commander Jabbour as Manager Counter Terrorism Domestic in Canberra. On 3 July 2007 Commander Jabbour arrived in the Brisbane office and assumed the position of Senior Investigating Officer of Operation Rain.

After 3 July Federal Agent Craig continued in the role of coordinator of the investigation. On 6 July this role was divided, Detective Superintendent Gayle Hogan of the Queensland Police Service becoming Investigation Co-ordinator (Queensland) with responsibility for investigations carried out in Queensland and Federal Agent Craig becoming Investigation Co-ordinator (National) with responsibility for interstate and international aspects of the investigations, including people of interest in states such as New South Wales and Western Australia.

A Major Incident Room was established on the morning of 3 July. The MIR was responsible for receiving, collating and assessing all information relevant to the investigation. It produced situation reports at least daily. Because much of the information was being received from the UK Metropolitan Police Service, the MIR was required to operate on a 24 hours a day, seven days a week. The personnel in a MIR ordinarily include an Information Manager, a Receiver, a Reader, a Reporter and a Task Manager. Each of these positions has specific responsibilities. For example, the Information Manager is in charge of the information flow within the MIR and reports to the Manager of the MIR. The Receiver assesses all information entering the MIR, decides on urgent taskings, and receives completed taskings. The Registrar is responsible for folioing and retrieving original documents and for ensuring that relevant documents are forwarded to the Reporter and to the intelligence cell. The Reader is responsible for reading all documents, including statements, interviews and reports, and identifying further actions to assist the investigation. The main function of the Reporter is to compile situation reports from information forwarded by the

Receiver. The Task Manager monitors and follows up on all of the tasks performed by the MIR.

Separate investigative teams were established for each of Dr Haneef and Dr Asif Ali. In addition, Commander Jabbour established a number of specialist teams—covering surveillance, computer forensics, forensic services, financial investigation, legal support, and a combined intelligence cell (including representatives of the AFP, the Queensland Police Service, ASIO, AUSTRAC and the Australian Customs Service). Additional support was provided by intelligence officers and the legal area in the AFP Canberra office.

There appears to be general acceptance that the MIR structure did not operate effectively in the early stages of the Haneef investigation. Commander Jabbour said there were initial difficulties in the management of information, primarily because of the limited experience of some AFP officers in MIR operations and the lack of access to and familiarity with AFP systems on the part of QPS officers. These concerns were echoed by Federal Agent Craig and by Detective Sergeant Simms, who went so far as to describe the MIR as a 'shambles for at least a week'. The QPS submission also drew attention to interoperability concerns arising from differing methodologies and incompatible systems and observed that the AFP viewed the MIR as an 'administrative process' with the primary purpose of collecting and collating information, rather than as an operational management tool for providing direction, command and control of the investigation. According to the Queensland Police Service, the problems included inefficiency in resource management arising from multiple and duplicated taskings and the investigation team working in isolation from the MIR.

Many of these concerns were raised and discussed in a joint 'debrief' and review of Operation Rain conducted by the AFP and the Queensland Police Service in February 2008. Although it was agreed that the final MIR structure was a suitable starting point for the preparation of a template or set of protocols for future counter-terrorism investigations, the review recognised that there had been difficulties in task and information management and a lack of resources in the initial stages of the investigation.

In his statement to the Inquiry, Commander Jabbour noted that 'while a suitable investigational structure was ultimately achieved in Operation Rain, this structure was not in place until two to three weeks into the investigation'. This accords with the position adopted in the QPS submission, which stated that 'after about two weeks' the MIR began to provide overall direction to the investigation both tactically and strategically. The implication is that there were problems in the investigation structure of Operation Rain throughout the period of Dr Haneef's detention, from 3 July until he was charged on 14 July and perhaps beyond.

The AFP and all state and territory police forces have entered into a Memorandum of Understanding for the Conduct of Multi-Jurisdiction Major Crime Investigation in Australia (including Terrorism). The memorandum

contemplates the oversight of such an investigation by a Joint Management Committee comprising the Assistant Commissioner (Crime) or its equivalent in each relevant jurisdiction and an Investigation Management Group consisting of a Chief Investigating Officer and the Senior Investigating Officers for each participating agency. The Memorandum of Association between the AFP and the Queensland Police Service also contemplates the establishment of a Joint Management Committee to oversee the activities of the Joint Counter Terrorism Team in Brisbane. This structure was not formally adopted in the case of Operation Rain. Instead, management meetings were conducted at least once daily by Commander Jabbour, as the Senior Investigating Officer, with other senior AFP and QPS officers. Jabbour was supported and advised throughout the investigation by Detective Superintendent Prunty from the UK Metropolitan Police Service, who attended most of the important meetings. Although Jabbour had tasked an AFP officer with taking contemporaneous notes of his meetings, conversations and decisions each day, no formal minutes were kept of any management meetings. Commander Jabbour reported frequently to Assistant Commissioner Prendergast in Canberra, and regular briefings were in turn provided to Deputy Commissioner Lawler and Commissioner Keelty.

In its submissions to the Inquiry the AFP conceded, 'In hindsight, a formal [Joint Management Committee] would have assisted during the course of the Operation to provide a forum for formal review and endorsement of critical decisions with records of such meetings being prepared and distributed to relevant agencies'.

Throughout the investigation Commander Jabbour was intimately involved in the details of the inquiries being conducted by investigators. To some extent, this close involvement and supervision arose from the circumstances in which the investigative team was required to come to grips with relatively untested legislative provisions in a complex and fluid factual setting. It is possible, however, that Jabbour's familiarity with the minutiae of the investigation hampered him in adopting a critical perspective of the case against Dr Haneef and prevented him from making an objective assessment for the purpose of making decisions in relation to the detention, charging and prosecution of Dr Haneef.

At the height of the investigation, Operation Rain involved about 250 AFP members and 225 QPS members, plus additional support from officers from ASIO, the Australian Customs Service, AUSTRAC, Western Australia Police, the New South Wales Police Service, and other state and territory police forces. The investigation resulted in a vast number of avenues of inquiry: an AFP submission noted that 2,313 'tasks' were generated on its case management system. Detective Sergeant Simms observed that Operation Rain was 'probably the first investigation of its kind the size that we had and with the complexities, given the international aspects of the investigation, that we have ever seen, as far as I'm aware, anyway, certainly that I was exposed to'. There was a large volume of information, much of which was received from the UK Metropolitan Police Service. The investigation extended to a number of persons of interest and encompassed inquiries in several states and territories.

In one sense, this serves to illustrate that the investigation was not focused exclusively on the question of whether Dr Haneef had committed a terrorism offence—in particular, the offence of providing support or resources to a terrorist organisation. No objection can be made to the AFP conducting a broad and thorough investigation of any possible links between the UK incidents and people in Australia. But the extent to which that broader investigation can be relied on to support the continued detention without charge of Dr Haneef is a different matter.

I note, too, that the investigation placed extreme demands on many of the AFP and QPS officers involved, especially during the first week in the Brisbane office. I acknowledge that the investigators, including those I interviewed, performed their tasks with a dedication that is commendable, in difficult circumstances and under high pressure.

3.3.4 Information management

The AFP was the lead agency in Operation Rain, and its PROMIS system was used as the primary information recording and case management system, consistent with the Memorandum of Understanding between the AFP and the Queensland Police Service in relation to Joint Counter Terrorism Team activities.

Management of information and tasking was an important concern from the start of the investigation. Detective Sergeant Simms told the Inquiry that in the early days of the investigation they were 'out of [their] depth in terms of being able to manage information' and referred to communication difficulties involving information not being conveyed to the investigators working on Dr Haneef's case. The investigation team seems to have been under-resourced in the first 24 to 48 hours. Simms noted that after he returned to AFP headquarters in the early hours of 3 July the matter 'escalated beyond anything I have ever, ever witnessed in my career and there were only a handful of people to deal with it'. Thompson noted that, despite an initial 'semblance of control', the investigation 'exploded' after 3 July. He said there were problems keeping track of taskings, about 100 or 200 of which were created each day, and that the Joint Counter Terrorism Team 'basically ceased to exist' and was swallowed up by the huge teams that were created.

Federal Agent Craig made some early attempts to establish processes for the management and assessment of information. He appointed an Investigation Quality Assurance Review Officer, whose role was 'to review the case log and results inquiries and identify any missed avenues of inquiry or investigation vulnerabilities' and held two 'investigation quality assurance' meetings to review progress, at 12.00 and 7.00 pm on 3 July. Minutes were kept at these meetings.

After Commander Jabbour arrived in the Brisbane office and assumed the position of Senior Investigating Officer, these processes were replaced by daily management meetings and operational briefings. There were also regular teleconferences with the counter-terrorism liaison officer in the London office,

during which updates on the progress of the UK and Australian investigations were exchanged. No formal minutes were kept of these meetings and briefings, although notes were sometimes made of the matters that were discussed.

Situation reports were issued by the Major Incident Room at least daily and often more frequently. During most of the first week of the investigation, however, these reports were brief and specific and did not serve as a cumulative summary of the information obtained to date. From around 7 July the situation reports became more structured, highlighting important information obtained since the last report and providing an update on the current status of the investigation—under headings such as investigation, Haneef evidence team, Ali evidence team, surveillance, intelligence, external agency liaison, strategic and policy issues, media and future directions. Nevertheless, the situation reports did not and were not designed to fulfil the function of a consolidated report of important information and outstanding inquiries.

The Operation Rain intelligence team produced regular intelligence advisory reports. These were generally issued twice daily until about 16 July, after which they were issued once daily for the rest of July and less frequently from August on. The reports assessed and analysed information as it was received. From 7 July there was reference to the preparation of 'comprehensive' intelligence advisory reports in which it was intended that all information provided to the intelligence team would be assessed, in order to inform decision-making processes relating to investigative strategies. It was contemplated that a separate intelligence advisory report would be produced dealing with each of Dr Haneef and Dr Asif Ali, together with another such report covering the other doctors of interest to the investigation.

Thus, an intelligence advisory report providing an 'overview' on Dr Asif Ali was issued on 11 July. On the same day, another such report, entitled 'Executive brief Operation Rain', was also issued; its stated purposes were 'to provide decision-makers with critical indicators of the activities of [Dr Haneef] and [Dr Asif Ali], to assist in establishing offences under Sections 102.7(2) and 103 Criminal Code 1995' and to 'outline significant information gaps that require further attention with a view to assisting evidentiary collection'. This report examined information relating to Dr Haneef's association with UK suspects, his activities on 2 July, the terms of his chat log conversations, his financial transactions and his record of interview. Various intelligence advisory reports also make reference to the preparation of a comprehensive 'time line'. On 12 and 13 July the intelligence team was involved in preparing material to be used for the purposes of briefing the Commonwealth Director of Public Prosecutions and responded to requests from management for intelligence 'snapshots' in relation to particular topics—among them the 'convergence' of Dr Haneef, Dr Asif Ali and Kafeel and Sabeel Ahmed in India between July and September 2006.

Useful as these intelligence reports might have been to investigators, they could not be used for obtaining an accurate and up-to-date summary of relevant information received in the course of Operation Rain. As the investigation

progressed, there was an obvious need for a document or record that provided in an accessible format a running compilation of the evidence collected by or provided to investigators on the important aspects of the investigation. If any information that differed from earlier information was obtained, the consolidated document or record could be updated to reflect the current position. Such a document would then facilitate ready identification of the state of the investigation at any particular time.

A consolidated record of evidence would have been invaluable in the preparation of search warrant affidavits, applications and supporting material under Part 1C of the Crimes Act, the material provided to the Department of Immigration and Citizenship in relation to possible visa cancellation, and the briefing material for the Commonwealth Director of Public Prosecutions. In the absence of such a reference source, the information for those documents had to be assembled from whatever materials were available and was often taken from a range of other secondary documents. This carried with it the risk of perpetuating inaccuracies or repeating information that had since been superseded or amended. It also generated a multitude of documents containing versions of the same information, none of the documents being clearly authoritative.

In addition, a consolidated record of evidence would have helped Commander Jabbour and the other investigators assess the case against Dr Haneef by weighing up the evidence against the elements of the offences they suspected Dr Haneef had committed. This could have allowed investigators to identify any crucial weaknesses and avenues of further inquiry.

In the diary notes made on behalf of Commander Jabbour there are numerous references to the development of an 'evidence matrix'. The AFP did not, however, produce any such document to the Inquiry. Among the documents the AFP created were the following:

- On 11 July Federal Agent Craig sent a spreadsheet entitled 'Op Rain evidence summary' to Assistant Commissioner Prendergast. This spreadsheet listed a number of items of evidence in relation to Dr Haneef and Dr Asif Ali, with comments under columns headed 'Evidence of guilt', 'Evidence of association' and 'Evidence of knowledge'. But the spreadsheet was far from comprehensive and did not appear to be directed to the elements of any particular offence or offences. Its limited utility might be illustrated by noting that there were only four matters identified as 'Evidence of guilt': two of these related to evidence about the time at which Dr Asif Ali learnt of the attack in Glasgow, one related to video footage found on Dr Asif Ali's computer, and the remaining one related to Dr Haneef's sudden departure suggesting an intention to flee. Most of the items of evidence were cited as evidence of an association between Dr Haneef and Dr Asif Ali or other people, including Dr Sabeel Ahmed.

- Several versions of another spreadsheet were circulated on 12 and 13 July. This document, which appears to have been prepared by officers in Counter

Terrorism Intelligence in the AFP's Canberra office, listed key 'events' in relation to Dr Haneef and Dr Asif Ali, with comments on the relevance and significance of each of them. The document is fairly limited in scope and substance—at least for the purposes of obtaining a full and accurate picture of the current state of the investigation.

On 10 July Commander Jabbour issued a document that was initially entitled 'Current evidence as at 10 July 2007' but was ultimately entitled 'SIO review of evidence—Operation Rain'. This document was probably produced by Jabbour in conjunction with Detective Superintendent Prunty from the UK Metropolitan Police Service. In its final form, the document stated it was 'a current "snapshot" of the operation' that had been produced 'in order to allow me [presumably, Jabbour] to review my current investigative strategy and significant lines of enquiry'. It contained a table showing the main sources of evidence but '[did] not purport to be based on a detailed account of all the material within the possession of the investigative team at this stage as much of the material is still being processed'. The document proceeded to discuss broad aspects of the evidence, under the headings 'Physical evidence', 'Financial', 'Physical movements/travel history', 'Communications' and 'Circumstantial'. It then considered the state of the evidence in relation to a number of possible offences, including s. 102.7 of the Criminal Code, before expressing a belief that there was not sufficient evidence to charge Dr Haneef.

This document seems to represent the closest the AFP got to creating a written record and assessment of the evidence in relation to the offences that were the subject of the investigation. Although Senior AFP Lawyer Mr Michael Rendina suggested that Jabbour had maintained a 'rolling note' in which the evidence was collated and evaluated by reference to the elements of various offences, there do not appear to be any other iterations of the 'SIO review of evidence' document.

The absence of any authoritative and updated consolidation of the evidence is demonstrated by the fact that the written material presented to the Commonwealth Director of Public Prosecutions on 13 July (the 'brief head') had to be put together overnight. It is also notable that the brief head did not incorporate any of the material or analysis contained in the 10 July document entitled 'SIO review of evidence'.

Some of the difficulties encountered during the course of Operation Rain could have been alleviated or avoided if there had been better systems and processes for the management of information—in particular, for keeping track of the current state and direction of the investigation. This might involve a dedicated officer or officers who are responsible for compiling and maintaining a record of the relevant information collected or received by investigators at any given time, with some analytical and possibly legal input into the organisation and assessment of that information.

The AFP pointed out that a dedicated officer in the Operation Rain Major Incident Room had been assigned the role of collating and cross-checking all

information. Nevertheless, as discussed, this did not result in the creation or maintenance of a consolidated record of the investigation in a form that could be used by other members of the investigative team, including for the purposes of review and oversight by senior management. Commander Jabbour received regular updates from team leaders at management meetings, but this was not as effective for such purposes.

3.4 The security intelligence investigation

On 2 July 2007 ASIO began its security intelligence investigation into Dr Mohamed Haneef. The investigation was conduced in parallel to—as opposed to jointly with—the criminal investigation being conducted by the Australian Federal Police. Several ASIO officers told the Inquiry that, although consultation between ASIO and the AFP could still occur in a parallel investigation, it was possible that the two agencies could arrive at different assessments and seek to take different action in accordance with their respective legislative functions.

In its investigation, which involved significant resources (including many officers), ASIO was responding to and analysing lead information passed from the AFP, rather than initiating the collection of its own information. In turn, ASIO supported the AFP's criminal investigation by exchanging information, assisting with the processing of information, and forwarding its findings as advice to the AFP. ASIO used a range of investigative techniques to analyse and generate a large amount of information. In Brisbane it was represented in a combined intelligence team the AFP established to manage the investigation. This team was sometimes referred to informally as the Joint Intelligence Group. Senior ASIO officers in Brisbane engaged daily in dialogue with AFP officers, providing the primary point of ASIO interaction with the AFP investigation. The main role of ASIO's Brisbane office was to facilitate the exchange of information between Operation Rain in Brisbane and ASIO's security intelligence investigation in Canberra. ASIO officers were also placed in the AFP's Major Incident Room in Brisbane; their role was similar—to facilitate the exchange of information between the AFP and the ASIO team in Canberra and vice versa.

The bulk of the analytical work was done by ASIO's Canberra team. Among other things, in the course of the security investigation ASIO did the following:

- analysed digital media
- manually reviewed files—text, audio, video and picture files
- trace-checked telephone numbers and email addresses
- produced 42 internal reports detailing the outcomes of inquiries into various aspects of the investigation. These reports formed the basis of ASIO's overall assessment of Dr Haneef and were used in the preparation of other reports and documents ASIO released

- produced four Attorney-General's submissions in respect of Dr Haneef—on 3, 6 and 18 July and 2 August 2007. These provided updates on ASIO's investigation and advised on media reporting relating to Dr Haneef

- produced security intelligence reports on 4 and 11 July, providing ASIO's assessment of the Australian connections to the UK attacks

- prepared a draft security assessment in respect of Dr Haneef and updated the assessment as the investigation progressed.

ASIO's National Threat Assessment Centre also produced four threat assessments in relation to Australian links to the UK attacks. The centre advised that there was no requirement for an upgrade to the threat level in Australia. At all times during the period being examined, the threat level remained at medium.

ASIO liaised closely with the AFP and other government organisations in Canberra and Brisbane. In Canberra, it began meeting with organisations on 2 July and continued to liaise daily to share information, carry out trace-checking, and discuss the progress of the investigation. In conducting its investigation, ASIO did not question or detain Dr Haneef. Its officers did not participate in and were not present during the AFP interviews. Nor was ASIO involved in or consulted about the decision to arrest Dr Haneef, the decision to keep him in detention pending charges (although the AFP did use some information provided by ASIO for that purpose) and the decision to charge him.

ASIO's security intelligence investigation into Dr Haneef was comprehensive. It resulted in numerous assessments and reports concerning Dr Haneef's relevance to security and regularly sought to ensure that government agencies and people who were responsible for making decisions in relation to Dr Haneef were informed of ASIO's position.

3.4.1 Chronological overview of the investigation

2 July 2007

At about 8.30 am on 2 July a senior ASIO officer (Officer G) received a telephone call from AFP Assistant Commissioner Frank Prendergast, who informed him that the UK Metropolitan Police Service had identified a person in Australia who was of interest in relation to the attempted terrorist attacks in London and the attack in Glasgow on 29 and 30 June 2007 respectively.

The AFP offered to brief ASIO on the matter. A briefing session was then held between about 9.45 and 10.20 am at AFP headquarters in Canberra. An ASIO manager and Senior Executive Service officer (Officer A) attended the briefing, which was chaired by Commander Ramzi Jabbour from the AFP. Among others attending were Detective Superintendent Prunty from the UK MPS and Federal Agents Luke Morrish and Sue Thomas from the AFP. Information given at this briefing included that Dr Haneef had been identified as having had contact with individuals arrested in connection with the UK attacks. It was also said that Dr

Haneef might be in Australia, and the UK authorities through the AFP were working to determine if this was the case.

On the basis of the information provided at the AFP briefing, Officer A concluded that Dr Haneef was a person who might be relevant to security within the meaning of the *Australian Security Intelligence Organisation Act 1979*. Officer A then completed the necessary paperwork and obtained the requisite authorisations in order to formally initiate a security intelligence investigation to determine Dr Haneef's relevance to security and to provide advice to government on potential threats to Australia's security.

Once the investigation had been authorised, Officer A and Officer D assembled the investigation team. Officer A was the manager responsible for ASIO's investigation, and he was subject to direction from ASIO's Deputy Director-General A (Officer C) and Officer G. At the operational level, the team was lead by Officer D. The investigation team was assisted by a number of subteams that were assigned specific roles. This coincided with Officer B (a Senior Executive Service officer) travelling from Canberra to manage the ASIO Brisbane office while officers normally stationed there were performing other duties. Events in the Haneef matter developed rapidly, so Officer B remained in Brisbane to oversee ASIO's activity and liaison with the AFP's Operation Rain team and with the Queensland Police Service. Officer E later returned to the ASIO Brisbane office and helped Officer B manage the Brisbane aspects of the Haneef investigation.

The initial focus of ASIO's investigation had three facets:

- to test the credibility and reliability of the lead information provided to the AFP
- to collect intelligence to enable ASIO to determine whether there were any links between Dr Haneef and known extremist activities or identities in Australia or overseas
- to establish Dr Haneef's capability and/or intent with respect to supporting, promoting or undertaking acts of politically motivated violence (including terrorism) in Australia or overseas.

ASIO's investigation was not directed towards whether Dr Haneef should be arrested or charged with any offence.

Dr Haneef was located late in the afternoon on 2 July. Officer A was in contact with Federal Agent Morrish throughout the late evening and early morning of 2 to 3 July and kept a record of the various conversations he had during that period. At 11.13 pm on 2 July Officer A was advised of Dr Haneef's arrest in a phone call from Morrish and again at about 11.20 pm by Officer F, who had been advised by ASIO officers present at Brisbane Airport. Morrish also told Officer A the AFP would be seeking a warrant to search Dr Haneef's home and would begin an interview with him at about 5.00 am on 3 July.

3 July 2007

From 3 July ASIO's investigation sought to gather as much initial information as possible and to run checks in various databases on information the AFP had seized from Dr Haneef. By this time the AFP and Queensland police had searched Dr Haneef and his possessions at the airport, as well his residence, laptop, vehicle and workplace. ASIO officers based in Brisbane scanned material the AFP had seized from Dr Haneef at the airport and conveyed it to ASIO in Canberra for analysis.

As part of its response, ASIO deployed case officers from interstate to assist the AFP at its northern headquarters in Brisbane and to help with ongoing investigations by the ASIO Brisbane office. At 5.30 pm Officer A informed Federal Agent David Craig from the AFP that an ASIO officer would join the combined intelligence team the AFP had established that day. The officer would stay until 10.00 pm, then another officer would join the team at 7.00 am the following day. Officer A also offered general ASIO assistance to the AFP if it was needed. He added that ASIO was willing to receive any AFP information on the outcomes of its investigation, which it could check in order to provide feedback. Craig confirmed that the intelligence team would operate 24 hours a day, but he was unable to say how long this would continue.

After arriving at the ASIO Brisbane office on 3 July Officer B arranged for an ASIO officer to be present in the AFP's Major Incident Room 24 hours a day. Information that passed between ASIO and the AFP was coordinated through the Major Incident Room. As a result of leads generated by the data forwarded by the AFP and in response to direct AFP requests, ASIO officers in Brisbane were also involved in making inquiries in the field. ASIO's priority was to become embedded in the AFP Major Incident Room to ensure access to all relevant information so it could be passed to ASIO in Canberra, to develop an operational plan to respond to leads and to ensure that ASIO and the AFP had a 'complete picture' of the relevant people.

Officer A decided on 3 July that an initial ASIO security intelligence report on Dr Haneef and the London terror attacks would be drafted. The purpose of the report was to advise the Australian Government and senior Australian officials of ASIO's understanding and assessment of Dr Haneef's relevance to security. A draft report was settled by Officer A and Officer G to express the facts ASIO knew and its assessment based on the information to hand.

At about 5.30 pm Officer A sent the draft security intelligence report to the AFP for clearance. This was done to ensure that ASIO's proposed report did not contain anything likely to prejudice the AFP investigation. It also ensured that the AFP had an unambiguous understanding of ASIO's formal assessment of Dr Haneef's relevance to security at that stage. At about 10.20 am on 4 July Ms Stephanie Taylor from the AFP telephoned Officer A to advise that the AFP was comfortable with the contents of the draft report.

ASIO also issued a threat assessment on 3 July; it said no specific, credible terrorist threat had been identified in Australia as linked to the attacks in the United Kingdom and that ASIO was cooperating with the relevant agencies to investigate the alleged Australian links to the events in the United Kingdom. ASIO also provided a submission to the Attorney-General; this was copied to the Department of the Prime Minister and Cabinet. The submission outlined details of the alleged Australian links and provided an update on the AFP investigation discussed the AFP's arrest and initial questioning of Dr Haneef, searches of his residence, office and vehicle, and the transmission of material collected from those searches to ASIO for analysis.

4 July 2007

Between 4 and 6 July ASIO continued its analytical work, focusing on the material seized from Dr Haneef and following up on trace-checks and lead information. It supplemented its analytical team to do this.

ASIO also briefed other members of the Australian Intelligence Community on the investigation and issued a second threat assessment. This assessment continued to advise that no specific, credible terrorist threat linked to the UK terrorist incidents had been identified in Australia and that there was no basis for varying the threat level from medium. It confirmed that the AFP had arrested and questioned Dr Haneef and had executed search warrants. It also noted that ASIO continued to liaise with agencies to investigate the significance of the alleged Australian connection with the UK incidents but advised that ASIO had no information to suggest Dr Haneef was involved in or had foreknowledge of the incidents or was involved in terrorist-related activities.

ASIO formally issued its first security intelligence report on 4 July. According to Officer A, even though the ASIO investigation was at an early stage, it was appropriate to issue the report at that time because, on the basis of the material reviewed to that point, by the morning of 4 July ASIO was 'confident':

> to advise Government of ASIO's initial analysis which had not identified information to suggest that Haneef: posed a specific threat to security, in Australia or overseas; was planning to undertake an act of violence in Australia or elsewhere; was involved in, or had foreknowledge of, the failed UK attacks.

The 4 July security intelligence report was distributed widely across government, including to the Department of Prime Minister and Cabinet, the Attorney-General's Department, the Department of Immigration and Citizenship and the AFP. Issuing the report did not, however, mean that ASIO had a concluded view about Dr Haneef's relevance to security: despite that assessment, the report noted that ASIO remained 'concerned about Dr Haneef's connections and activities' and that its investigation of his activities was continuing.

In his statement to the Inquiry, Officer A noted that as at 4 July there remained a considerable amount of material to review that had the potential to show

Dr Haneef posed a threat to security, but the report said, 'ASIO had not uncovered information of that nature as of early 4 July 2007'.

5 July 2007

By 5 July ASIO's analysis of 'relevant product' had yielded intelligence. Although ASIO considered that the data required further assessment and analysis, the preliminary analysis did not exhibit security significance. ASIO passed to the AFP an analytical chart under caveat that identified links to and from Dr Haneef before 2 July.

A third threat assessment was issued. It repeated much of the information that had been in the previous assessment and noted that the threat level in the United Kingdom had been downgraded.

6 July 2007

The initial investigation of Dr Haneef led to a number of other people becoming subjects of the AFP investigation, and AFP search warrants were executed in relation to some of them. From 6 July Officer A and Officer G decided that the ASIO investigation would focus only on Dr Haneef and one associate. In particular, the analysis of 'search product' concentrated on determining Dr Haneef's relevance to security as quickly as possible. Although ASIO continued to accept from the AFP electronic media relating to other people of interest, it examined or processed that material only if Officer A or Officer G decided it was likely to contain leads relevant to security.

In an internal ASIO situation report dated 6 July Officer D noted important recent developments and summarised information resulting from ASIO's analysis. The analysis did produce data requiring further investigation, but there was no information to suggest that Dr Haneef posed a threat to Australia or had advance knowledge of the UK attacks.

ASIO issued its fourth threat assessment on 6 July. It also prepared a further submission to the Attorney-General, copied again to the Department of the Prime Minister and Cabinet. The assessment said Dr Haneef and his associates were the subject of ongoing inquiries, but it continued to maintain there was no information to suggest that Dr Haneef was involved in or had foreknowledge of the UK incidents or was involved in terrorist-related activities. The submission basically reaffirmed the assessment ASIO had made in the security intelligence report of 4 July. As at 4.00 pm on 6 July ASIO had:

> not identified any information that suggested a specific threat in Australia or overseas as a result of HANEEF's presence in Australia, nor has information been identified to indicate HANEEF had any involvement in, or foreknowledge of, the 29–30 June terror acts in the UK.

The submission to the Attorney-General confirmed that ASIO still had no basis for a questioning or detention warrant or to issue an adverse security assessment.

At 7.52 pm Officer A sent an email to the broader intelligence investigation team in ASIO, changing the focus of the investigation from examination of data and quick analysis to a more analytical consideration of whether Dr Haneef and his associate posed a threat to security. The email noted the need to compare the facts of the case as known by ASIO and the facts relied on by the AFP. It is apparent that even at this early stage ASIO had seen a need to be in a position to be able 'to explain any difference between ASIO and AFP positions on the same information'.

7 July 2007

On 7 July ASIO produced two minutes focusing on compiling internal assessments of Dr Haneef's activities. The first dealt with the images taken from the computer hard drives of Dr Haneef and his associate, which had been recovered in the AFP searches executed on 3 July. The AFP had identified 40 images from Dr Haneef's hard drive as being of possible interest and had forwarded them to ASIO. The images were of the 'Mufeed' group and tourist photos of Sydney Harbour. Preliminary ASIO analysis of the images suggested there was 'nothing of obvious imminent security interest'. The second minute provided details of the investigations and analysis relating to Dr Haneef and his associate. The analysis concluded that Dr Haneef did not continue to pay for a SIM card after he left the United Kingdom in 2006.

8 July 2007

On Sunday 8 July ASIO prepared an interim internal assessment of Dr Haneef's computer use and content. The conclusion was that the material found on his computer indicated he supported a moderate interpretation of Islam; there was limited information of security relevance in relation to his contact with other identified people of interest.

At 2.00 pm a meeting began between Officer A, other ASIO officers and Federal Agents Morrish and Anderson. ASIO later documented the discussions at the meeting. The purpose of the meeting was 'to discuss the progress of investigations against Muhammed [sic] Haneef and his associates and in particular legal avenues for revoking Haneef's visa'. ASIO confirmed at the meeting that it did not have sufficient information to justify an adverse security assessment against Dr Haneef. Federal Agent Morrish provided information about the AFP investigation and said the AFP, in consultation with the Department of Immigration and Citizenship, was exploring the possibility of taking action under s. 501 of the *Migration Act 1958* 'which would revoke Haneef's current visa and see him deported'. Morrish also outlined the 'key planks' of the AFP's case against Dr Haneef at this time:

- that Dr Haneef appeared to have used a pretext for leaving Australia—that is, he told police he was leaving in connection with the birth of his child and had a one-way ticket to Bangalore

- that Dr Haneef's SIM card was found on Kafeel Ahmed and his 'telephone number' was found in Dr Sabeel Ahmed's possession

- the Yahoo! chat conversation between Dr Haneef and his brother Mohammed Shuaib on 2 July (as recovered from Dr Haneef's hard drive), in which 'they refer to Haneef "getting out" and the "project" involving' Kafeel.

The AFP agents explained that Dr Haneef had left his telephone and SIM card in the United Kingdom and that his telephone handset was found in Sabeel Ahmed's possession and his SIM card was identified on Kafeel Ahmed when he was arrested by the UK authorities. The information the AFP provided at this point revealed that the AFP held the view that Dr Haneef had left both his SIM card and his telephone handset with his cousins in the United Kingdom. Morrish also referred to 'a "farewell letter" written by Sabeel or Kafeel Ahmed which contained a reference to the "project"'. He undertook to provide a copy of the letter to Officer A by 4.00 pm that day.

At about 4.40 pm a further meeting began, at AFP headquarters in Canberra, although some ASIO and AFP officers in Brisbane attended by videoconference. The meeting was chaired by Commander Jabbour, who was in Brisbane at the time. ASIO later documented the discussions. At the meeting ASIO offered to provide a copy of its classified chronology to the AFP after Jabbour had noted that 'the AFP's greatest priority' was to complete a time line of events. Later that day ASIO in Canberra sent a slightly sanitised version of the chronology to ASIO in Brisbane for forwarding under caveat to the AFP.

At this meeting Commander Jabbour asked ASIO for its view of Dr Haneef. In reply, Officer A reaffirmed that ASIO did not have information to support an adverse security assessment. Officer A noted that earlier that day he had attended a meeting with Federal Agent Morrish and they had 'matched notes'. Officer A also confirmed in response to a direct question from Assistant Commissioner Prendergast that ASIO had insufficient information to entertain the notion of issuing a questioning warrant against Dr Haneef. Jabbour reportedly said the 'AFP did not have enough on HANEEF to charge him' and they were 'seeking to charge for support to a terrorist act'. This acknowledgment is noteworthy, particularly in the light of the statements purportedly made by Morrish at the earlier meeting, which emphasised the 'key planks' of the AFP's case at this time.

Prendergast and Jabbour foreshadowed at the meeting that the AFP intended to seek a further 48-hour extension of 'dead time' to give the AFP more time to analyse information. If that application was unsuccessful, the AFP proposed to lodge a preventative detention order. Federal Agent Weldon advised the meeting that a draft order had already been provided to the Attorney-General's Department for an opinion, and the AFP had been informed that the test for such an order had been met.

In an internal ASIO email sent at 9.56 pm Officer A noted that the AFP did not yet have a written draft of the police 'case' against Dr Haneef. Although acknowledging there was 'still some work to be done', Officer A had formed the

view that the proposed AFP case 'was not strong'. He explained that he formed this view because the AFP's case appeared to rest on information from the UK Metropolitan Police Service and the AFP and ASIO had discovered little information in Australia that demonstrated or corroborated the UK information or showed that Dr Haneef was a willing participant in or had foreknowledge of the attacks in the United Kingdom.

9 July 2007

By the morning of 9 July ASIO was beginning to scale down its security intelligence investigation into Dr Haneef and had prepared a summary of its work to date. The summary was prepared by one of Officer D's assistant directors. It showed what assessments and tasks had been completed and what remained to be done. The document shows that by the end of 8 July ASIO had examined a considerable amount of material. It had concluded on the basis of this material that it was 'unable to establish a nexus to security between Haneef and the events in the UK. Investigations have revealed a social network but there has been no indication of indicators of security interest'.

ASIO examined the reasons advanced to support the UK authorities' initial interest in Dr Haneef, which were as follows:

- He had shared living arrangements with 'persons of interest' in the United Kingdom.
- A mobile phone handset and SIM card belonging to Dr Haneef had been used in the attempted attacks and the attack in Glasgow.
- There had been email contact between Dr Haneef and a person of interest in the United Kingdom immediately before the Glasgow attack.

Although acknowledging that the nature of Dr Haneef's links to the persons of interest in the United Kingdom had 'not yet been fully explained', ASIO sought to answer various pertinent questions relating to Dr Haneef and to assess whether the subsequent investigations supported the initial basis for concern.

Some of the conclusions drawn from ASIO's analysis at this stage were as follows:

- No information had been found 'to suggest the connections [between Dr Haneef and UK suspects] were more than familial/social/professional'.
- It was unlikely that Dr Haneef had prior knowledge of the UK attacks or the involvement of his associates. This conclusion had been reached on the basis that Dr Haneef had not demonstrated any interest in the attacks until after a relative overseas notified him of his own suspected involvement and because of the fact that he had made numerous attempts to contact a UK policeman.
- No direct contact had been identified with other persons of interest connected to the plot in the United Kingdom.

- There was insufficient material to suggest that Dr Haneef followed an extremist ideology.
- While some confusion persisted about whether Dr Haneef had left a mobile phone as well as a SIM card with the UK persons of interest, his explanation for leaving the SIM card with Sabeel—to enable him to take advantage of a cheap calling rate—was reasonable and there was no evidence that Dr Haneef continued to pay the costs of the UK-based SIM card after he left the United Kingdom.
- There was no evidence that Dr Haneef had engaged in any form of target or attack planning.
- Nothing was found in Dr Haneef's financial records that raised suspicion: the purchases were domestic in nature.

Officer A emailed ASIO's summary of its investigative activity to Officer C on the morning of 9 July. ASIO told the Inquiry that this document was prepared for internal use, and there was no record to indicate that it had been distributed externally to other agencies, including the AFP. ASIO did maintain, however, that 'anything of significance to the Haneef investigation was communicated to the AFP and/or incorporated into other reports for external distribution'.

ASIO reported on its assessment at the National Counter-Terrorism Committee meeting that began at 10.00 am on 9 July. It confirmed that it continued to assist the AFP in its analysis of Dr Haneef's property and other relevant data. It also reported that special attention had been given to events leading up to the UK incidents and that ASIO now intended to expand that analysis to focus on the planning stages of the UK incidents. As at previous meetings, ASIO confirmed that it did not have sufficient grounds to issue an adverse security assessment against Dr Haneef.

10 July 2007

On 9 or 10 July ASIO began drafting its second security intelligence report. Officer A authorised the drafting of the report (the version distributed to Australian government readers). Officer D or another ASIO officer drafted it and either Officer C or Officer G later approved its contents. The draft report was again forwarded to the AFP for clearance, this time at about 5.10 pm on 10 July. Officer A and Federal Agent Morrish had a conversation at about 8.10 pm in which Morrish communicated a request from Assistant Commissioner Prendergast to remove one sentence in the draft report because there was conjecture about a specified date. ASIO agreed to the amendment.

11 July 2007

On 11 July ASIO completed two further internal assessments that drew the following conclusions:

- ASIO could find no evidence of direct contact between Dr Haneef (or an associate) and Dr Bilal Abdulla, who was arrested in connection with the Glasgow attack.
- The reviewed material did not show that Dr Haneef adhered to an extremist ideology.

ASIO told the Inquiry that, although many of its internal minutes were not passed in that form to the AFP (including these two particular documents), 'anything of significance to the Haneef investigation was communicated to the AFP and/or incorporated into other reports for external distribution'.

ASIO's second (and final) security intelligence report was issued on 11 July and distributed widely across government. It formally reiterated the message ASIO had consistently conveyed since it issued its first security intelligence report on 4 July. According to ASIO's assessment, although Dr Haneef's links to two individuals arrested in the United Kingdom had been confirmed, ASIO held no information to suggest that Dr Haneef had any involvement in or foreknowledge of the UK attacks.

The 11 July report set out ASIO's assessment made on the basis of material known to the organisation as at 10 July. Some elements of ASIO's investigation had not been finalised, but the material analysed by this time was significant and included a joint review with the AFP of material and electronic media obtained from the searches. The 11 July report contained some of the information forming the basis of ASIO's assessment. Among other things, it said the following:

- Dr Haneef had continuing contact with his second cousin Dr Sabeel Ahmed, who had been arrested in the United Kingdom for his alleged involvement in the incidents, and had less frequent contact with another second cousin, Kafeel Ahmed, who was involved in the Glasgow attack and probably the London acts. This contact appeared to be social and familial.
- There was no information to support an assessment that Dr Haneef followed an extremist interpretation of Islam.
- Analysis of the available data had not revealed any substantive national or international links to extremist networks.
- Tracing with liaison services had not identified any new links of likely security concern.
- ASIO had not found any material to suggest that Dr Haneef had foreknowledge of or involvement in the planning or execution of the UK attacks.

The 11 July security intelligence report also noted two matters that remained unresolved. ASIO was yet to definitively determine why Dr Haneef had apparently misled the AFP in connection with his reasons for leaving Australia on 2 July and trying to depart under the guise of a cover story. The report also raised the question of how Dr Haneef's mobile phone and SIM card came to be used by those involved in the UK attacks, although it noted in this regard that 'recent unconfirmed information may provide a plausible reason for this'.

By the time the 11 July report was issued ASIO had completed the bulk of its investigations. More than half the material it had received had been analysed, and no evidence connecting Dr Haneef to the UK attacks in a way that suggested he posed a threat to security had been found. ASIO's advice continued to be qualified by the fact that it was based on the information ASIO had analysed at that time. The Inquiry was told it was not unusual for ASIO to qualify its assessments in such a way because it allowed for the possibility that additional information might still be discovered. Notwithstanding this qualification, ASIO never subsequently became aware of any information that caused it to alter the views expressed in the report of 11 July. Accordingly, it issued no further security intelligence reports in relation to Dr Haneef.

12 July 2007

At about 12.30 pm on 12 July Federal Agent Morrish gave to Officer A a draft of the 'Part B' document the AFP intended to provide to the Department of Immigration and Citizenship. The Immigration Minister, the Hon. Kevin Andrews MP, was to use the document in assessing whether Dr Haneef's visa ought to be cancelled on character grounds. Federal Agent Morrish asked that ASIO consider the document with a view to 'harmonising' ASIO's assessment with that of the AFP. After consultation between senior ASIO officers and the organisation's internal legal advisors, it was resolved that Officer A would look at the Part B document to check for factual inaccuracies or relevant information missing from the chronology and to ensure that ASIO information had not inadvertently been included. Given its position that there were insufficient grounds to issue an adverse security assessment, ASIO considered it inappropriate to contribute to any character assessment of Dr Haneef. Officer A said that he 'did not intend to offer an endorsement, judgment or assessment of the AFP's document'.

Officer A spoke again with Federal Agent Morrish at 6.18 pm. Officer A pointed out ASIO information in the draft Part B document and asked that it be removed. Morrish said the material had already been provided to the Department of Immigration and Citizenship, but after some further discussions involving Mr Peter White from DIAC were held it was resolved that the ASIO-sourced information would be removed. The discussions at this time centred on excising ASIO-sourced material and preventing it from potentially being released at a later time if judicial review proceedings were initiated.

ASIO was unable to locate a copy of this particular document to produce to the Inquiry. It is therefore unclear what this version of the document contained or in

what respects it differed from the final document Minister Andrews considered when he cancelled Dr Haneef's visa on 16 July. What can be said, though, is that ASIO was not comfortable with the idea of 'endorsing' the contents of the document given its stated position on Dr Haneef's relevance to security. There is nothing to suggest that on this occasion ASIO sought to emphasise to DIAC its assessment of Dr Haneef, to otherwise challenge the substance or accuracy of the material in the draft Part B document, or to reinforce the fact that ASIO and the AFP had formed different assessments of Dr Haneef.

Of course, ASIO's security intelligence report of 11 July had already clearly expressed ASIO's assessment of Dr Haneef and provided in some detail the information supporting that assessment. That report had been distributed widely throughout government, including to the (then Acting) Secretary of DIAC. ASIO had also consistently reported at the various meetings of government held throughout July 2007 that there was no basis for it to issue an adverse security assessment. It was patently clear that differences existed between the assessments of Dr Haneef by ASIO and the AFP.

The 12 July conversations that occurred between Officer A, Federal Agent Morrish and Mr White focused solely on excising identified ASIO material from the Part B document. Mr White said he did not appreciate from this discussion that the ASIO and AFP assessments of Dr Haneef were incompatible or that ASIO did not necessarily agree with the information contained in the Part B document. It is difficult to see how ASIO's request to have its material removed from the document could be taken as an endorsement of the remaining contents, particularly considering the nature of its previous iterations. These finer points of clarification—if they were required—simply did not arise during the discussions that took place on 12 July.

13 July 2007

On 13 July ASIO completed its analysis of Dr Haneef's use of the word 'project' and of other documents relating to Kafeel Ahmed. ASIO's assessment was that Dr Haneef was not aware of Kafeel's intentions and did not have foreknowledge or involvement in the UK attacks. Officer A also received a copy of the AFP's draft Operation Rain 'brief head' provided to the CDPP. The brief set out the AFP case against Dr Haneef. After Officer A and Officer D had reviewed the brief, a meeting was organised for 17 July to discuss the differing conclusions both agencies had reached in six areas that were common to ASIO's security intelligence investigation and the Operation Rain criminal investigation.

14 July 2007

The AFP formally charged Dr Haneef at about 7.40 am on Saturday 14 July. ASIO's National Threat Assessment Centre issued an incident advice notifying government of this development and advised that it had seen no credible intelligence that would justify a change to the terrorist threat level for Australia.

ASIO finalised an internal assessment summarising the identified contact between Kafeel Ahmed and Dr Haneef. It had been unable to find any record of direct contact between Dr Haneef and Kafeel since Dr Haneef arrived in Australia in September 2006. Its assessment also noted, however, that Dr Haneef had said in his AFP interview he had occasional contact with Kafeel by Yahoo! chat and had given police the password to his Yahoo! account. ASIO noted that this did not suggest he had intended to remove all evidence of contact with Kafeel.

15 July 2007

From Sunday 15 July ASIO withdrew its physical presence from the AFP's northern headquarters in Brisbane. Telephone contact arrangements were maintained. By this time ASIO had also finalised an internal assessment summarising a Yahoo! chat conversation between Sabeel Ahmed and Dr Haneef of 17 June (as obtained from Dr Haneef's hard drive). The assessment noted that the AFP and ASIO translations of the chat differed slightly, although both versions had Dr Haneef and Sabeel Ahmed discussing Kafeel Ahmed's move to Glasgow. ASIO acknowledged the AFP's assessment that the reference to the move to Glasgow suggested a link to planning for the Glasgow attack. ASIO's assessment of this chat noted that the translation of a particular excerpt in the AFP brief of evidence differed from the translation contained in the AFP Yahoo! chat log. Further, ASIO noted that the AFP brief of evidence made no mention of an earlier Yahoo! chat between Dr Haneef and Sabeel, on 1 May 2007, which, taken in context with the 17 June conversation, suggested that Dr Haneef had prior knowledge that Kafeel was intending to travel to the United Kingdom and that he understood he was working in Cambridge. ASIO concluded that the 17 June conversation appeared to be the first occasion on which Dr Haneef learnt of Kafeel's relocation to Glasgow. Although it concluded that certain lines of inquiry—such as Kafeel's activities and locations in mid-2007—warranted further investigation, it made the interim assessment that the conversation did not suggest Dr Haneef had prior knowledge of or was involved in the UK attacks.

16 July 2007

On Monday 16 July Dr Haneef was granted bail. Even if he had been able to meet his bail sureties he would have continued to be detained because the Minister for Immigration and Citizenship cancelled his visa on character grounds on the same day. From 16 to 24 July an ASIO officer was tasked with conveying advice, responses and requests between ASIO and the AFP and visited the AFP's northern headquarters each day, sometimes for extended periods.

17 July 2007

On Tuesday 17 July ASIO finalised further assessments in relation to Dr Haneef. Among other things, it assessed that it was unlikely that Dr Haneef (through Sabeel) had prior knowledge of Kafeel's intentions. ASIO told the Inquiry that anything of significance was forwarded to the AFP or incorporated in other external reports.

At about 11.15 am Officer A chaired a one-hour meeting with Federal Officers Morrish, Lamont and Anderson from the AFP; Officer D from ASIO also attended. The meeting was held in ASIO's Canberra office, and its purpose was to ensure that the AFP and ASIO 'were working from the same factual base'.

Before the meeting Officer D prepared a table summarising the main points of difference between ASIO and the AFP in relation to Dr Haneef. Meeting participants discussed the six key points on which ASIO had formed a different conclusion or identified an error in connection with the AFP's position. The six points of difference were as follows:

1. *Dr Haneef's UK SIM.* Since arriving in Australia Dr Haneef had not called the SIM card he left with Sabeel in the United Kingdom and had not contacted any of the persons of interest based in the United Kingdom using his known communications services.

   – The AFP considered it 'an apparent and plausible inference' that Dr Haneef knew operational security was being used in relation to the phone, so he avoided using it.

   – ASIO considered it was more likely that Dr Haneef genuinely did not have contact with the persons of interest based in the United Kingdom. It considered that its view was supported by analysis.

2. *The Yahoo! chat: the move to Glasgow.* In a translated Yahoo! chat between Dr Haneef and Sabeel Ahmed on 17 June 2007 (as obtained from Dr Haneef's hard drive) Kafeel's proposed move from Cambridge to Glasgow is discussed and inquiries are made about his job in Cambridge.

   – The AFP considered that Dr Haneef's awareness of a possible move by Kafeel from Cambridge to Glasgow revealed an awareness of planning for the Glasgow attack.

   – ASIO found there was no basis for this conclusion and that it was more likely Dr Haneef was literally interested in his second cousin's employment prospects and was receiving occasional news from Sabeel.

3. *Activities on 2 July 2007: Haneef tries to leave Australia.* On 2 July 2007 Dr Haneef communicated with family members and an associate. He subsequently made plans to leave Australia, was given the number of a UK policeman by Sabeel's mother, and tried numerous times to contact the policeman. Dr Haneef told the AFP his travel to India was related to both the birth of his child and the UK attacks.

   – The AFP concluded the events of 2 July 2007 'clearly link Haneef to the [attempted] terrorist attacks in London'.

   – ASIO regarded Dr Haneef's significant communications as attempts on his part to ascertain what had happened in the United Kingdom. It also found his attempts to contact a UK policeman inconsistent with the

actions of someone trying to avoid the scrutiny of authorities. Once he discovered that his UK SIM card was implicated in the UK incidents, he developed a cover story that would allow him to leave Australia. It was ASIO's assessment that Dr Haneef was surprised by events and sought to return home, where his family could support him. Although he was less than forthright with the AFP, this did not mean he had foreknowledge of the attacks.

4. *Haneef and Dr Bilal Abdulla identified in July 2006 photographs.* Photographs on Haneef's and an associate's computer hard drives show a group of men wearing T-shirts bearing the logo 'Mufeed'. Information provided to the AFP identified Bilal Abdulla in one of the photographs with Haneef and his associate, but ASIO could not replicate this identification and sought clarification.

   – The AFP maintained the identification.

   – ASIO's assessment was that the person identified as Abdulla did not appear in the group photograph with Haneef and his associate, and it was inaccurate to say otherwise without further clarification.

5. *Vehicle-related inquiries.* Between December 2006 and May 2007 Dr Haneef's associate had made inquiries about buying a vehicle and had explored many makes and models. The computer hard drive of Dr Haneef's associate contained numerous photographs of different vehicles. One series of photographs showed images that included the boot and various other angles of a Toyota Corolla.

   – The AFP implied that the associate's inquiries could parallel the inquiries made by the UK suspects when buying vehicles for the UK incidents. The AFP concluded in relation to the photos of the Toyota Corolla that the associate had done research with a view to identifying a vehicle with sufficient space for incendiary devices similar to those used for the UK incidents.

   – ASIO's assessment was that it was more likely that the associate's inquiries were for the purpose of buying a vehicle for his legitimate use. The research the associate engaged in was extensive and showed a vehicle was sought for long-term use. There was no basis for concluding that the photographs of the Toyota's boot meant the associate was looking for a vehicle capable of carrying incendiary devices.

6. *Haneef's use of his PDA on 29 June 2007.* Analysis showed Dr Haneef accessed the internet via his PDA (personal digital assistant) on three occasions between 9.08 am and 9.11 am (AEST) on 29 June 2007. Attempts to detonate the London based devices reportedly began at 10.45 am (AEST). The AFP noted that the PDA had been used only once previously, in December 2006, to access the internet.

- The AFP had not reached a clear decision about this information, other than noting that the internet access on 29 June occurred about one hour before the attempted London attacks.

- ASIO was unable to make an assessment of this.

The ASIO record of the 17 July meeting with the AFP officers shows Federal Agent Morrish confirming that the basis of the AFP's case against Dr Haneef rested on three points (from which 'some fairly strong inferences' could be drawn):

- Dr Haneef leaving his SIM card and handset in the United Kingdom with Sabeel Ahmed

- the Yahoo! chat logs relating to Kafeel Ahmed's proposed move to Glasgow

- Dr Haneef's attempt to leave Australia on 2 July using a cover story.

ASIO confirmed that, even at this meeting, the AFP officers present maintained that Dr Haneef had left a SIM card and a handset—as opposed to just a SIM card—with Sabeel when he (Dr Haneef) left the United Kingdom in 2006. This is confirmed in the statements given to the Inquiry by Officer A and Officer D and a record of conversation document prepared by Officer D at the conclusion of that meeting.

Throughout the course of its security intelligence investigation, ASIO's record keeping and document management was comprehensive and meticulous. It is bewildering that the AFP would still be saying at a meeting on 17 July that Dr Haneef had left both a SIM card and a handset with Dr Sabeel Ahmed in 2006. In truth, on the evening of 13 July 2007 the AFP had received information to the effect that only a SIM card had been found. This was reflected in the fact that the charge preferred against Dr Haneef on the morning of the 14 July had been amended to remove reference to a mobile phone. The charge initially drafted by a prosecutor from the Commonwealth Director of Public Prosecutions on the afternoon of 13 July had referred to both a SIM card and a handset, but this was amended by the AFP in the light of further information received in the interim from the UK Metropolitan Police Service before the charge was laid early on 14 July.

According to ASIO the AFP also stated at the 17 July meeting that it had since reassessed the alleged photograph of Dr Abdulla and that its assessment now accorded with that of ASIO on this point. Although the AFP and ASIO agreed at this meeting that they had the same understanding of the facts in relation to points of difference 2, 3 and 5, they acknowledged that the inferences drawn by each agency in relation to these matters differed. ASIO Officer A said that at the conclusion of the meeting the AFP officers understood ASIO's position and appreciated the points of difference with the AFP's assessment.

18 July to 28 July 2007

From 18 July ASIO's investigation began winding down. ASIO finalised its further outstanding assessments relating to Dr Haneef and determined there was nothing of security concern. The Commonwealth Director of Public Prosecutions withdrew charges against Dr Haneef on 27 July, and on the night of 28 July Dr Haneef voluntarily left Australia.

From the start of ASIO's security intelligence investigation an ASIO officer had been tasked with preparing a draft security assessment in relation to Dr Haneef. The document was assembled on a continuing basis, as information became available. The purpose was to ascertain Dr Haneef's relevance to security and to identify information gaps that might be pursued. The document was finalised on 28 July. It provided the most complete statement of Dr Haneef's assessed relevance to security. On the information available to ASIO at 28 July, there was no basis on which ASIO could make an adverse or qualified security assessment in relation to Dr Haneef.

After 28 July 2007

On 3 August ASIO finalised its assessment of the material resulting from the AFP's search of Dr Haneef's residence on 8 July. The material provided valuable information and helped ASIO determine the nature and context of Dr Haneef's contacts and activities in Australia and overseas.

On 10 September ASIO finalised its summary of the security intelligence investigation written by Officer D and settled by Officer A. The summary offered the following assessment of Dr Haneef:

- Dr Haneef had no prior knowledge of the attack-planning activities engaged in in the United Kingdom. This assessment was based on
  - the lack of any identified contact of security relevance between Dr Haneef and identified persons of interest in the United Kingdom involved in the planning and execution of the attacks
  - the lack of any information obtained from Dr Haneef's seized possessions suggesting any connection to the attacks
  - the likelihood that, had Dr Haneef known his SIM card was to be used for attack planning, he would not have allowed it to remain in his name and so be traceable to him
  - the likelihood that Dr Haneef adhered to a moderate interpretation of Islam.
- On the basis of the material available, in the period leading up to the UK attacks Dr Haneef had a continuing and close association with Dr Sabeel Ahmed and an indirect, sporadic association with Kafeel Ahmed. Dr Haneef had met Dr Bilal Abdulla, but they did not appear to have had contact since Dr Haneef came to Australia. There were no indications that Dr Haneef had

any contact with the other people identified to be associated with the UK attacks.

- The use by Kafeel Ahmed of Dr Haneef's UK SIM card in planning the attacks does not mean Dr Haneef was involved in the plot. It could be argued that Dr Haneef's failure to transfer ownership of the card was negligent, but ASIO considered that, when Dr Haneef provided the SIM card to Sabeel Ahmed, Dr Haneef ceased to have control over the SIM card's use. Indeed, after his arrest Sabeel Ahmed told the UK police this was the case. ASIO considered that, had Dr Haneef known the SIM card was to be used in the commission of a terrorist act, he would not have left it in his name so that it could so easily be traced back to him. Also noted were the date Dr Haneef relinquished possession of the SIM card relative to the date of the attacks and the fact that the card was given to Sabeel—not Kafeel, who used it in connection with the attacks.

- ASIO assessed that Dr Haneef was not involved in and did not have knowledge of the attack planning in the United Kingdom. Dr Haneef's first knowledge of any involvement on his second cousins' part and his SIM card came in the early afternoon of 2 July (AEST). His decision to leave Australia in the circumstances he faced on 2 July initially appeared suspicious. ASIO investigations found, however, the following:

  – Dr Haneef had made inquiries about parental leave before learning of the involvement of his cousins and his SIM card in the UK incidents.

  – After becoming aware of his cousins' involvement, Dr Haneef made numerous unsuccessful attempts to contact a policemen whom he believed was involved in the investigation.

  – Dr Haneef had numerous discussions with members of his family in India about the situation—including a Yahoo! chat in which Dr Haneef's brother urged him to return to India.

- Considering the absence of any information to suggest that Dr Haneef had any prior knowledge of the attacks, ASIO concluded that Dr Haneef's attempted departure did not point to involvement in the planning or the attacks. Rather, ASIO was of the view that Dr Haneef panicked when he found out about the attacks and the implication of his cousins and his SIM card and did what many people do in a crisis—head home. ASIO found that Dr Haneef's decision to use a pretext was understandable: he had already made inquiries about parental leave and he would not want to make public his relationship with the Ahmed brothers.

- ASIO's assessment was that there was no information to suggest that Dr Haneef adhered to a radical interpretation of Islam. The organisation's investigations revealed no material on Dr Haneef's computer, in his hard-copy search product, in his interview transcripts or in his communications that suggested he adhered to such an interpretation.

- ASIO found no information to suggest that Dr Haneef or any of his associates based in Australia was engaged in activities prejudicial to security. Specifically, it found no information suggesting any parallel attack planning was under way in Australia. Its investigations into Dr Haneef's associates bought to light no information suggesting they held extremist Islamic beliefs or had engaged in activities that might be considered relevant to security.

3.4.2 ASIO's internal review

On 6 August ASIO began a review of its management of the security intelligence investigation concerning Dr Haneef. In an email dated 6 August Officer C invited discussion 'around the logistics of the investigation' and how ASIO 'managed it internally and externally'.

Officer B's evidence was that the division to which Officer B belonged performed well in 'difficult circumstances'. Officer B said the internal reporting mechanisms within ASIO, procedural arrangements for the logging of information received from and passed to the police, and the filing system were effective. Officer C said ASIO's review of the investigation emphasised the importance of communication across all levels and of ensuring that ASIO's investigation teams keep relevant areas informed of developments.

Officer C gave evidence to the Inquiry about some important changes that had been implemented since ASIO completed its investigation into Dr Haneef. Among them was the formation of working groups. The Director-General of ASIO, the AFP Commissioner and the Commonwealth Director of Public Prosecutions had met and drafted terms of reference for how they would operate. This meeting of agency chief executives effectively implemented recommendation 1 of the Street Review. Officer C said an operational coordination group comprising the Deputy Director-General of ASIO, the Deputy Commissioner of the AFP and the Deputy Director of the CDPP had also met. Since then, two documents were signed on 13 October 2008—the National Counter-Terrorism Protocol (between ASIO and the AFP) and the Counter Terrorism Prosecution Guidelines (between the CDPP, the AFP and ASIO). This has given effect to recommendation 2 of the Street Review. Further, ASIO has since responded to recommendation 4 of the review.

ASIO noted that, as with any important investigation, it had learnt a number of valuable lessons from its investigation of Dr Haneef. One of these was to reinforce ASIO's previous experience by confirming the need to have an investigative framework in existence before starting a major investigation; this minimises the administrative burden associated with the transition from normal operations to a major investigation. ASIO has since developed terms of reference for the development of a major investigation framework.

3.4.3 Advice provided by ASIO

During the investigative period ASIO used established channels for disseminating both oral and written advice to government in relation to its assessment of Dr Haneef and his relevance to security. ASIO representatives provided oral advice at meetings of the National Security Committee of Cabinet and the National Counter-Terrorism Committee and in various intergovernmental meetings and teleconferences. Written advice to government was conveyed through security intelligence reports, threat assessments and submissions to the Attorney-General.

Oral advice

Officer C was ASIO's primary representative at the various government meetings and teleconferences held throughout July 2007 concerning Dr Haneef. This included four meetings of the National Counter-Terrorism Committee (convened on 2, 3, 6 and 9 July) and four meetings involving solely Australian government agencies (on 3, 5, 11 and 12 July). In addition, ASIO participated in about 27 teleconferences in July 2007. These teleconferences were often held twice daily; from 2 to 10 July they involved representatives of the Department of Prime Minister and Cabinet, ASIO and the AFP and from 11 to 27 July they also involved representatives of the Department of Immigration and Citizenship, the Attorney-General's Department and the Department of Foreign Affairs and Trade at different times.

Officer D or Officer A generally briefed Officer C before each government meeting or teleconference, and one of them also usually attended the twice-daily teleconferences with Officer C. In addition, Officer C received twice-daily written briefing notes prepared by ASIO's National Threat Assessment Centre. At the various meetings and teleconferences, ASIO advised that it did not have a basis to issue an adverse security assessment in relation to Dr Haneef. Officer C told the Inquiry that for the first week of the investigation ASIO's advice was based on the absence of information suggesting Dr Haneef was a threat to security, rather than any firm conclusion that he did not present a threat. Over time, though, and by 11 July, the advice was based on conclusions drawn from ASIO's analysis of material and information obtained during the investigation.

The first National Counter-Terrorism Committee meeting, held at 3.00 pm on 2 July, and the two teleconferences held that day, at 2.00 pm and 5.30 pm, dealt with the UK incidents. There was no substantial discussion of Dr Haneef because very little was known about him at the time. In contrast, the NCTC meeting at 10.00 am on 3 July and the telephone hook-ups held at 8.30 am and 4.00 pm the same day all focused primarily on Dr Haneef. Thereafter, the meetings and teleconferences were predominantly concerned with examining developments in the Haneef investigation and the possible options for action.

At the meeting solely of Australian government representatives held on 5 July there was significant discussion of possible options relating to Dr Haneef. This meeting involved representatives of various government organisations, among

them the Department of the Prime Minister and Cabinet, the AFP, ASIO, the Attorney-General's Department, the Department of Immigration and Citizenship and the Department of Foreign Affairs and Trade. The discussion centred on a draft options paper prepared and circulated by Ms Rebecca Irwin, from the Department of the Prime Minister and Cabinet. The paper canvassed the various powers and responsibilities of relevant government agencies in relation to Dr Haneef and a range of possible actions that might be open to them.

ASIO's advice at the 5 July meeting and in response to the draft options paper was that it did not consider as a viable option the issuing of a questioning or detention warrant against Dr Haneef because the threshold for issuing such a warrant could not be met. ASIO noted that Dr Haneef was already in custody and was apparently cooperating with the AFP. ASIO also advised that it did not have information that would allow for an adverse security assessment of Dr Haneef.

A National Security Committee of Cabinet meeting was held on 16 July. The convention on cabinet confidentiality prevents disclosure of the Cabinet's deliberations at that meeting. An ASIO representative attended the meeting, however, and provided advice to those present.

Written advice

ASIO produced two security intelligence reports on Dr Haneef, on 4 and 11 July. The reports provided a broad summary of intelligence received in respect of Dr Haneef and ASIO's assessment of this intelligence. Each report was distributed to key stakeholders within government. For example, the 11 July report was sent to the AFP Commissioner and the AFP, the Queensland Police Service, the Secretary of the Department of Immigration and Citizenship, the Attorney-General's Office and Department, the Prime Minister's Office, the Secretary of the Department of the Prime Minister and Cabinet, the Office of the Minister for Foreign Affairs, the Department of Defence, and other agencies within the Australian Intelligence Community.

On 3, 4, 5 and 6 July, ASIO's National Threat Assessment Centre published threat assessments concerning the potential threat to security posed by Dr Haneef. The assessments had a consistent theme—that, although ASIO's investigations were continuing, there was no information to suggest that Dr Haneef was involved in or had foreknowledge of the UK incidents or was associated with any terrorist-related activities in Australia. The threat assessments were distributed to the government stakeholders that reviewed ASIO's security intelligence reports; in each one the terrorist threat level in Australia was said to remain at medium.

ASIO also sent written submissions to the Attorney-General on 3, 6 and 18 July and 2 August. The submissions updated the Attorney-General on ASIO's assessment of intelligence and its assessment of information in media reporting. For example, the 6 July submission advised:

> On 5 July ASIO provided advice to the Department of the Prime Minister and Cabinet (PM&C) regarding ASIO's powers and the operational viability

> of exercising those powers. We advised that ASIO did not hold information or have grounds that would justify application for a questioning and detention warrant or for a questioning warrant, nor did ASIO have information that would allow for an adverse security assessment on HANEEF.

3.4.4 The position of the former Attorney-General

The Commonwealth Attorney-General from 7 October 2003 until 3 December 2007, the Hon. Philip Ruddock MP, made himself available to give evidence to the Inquiry for one hour. Both ASIO and the AFP are part of the Attorney-General's portfolio. Mr Ruddock said that before the federal election in 2004 the AFP reported to the Minister for Justice and Customs but, following a fundamental reorganisation of homeland security by the government, the AFP subsequently had two lines of reporting—to the Minister for Justice and Customs (now the Minister for Home Affairs) on its day-to-day activities and to the Attorney-General in connection with national security.

Information provided to Mr Ruddock

As noted, during the Haneef matter, ASIO produced four written briefs to the Attorney-General and gave updates on ASIO's assessment of intelligence and media reporting. The Attorney-General's Office was also on the distribution lists for the two security intelligence reports issued on 4 and 11 July and the four threat assessments issued on 3, 4, 5 and 6 July. During his evidence to the Inquiry, Mr Ruddock was shown several of these documents and, although he said he did not now have an independent recollection of their contents, he accepted that he would have received them. He explained that as Attorney-General he daily received a huge amount of material—including information and briefings from all the intelligence security agencies.

During Operation Rain the AFP presented ministerial briefs to the Attorney-General on 4, 10, 18, 20, 25 and 27 July. The briefs provided updates on the progress of the AFP investigation, specific developments and media reporting. Mr Ruddock said the written briefs were fairly limited in content and did not canvass matters that were being investigated other than to say there was an investigation. He said he probably learnt more from media reports than he did from the AFP briefs. He did not recall specifically seeking from the AFP a briefing on the Haneef matter.

Mr Ruddock also gave evidence that he met with AFP Commissioner Mr Keelty on a number of occasions during July 2007. They first met on 3 July, after Dr Haneef had been arrested, and agreed to appear together to make a media statement. Mr Ruddock was confident he had received another briefing about the progress of the Haneef matter when it was before the court. He recalled a discussion with the Commissioner about the pressure the legislative time limits caused because of the amount of material the AFP still had to investigate. Mr Ruddock said he also saw Commissioner Keelty at about the time Mr Damian

Bugg, the then Commonwealth Director of Public Prosecutions, told him he had formed an opinion that the prosecution could not proceed. Mr Ruddock said he did not have day-to-day contact with Commissioner Keelty but that the Commissioner would generally attend if there were matters relating to national security to discuss. He recalled speaking with Commissioner Keelty 'two or three times' but conceded it could have been more. He told the Inquiry that in his discussions with Commissioner Keelty he did not seek to touch on the state of the investigation, the likelihood of charges, or whether sufficient material had been obtained at any particular stage.

Was Mr Ruddock aware of the differing assessments?

Mr Ruddock told the Inquiry he was aware ASIO was of the view that the intelligence sources had 'no information' in relation to Haneef and that this did not surprise him. He had always considered the AFP and ASIO and the sources they used were very different. Mr Ruddock acknowledged that it had been made clear to him from an intelligence perspective that 'they had nothing', but he had always seen the respective roles 'as being separate and distinct'. He explained that ASIO was an organisation 'that is meant to counsel and warn, find intelligence information, to deliver assessments'. ASIO performed its tasks in quite different ways, and it had people who were trained differently. In contrast, the AFP was a police organisation that 'investigates' and has to be able to give evidence that can be adduced before a court. Mr Ruddock's evidence to the Inquiry was:

> So when I sit around a table and I hear, as I did, O'Sullivan [the Director-General of ASIO] say: 'From an intelligence perspective, we have formed a view that'—I don't recall precisely how he said it—'he wasn't carrying out a terrorist attack here in Australia', and whatever else the statements are, I heard those as consistent with what I see as being views formed by different agencies that have different tasks.

Mr Ruddock did not recall it ever having been put to him that ASIO had 'reviewed all of the material and had come to a different view in relation to those materials from the Australian Federal Police'. He knew that ASIO had a different view, but in his mind that did not mean the judgments of the AFP were 'inappropriate'.

During the interview, and having refreshed his memory of the ASIO security intelligence report dated 4 July, Mr Ruddock said that, although he had no independent recollection of the document, he would be 'very surprised' if he had not read it. He added, however, that he had always seen the intelligence role as being different from the policing role and that he would have viewed this particular document as showing that ASIO 'were doing their professional task of assessing all of the material known to them to form a judgment'. He also believed the 6 July ASIO submission to the Attorney-General expressed similar views on the state of information at that stage, although he had no independent recollection of an 'options paper' referred to in the submission. In relation to ASIO's security intelligence report of 11 July, he said:

> I mean, my reading of the material was that there were assessments that you didn't have information that people were planning an attack, but there was sufficient information for inquiries to continue. And, reading that, you know—I haven't read that for a long time—it reinforces the view I formed that they were proper matters to be examined.

It was Mr Ruddock's evidence that he would not have treated material in relation to Dr Haneef any differently from any other material he had: it was not something he had to particularly focus on any more than all the other things he was dealing with as Attorney-General or that members of the National Security Committee of Cabinet were dealing with. He added, 'I never gave directions to the intelligence agencies as to what they should inquire into and I never gave directions to the police about what they should investigate. How would I do that?'

Mr Ruddock was adamant that investigations should proceed without political influence and said he 'studiously avoided any political interference in relation to investigations'. If he started to raise matters politically and that became public, he said, he would be held accountable. His view of the AFP was that 'they were an independent agency that had to undertake inquiries free of political interference or direction'.

Mr Ruddock was obviously aware that differing assessments were being made by ASIO and the AFP in relation to Dr Haneef but considered this was unsurprising given the agencies' differing roles and functions. He did not think ASIO's assessments were expressed in such a way as to suggest that further inquiries or the AFP's judgments were inappropriate. Nor did he seek to take any action with respect to the different assessments: he thought that would be tantamount to political interference in the independent functions of the two agencies. Although he knew both agencies were working together, he did not understand that they were analysing the same material. Consequently, he asked no questions. Considering that both organisations came within his portfolio responsibility, his lack of concern for this fundamental difference in opinion might be viewed as troubling.

3.4.5 Was ASIO's position ignored or misunderstood?

The consistent advice ASIO provided to government in oral and written form was that the organisation had insufficient information to issue an adverse security assessment on Dr Haneef and had not identified credible information to suggest that he had foreknowledge of or involvement in the UK attacks. ASIO's assessments might have been qualified to some extent by noting they were based on information available at the time or because its investigation was continuing, but its fundamental assessment of Dr Haneef remained constant.

Notwithstanding ASIO's advice, other government organisations continued to pursue action against Dr Haneef and to discuss at meetings various options for possible action. For example, on 3 July the AFP made two applications to extend

the investigation period, and on 3, 5, 9 and 11 July it applied for 'specified time' (or 'dead time'). Dr Haneef was charged with an offence on 14 July, and his visa was cancelled on 16 July. Of course, operational agencies' ability to make independent assessments and decisions in accordance with their statutory authority is not in dispute simply because another agency formed a different view. From a whole-of-government perspective, however, no serious attempt was ever made to interrogate ASIO's assessment of Dr Haneef or to reconcile it with the approach pursued by the AFP or the consideration of possible further action by other government agencies.

The occasion when this came closest to occurring was at the National Counter-Terrorism Committee meeting that began at 10.00 am on 9 July 2007. This was the first NCTC meeting chaired by Mr Duncan Lewis, Deputy Secretary of the Department of the Prime Minister and Cabinet. Mr Lewis had been on leave the preceding week, and Mr Hugh Borrowman (from PM&C) had chaired the earlier NCTC and other meetings. Officer C and two other high-level ASIO officers attended the meeting to represent ASIO. During the meeting Officer C reported that ASIO still had insufficient grounds to issue an adverse security assessment in relation to Dr Haneef. Mr Lewis asked how the AFP could meet its thresholds if ASIO could not, and Ms Rebecca Irwin (from PM&C) responded by saying it was because ASIO and the AFP were applying different tests. Officer C offered to elaborate on the reasons for ASIO's assessment, but Mr Lewis did not take up that offer.

By 9 July ASIO had completed a relatively comprehensive summary of its investigative activity to date; this included analysis of a large amount of information and data. ASIO's assessment of Dr Haneef by this time was close to crystallising to the position ultimately expressed in the security intelligence report issued on 11 July. ASIO engaged in continuing dialogue with the AFP and had participated in two meetings with AFP officers on 8 July, at which both agencies had discussed and compared the bases for their differing assessments of Dr Haneef. Officer A had formed the view at the end of the two meetings on 8 July that the proposed AFP case against Dr Haneef 'was not strong'. He also noted that the AFP still did not have a written draft of its case. In comparison, by 9 July ASIO had completed a quite detailed analysis and had issued the 4 July security intelligence report and four threat assessments. ASIO had also spoken of its assessment at five meetings of the NCTC or solely specific government representatives and participated in about nine teleconferences.

It is regrettable that a closer analysis or comparison of the respective positions of ASIO and the AFP was not carried out at the whole-of-government level. ASIO had obviously contributed a large amount of information indicating there was nothing to suggest that Dr Haneef represented a risk to security or had foreknowledge of or involvement in the UK attacks. Officer C noted in evidence before the Inquiry that, with the benefit of hindsight, ASIO could perhaps have put its conclusions concerning Dr Haneef more forcefully—that is, provided more detail about why ASIO had concerns about interpretation of the information. Officer C felt that, even if he had taken the opportunity in government meetings

or in passing conversations with AFP Commissioner Keelty to describe ASIO's position in greater detail, he doubted it would have made any difference. It would, however, have made him 'feel a lot more comfortable'.

Mr Lewis acknowledged that it was apparent throughout the NCTC process that the AFP and ASIO held different views. He offered a number of reasons to explain the apparently anomalous situation in which very different assessments of Dr Haneef were being communicated by the two agencies. Although emphasis is given here to Mr Lewis's explanations, it is worth noting that a number of witnesses the Inquiry interviewed echoed his views.

Mr Lewis sought to draw a distinction between the different roles of the AFP and ASIO when pursuing their respective investigations. He said it caused him no alarm that the two agencies were offering different conclusions because they were independent institutions and because the purposes of security intelligence and police intelligence were different. This belief was also reflected in the evidence of the former Attorney-General, Mr Ruddock, as well as a number of ASIO officers. For example, Officer A explained that it was not unusual for ASIO to conduct a security investigation of a counter-terrorism target in parallel with an investigation by the AFP. The term 'parallel' was said to emphasise the fact that both agencies conduct investigations for different purposes, as established within their respective legislative responsibilities. This was contrasted with 'joint' investigations, where a single outcome might be sought or resources and activities are directed to a single team. Officer A explained that while a parallel investigation did not exclude consultation or information exchanges between the two agencies, it did mean that ASIO and the AFP could arrive at different assessments and seek to take different action with respect to an individual, in line with their legislative functions.

Mr Lewis also said it was his view that the AFP was privy to information from its inquiries (or from the United Kingdom) that gave it cause to pursue its investigation with 'great vigour'. He assumed that there would be parts of the police intelligence relating to subsequent prosecutorial matters that (for various reasons) would not be shared with an intelligence agency. The assumption that there was at least some information not shared between ASIO and the AFP was relied on to resolve differences in the respective assessments of these agencies. Mr Lewis also said that, although ASIO had the view that no particular culpability could be found, the AFP inquiry was 'advancing on a different set of information'. He indicated that ASIO's position appeared to be 'ongoing', whereas the AFP's inquiries had 'reportedly more substance in them'. According to Mr Lewis, ASIO's position appeared to be that it could see 'no reason to find adversely against Dr Haneef from a security intelligence point of view', whereas the AFP was 'pursuing a vigorous line of inquiry both in terms of quantity and penetration but all the time maintaining that one of the very real options was that there may in fact be no case against Dr Haneef'. Mr Lewis said the positions of ASIO and the AFP might be seen to be less stark when viewed in these terms.

Another reason the ASIO position did not warrant closer inspection when compared with the actions of other agencies rests on the independence of the respective agencies and the proper function of the National Counter-Terrorism Committee. Mr Lewis emphasised that responsibility for making operational decisions in a counter-terrorism investigation appropriately lay with the respective departments and agencies. He acknowledged that the NCTC had a role to play in facilitating the policy structures by which information is shared between the Commonwealth and the states and territories, but this role did not extend to the specific pieces of information. In Mr Lewis's opinion, the NCTC would be an inappropriate forum for ASIO and the AFP to share all details of their investigations, particularly because they often involved highly sensitive material. There is some force in this view. If agencies and departments attending NCTC meetings were required to disclose precise details of an active counter-terrorism investigation or justify their decisions and actions, this could be counter-productive to information sharing. It might also increase the potential for a perception of interference in the independent functions of the operational agencies.

Notwithstanding these explanations, it is surprising that the different assessments of Dr Haneef by ASIO and the AFP did not attract greater attention or assume more significance at the whole-of-government meetings. Although it has been suggested that ASIO and the AFP had different information available to each of them and that this justified their disparate assessments of Dr Haneef, most of the information and data ASIO reviewed to support its assessments was passed to it by the AFP, and the reports of ASIO's analysis of that material had been shared with the AFP. In these circumstances, the absence of any real inquiry at the whole-of-government level to explain the differences between the assessments of the two agencies or to attempt any reconciliation of ASIO's position with the continued action of other agencies and departments is conspicuous.

In the context of the Haneef matter, the National Counter-Terrorism Committee was effectively confined to being a forum in which information was shared between the Commonwealth and the states and territories for the purpose of providing advice to government. I accept that these are essential functions. But sensitive or classified information was not really discussed at the NCTC meetings, and at the meetings of government generally there was no analysis of the different assessments. If such gatherings were unsuitable forums for examining or understanding the detail of the approaches taken by specific agencies and comparing their different views, where should this occur? It is my view that a better explanation by the relevant agencies of the substance of their assessments and the reasons for any differences might well have elicited greater understanding about the viability of potential options for action against Dr Haneef. Specific government departments and agencies also met with each other on numerous occasions during the course of the Haneef case. Yet, despite all these interagency and whole-of-government meetings, the 'bigger picture' was never completely appreciated. If government meetings are unsuitable forums for exploring the operational detail of counter-terrorism investigations, it is necessary

to ensure that a suitable forum *does* exist and that it is used for enabling robust discussions between government organisations involved in counter-terrorism investigations.

It is possible that, if ASIO had communicated its position more forcefully or in greater detail and had explained how its assessment of Dr Haneef differed in substance from the AFP's, this might have had some effect in redressing the apparently collective misconception about the precise nature of ASIO's position and the significance of its assessments. But that is speculation. Various government officials told me in evidence that there is an emerging change in the philosophical approach to joint or coordinated counter-terrorism operations. Historically, the exchange of information has been severely restricted by the perceived need for secrecy and the principle of 'need to know'. This approach is now changing to an 'obligation or responsibility to share information': if uncertainty or mystery surrounds the roles and operations of critical government agencies, this will increase the risk of producing confusion and inconsistent outcomes.

In March 2008 Sir Laurence Street completed his review of the way the AFP works with its partner agencies on counter-terrorism investigations. I understand that much work has been done to implement some of the recommendations of the review. The momentum for this implementation program should not be lost.

Administrative arrangements and guidelines—such as the National Counter-Terrorism Plan, the *National Counter-Terrorism Handbook*, interdepartmental and interagency protocols and memorandums of understanding, and the Attorney-General's Guidelines—should be reviewed to ensure that they contain effective and pragmatic mechanisms for achieving a truly coordinated approach for government organisations involved in counter-terrorism investigations and provide clear and detailed guidance to individuals operating at all levels in those agencies. Attention must continue to be given to the operational connectivity between the AFP, ASIO and the Commonwealth Director of Public Prosecutions, but this should also extend to the Department of Immigration and Citizenship. Any proposed solution requires an examination of the interplay between the various departments and agencies, recognising their various responsibilities and roles but ensuring that suitable checks and balances exist and all relevant information is provided to decision makers.

As the analysis in this chapter attests, there seemed to be a collective misconception throughout government about the precise role of ASIO and the significance to be attached to the organisation's material. ASIO is Australia's principal security intelligence agency, and it is crucially important that the various elements and officials of government understand its precise role and function. Indeed, in a counter-terrorism context, it is vital that there be no confusion about the roles and responsibilities of respective departments and agencies and the significance to be attached to the material they produce or the services they provide.

ASIO's internal administrative procedures, document management and record keeping throughout the Haneef matter were well organised and meticulous, and it regularly issued reports and assessments and initiated meetings with representatives of other agencies. In spite of this, there were misunderstandings about ASIO's exact role and the importance of its assessments. A committee should be formed to conduct a review to determine ways of dispelling any misapprehensions about the respective roles, functions and responsibilities of government agencies and departments and the information they produce. This review should focus on the broad range of matters that can arise at the interface between the various agencies and departments involved in counter-terrorism operations. The review should examine the following:

- the relationships between the various agencies and departments
- the internal structures and elements of each agency or department
- how external communication is carried out, both by the agency collectively and through its individual officers
- the purpose of the information, intelligence and materials produced by the various agencies
- how other agencies can use that information.

The committee should review existing procedures, arrangements and guidelines with a view to providing clarity and achieving a common understanding.

Recommendation 2

The Inquiry recommends that a committee—consisting of the Deputy Director-General of ASIO, the Deputy Commissioner of the Australian Federal Police, the Deputy Director of the Commonwealth Director of Public Prosecutions and senior representatives (at minimum at deputy secretary level) of the Department of the Prime Minister and Cabinet, the Department of Immigration and Citizenship and the Attorney-General's Department—be established to conduct a review and determine ways of dispelling misapprehensions about the respective roles, functions and responsibilities of government agencies and departments in a counter-terrorism context and the purpose of the information they produce in that context. The committee should review existing procedures, arrangements and guidelines with a view to providing clear guidance and achieving a common understanding.

3.5 Charging, prosecution and release

3.5.1 The initial involvement of the Commonwealth Director of Public Prosecutions

It was reporting in the media on 3 July 2007 that first alerted the Commonwealth Director of Public Prosecutions to Dr Haneef's arrest. Mr Clive Porritt, a senior prosecutor with the CDPP in Brisbane, made inquiries of the Australian Federal Police that afternoon and was told Dr Haneef was being interviewed and might be charged. Mr Porritt informed Mr Graeme Davidson, CDPP Deputy Director Counter Terrorism at CDPP head office, of this and was asked to continue to provide updates. Later that day, Mr David Adsett, Deputy Director of the Brisbane office, told Mr Davidson that Mr Porritt was the case officer for the matter. At about this time Mr Porritt arranged for a junior CDPP prosecutor, Ms Robyn Curnow, to assist him. He also contacted the AFP to offer CDPP assistance.

On the morning of 4 July Mr Porritt had conversations with Mr Davidson and an AFP lawyer. Mr Davidson commented in an email to Mr Porritt that the CDPP was learning more about the Haneef matter from the media than from the AFP. The AFP lawyer said the AFP did not expect charges would be laid in the immediate future and there would most probably be further applications to extend the investigation period. From 4 to 5 July Mr Porritt and Ms Curnow helped the AFP prepare applications for investigative tools connected with the conduct of the AFP investigation. Commander Ramzi Jabbour rang Mr Davidson on 4 July to discuss a particular matter related to the investigation. Although Jabbour and Davidson often spoke to each other about counter-terrorism matters, other than a short conversation on 6 July this was the only direct contact they had with each other before Dr Haneef was charged.

On 6 July at 11.00 am Mr Porritt and Ms Curnow attended the AFP's Brisbane office for a briefing on the investigative tools applications. Commander Jabbour, who led the briefing, referred to challenges and pressures in the investigation and said CDPP assistance might be needed in urgent circumstances. The meeting was not a full briefing on Operation Rain and did not discuss in detail the case against Dr Haneef since the application related to a different person. Mr Porritt subsequently emailed Mr Davidson, outlining in very broad terms the nature of the AFP investigation and noting that Dr Haneef might be charged the following week. Mr Porritt met with Mr Adsett later that afternoon to update him on what he knew of the AFP investigation, including the fact that Mr Peter Russo, a solicitor with Brisbane firm Ryan & Bosscher, now represented Dr Haneef.

On Sunday 8 July Mr Adsett emailed Mr Porritt asking him to find out from the AFP the offence under which Dr Haneef had been arrested. Mr Adsett noted that before Dr Haneef could be 'detained for the purpose of the investigation' he needed to have been arrested for a terrorism offence. Mr Porritt emailed Davidson and Adsett at 9.25 am on 9 July, saying he was trying to find out from the AFP the nature of the charge and that to date no briefing had been provided

in relation to Dr Haneef. Mr Porritt subsequently spoke to Commander Jabbour and was advised that Dr Haneef had not been charged with any offence but was suspected of having provided support for terrorism and being a member of a terrorist organisation. He was also advised that the AFP intended to seek at least a further four days' extension to the detention period. Mr Michael Rendina, a senior AFP lawyer, later told Mr Porritt the AFP understood that under the legislation a suspect could be arrested for an offence but not charged pending further investigation of that or another offence, subject to complying with the provisions for extending detention time. He told Porritt he expected Dr Haneef would ultimately be charged.

At 1.00 pm on 10 July the AFP invited Mr Porritt to attend its Brisbane office the following day to discuss 'possible charges against Dr Haneef'. Mr Porritt advised Mr Davidson, Mr Adsett and Mr Curnow of this 'welcome development', but the police subsequently rescheduled the meeting to 12 July. On 10 July Commander Jabbour prepared a document summarising the material the police had gathered that implicated Dr Haneef in an offence. In that document Jabbour expressed the belief that he did not currently have 'sufficient evidence to charge HANEEF'. Although Jabbour and other senior police still held this belief on 13 July, Jabbour told the Inquiry he wanted the CDPP's professional advice before making a final decision.

At about 2.25 pm on 10 July an officer from the Attorney-General's Department contacted Ms Sara Cronan, a prosecutor in the Commercial, International and Counter Terrorism Branch at CDPP head office, to advise her that Federal Agent Luke Morrish needed assistance in preparing an urgent mutual assistance request in relation to the Haneef investigation. (It was routine for the CDPP to provide assistance in the preparation of mutual assistance request paperwork.) The AFP provided to Ms Cronan some brief information about the Haneef investigation in order that she could prepare the draft request, which was then forwarded to the Attorney-General's Department. During the next few hours further drafts were prepared, and by 9.30 am on 11 July the final document had been sent to the Attorney-General, who signed it.

The factual material provided to Ms Cronan was very brief but did include some information from the first record of interview with Dr Haneef. Some of the assertions were factually incorrect. Neither Mr Porritt nor Mr Davidson was aware of the information provided to Ms Cronan, and Mr Porritt was probably also unaware that a mutual assistance request had been made when he later gave advice to the AFP.

Early on Thursday 12 July AFP Commissioner Mick Keelty and the former Director of Public Prosecutions, Mr Damian Bugg, had a phone conversation in which Mr Keelty expressed the view that there was not enough evidence to charge Dr Haneef but that if sufficient evidence were obtained the AFP would want to move quickly. Mr Porritt was unaware of Mr Keelty's views or that those views had been expressed to Mr Bugg.

By Thursday 12 July Dr Haneef had been detained for 10 days. The 'extension' of his detention was due to expire at about 2.00 pm the following day, and a further application to extend the detention period was being challenged by his lawyers. Commander Jabbour was aware that a decision to charge or release Dr Haneef had to be made soon. At 4.15 pm on 12 July Mr Porritt attended the rescheduled AFP briefing, accompanied by Ms Curnow. Until then, Porritt had only limited knowledge of the investigation. The CDPP had not been involved in any of the previous AFP applications to extend Dr Haneef's detention and was not involved in the subsequent decision to withdraw the application to further extend the detention period, which was due to be heard by Magistrate Gordon at 2.00 pm on 13 July. This was consistent with existing arrangements whereby the AFP would seek assistance from the Attorney-General's Department and the Australian Government Solicitor as appropriate on such matters.

3.5.2 The 12 July briefing

Commander Jabbour conducted the 12 July briefing with input from other police. Among those present were Federal Agent David Craig, Superintendent Gayle Hogan, two members of the UK Metropolitan Police Service (Detective Superintendent John Prunty and Detective Inspector Anne Lawrence), AFP lawyer Mr Rendina, and two lawyers from the Australian Government Solicitor (Mr Andrew Berger and Mr Tom Howe QC).

At the briefing Mr Porritt and Ms Curnow were advised that the AFP was considering charges of providing support to a terrorist organisation and financing a terrorist or terrorism. Jabbour provided an overview of the evidence obtained to date and said the investigation was continuing. This was the first time anyone from the CDPP had been briefed in any detail on the Haneef case. Commander Jabbour told Mr Porritt he was seeking the CDPP's advice on whether there was enough evidence to charge Dr Haneef with any terrorism offences. Detective Inspector Lawrence told the meeting that the SIM card Dr Haneef had given to his cousin Dr Sabeel Ahmed had been found in Glasgow, melted into Kafeel Ahmed's chest. Later that evening new information was received from the United Kingdom, saying Dr Haneef's SIM card had in fact been found in Sabeel Ahmed's possession.

It was agreed that the AFP would prepare a briefing paper, setting out all the relevant material in written form, for Mr Porritt to consider the following morning. A number of AFP officers contributed to the compilation of this material, which comprised a 48-page briefing paper and various other documentation and statements. The paper was not a formal brief of evidence; rather, it was what Commander Jabbour later agreed to be a disorganised summary that reproduced various bits of evidence in a rambling way, without any particular structure or focus. Mr Porritt did not contact either Mr Davidson or Mr Adsett to advise them of developments.

Mr Porritt told the Inquiry he gained the impression at the meeting that 'the results of the investigation so far appeared to have persuaded the police and

[Australian Government Solicitor] officers that there were strong grounds for suspecting that Dr Haneef had been involved in some way'. The police were optimistic that other inquiries would strengthen the case against Dr Haneef. There had been no reference to any evidence suggesting that a terrorist organisation existed at the time Dr Haneef gave his SIM card to Sabeel Ahmed in July 2006.

3.5.3 Friday 13 July

Mr Porritt returned to the AFP Brisbane office on the morning of 13 July and was joined by Ms Curnow at about midday. On arrival he was given the 48-page briefing paper and the other material. He was shown into a conference room and left alone to read. Occasionally he left the room to ask a question or a police officer came in to provide additional information orally, give him a document or answer a question.

The 48-page briefing paper was the most important document provided to Mr Porritt for the purpose his giving advice. It represented an attempt to summarise the material the police had obtained in relation to Dr Haneef. There were no references to material suggesting that a terrorist organisation existed in July 2006. The cover page of the paper set out a draft charge under s. 102.7(1) of the *Criminal Code Act 1995*. The paper itself provided a brief background to the UK terrorist attacks and details of the perceived Australian link to these events—namely, the use of a mobile telephone service and a SIM card registered in the name Mohamed Haneef. It was asserted that Dr Haneef was 'closely associated with the suspects currently in custody in the United Kingdom' and that the Metropolitan Police Service believed Dr Haneef had lived with Kafeel and Sabeel Ahmed for an unspecified time.

The briefing paper also set out a summary of the telephone contact between the UK suspects and other people of interest, focusing on calls made after 10 May 2007. It was asserted that 'the handset and SIM card were identified as being active in the vicinity of the attempted attack in London and the attack in Glasgow'. It was the 'use of this mobile that initially made HANEEF a person of interest'. The briefing paper also pointed out as 'noteworthy' a number of contacts between Dr Haneef and UK phone numbers, although none of these contacts was described, and subsequent investigations failed to establish that Dr Haneef had contacted any phones used by the UK suspects between 10 May and 2 July 2007. The paper also commented that, although the phone had been used in connection with the planned attacks, 'since Haneef left the phone in the UK with S Ahmed in July 2006, there is nothing to connect him directly to the telephone itself, that is, since his arrival in Australia'. This succinctly identified one of the most important gaps in any case against Dr Haneef.

The briefing paper reported that Dr Haneef's handset and SIM card were found in the possession of Sabeel Ahmed. Detective Inspector Lawrence had told the briefing the previous evening that Dr Haneef's SIM card was found on Kafeel Ahmed at Glasgow Airport. That there had been a change to the information was

not highlighted in the briefing paper; nor was this change specifically brought to the attention of Mr Porritt or Ms Curnow.

Additionally, throughout the briefing paper it was reported that Dr Haneef had left both his SIM card and mobile phone handset with Dr Sabeel Ahmed. This assertion was inconsistent with what Dr Haneef had said in his first interview with the AFP on 3 July and with what Sabeel told the UK police. Both said only a SIM card had been left, not a handset as well. A transcript of Sabeel's interview was provided to the AFP on about 6 July but was not included in the material made available to Mr Porritt.

Particular emphasis was given in the briefing paper to Dr Haneef's conduct on 2 July. This included his phone and internet contacts with family members and the content of those communications, his numerous attempts to contact a person later identified as a UK police officer (Mr Tony Webster), his contacts with his employer and Dr Asif Ali concerning his arrangements to leave Australia, and his access to an internet story about the UK attacks. Particular attention was given to the fact that Dr Haneef had tried to 'flee Australia' on the date that two of the UK suspects were arrested. The brief expressed the belief that Dr Haneef was trying 'to avoid arrest'. Attached were full translations of the internet chats Dr Haneef had with his brother Shuaib on 2 July and with Sabeel Ahmed on 17 June.

The briefing paper referred to information suggesting that Sabeel Ahmed had engaged in radicalising conduct and held radical views. Mr Porritt said he placed considerable weight on this material. Nothing in the briefing paper suggested that Dr Haneef may have held radical views. The briefing canvassed Dr Haneef's financial transactions, although it did not suggest he had financed terrorism or a terrorist organisation. The remainder of the briefing paper consisted of a summary of investigations in Australia and two short excerpts from the record of the interview with Dr Haneef on 3 July.

During the day Mr Porritt and Ms Curnow asked for further information about the extremist views of the UK suspects, their relationship with Dr Haneef, and whether they had lived together and, if so, for how long. Ms Curnow received a two-page document entitled 'Cambridge' that detailed periods when it was thought Dr Haneef resided with Sabeel and Kafeel Ahmed. Porritt and Curnow understood that Dr Haneef had resided for a lengthy period with Sabeel and Kafeel and attached much importance to this when assessing the strength of the case against Dr Haneef.

To the extent that the 'Cambridge' document implied that the information about Dr Haneef's UK residence arose from the answers he gave in the interview of 3 July, it was obviously incorrect. Dr Haneef was questioned at length about places he had lived in the United Kingdom and the people he lived with, and he refuted any suggestion that he had resided with Sabeel or Kafeel.

Information not provided to the CDPP

The conversation between Dr Haneef and police at Brisbane International Airport at the time of his arrest was recorded and transcribed by the AFP, but it was not provided to the CDPP. In it, Dr Haneef gave unsolicited explanations for giving a SIM card to his cousin Sabeel, for his mother's calls telling him there was a problem with the SIM card, and for his numerous attempts to contact Mr Webster. He also explained that he had left his car and laptop with Dr Asif Ali.

Similarly, the CDPP did not receive a transcript of the record of the interview conducted with Dr Haneef on 3 July or a detailed five-page synopsis of that interview, prepared on 6 July. Neither Mr Porritt nor Ms Curnow asked to see the full transcript, although each questioned police officers about various aspects of the interview—including their impressions in relation to Dr Haneef's demeanour and the truthfulness of his answers. Ms Curnow was told Dr Haneef had been evasive and unresponsive during the interview. Mr Porritt gained the impression that police were very suspicious about what Dr Haneef was telling them in the interview. Curnow said the information provided about the first interview was important to their consideration of the strength of the case against Dr Haneef. Porritt suggested topics to cover in the next interview, unaware that many had already been covered in the first interview.

On Saturday 30 June 2007, about 75 minutes before the Glasgow Airport attack, Sabeel Ahmed received from his brother Kafeel a text message instructing him to access a particular email account. Sabeel accessed this account 75 minutes after the Glasgow attack and found an email message from Kafeel to him that contained a further message to other members of the family. This email—'the Kafeel email'—was not disclosed to the CDPP officers. In it, Kafeel apologised to Sabeel for having lied to him about his real activities. On the face of it, the message suggested Sabeel had not known that his brother was involved in or planning to engage in terrorist activity. In the light of Sabeel's central importance to proving any charge against Dr Haneef, this information was plainly relevant to a proper assessment of the case against Dr Haneef. Neither Mr Porritt nor Mr Davidson became aware of the contents of this email before the charge was discontinued on 27 July 2007.

The CDPP was never told of, and nor did it receive, ASIO's analytical reports or its assessments of Dr Haneef. Threat assessments and analytical reports prepared by ASIO were passed to the AFP throughout the investigation. ASIO's security assessments issued on 4 and 11 July said ASIO had no basis for issuing an adverse security assessment against Dr Haneef and that no information suggesting Dr Haneef had foreknowledge of or involvement in the UK attacks had been found.

As at 13 July the AFP investigation team's collective view was that there was insufficient evidence to charge Dr Haneef. At no stage were these views disclosed to Mr Porritt or Ms Curnow. Instead, Mr Porritt gained the impression that the AFP generally—and Commander Jabbour in particular—were 'very upbeat, very

confident' about the strength of the case. Detective Superintendent Prunty seemed quietly confident about the progress of the UK investigation, and Jabbour had said, 'The case can only get stronger'. At interview, Jabbour accepted these were fair descriptions of the way he presented the material to Mr Porritt.

At about 1.45 pm on 13 July Commander Jabbour approached Mr Porritt and asked him whether he had formed a view. Although they had been told to take as much time as necessary, Porritt and Curnow were advised that a decision needed to be made about whether or not to press for a further extension of the detention period when the court convened at 2.00 pm. Porritt said he needed more time but would be able to advise later that afternoon. At about 1.50 pm the AFP decided to withdraw the application for a further extension of the detention period. This meant that the investigation period, with 12 hours' investigation time remaining, would shortly recommence. Following the expiration of this time Dr Haneef would have to be charged (and taken before a magistrate) or released. Porritt and Curnow were not involved in the decision to withdraw the application but were told it had been made.

At about 2.00 pm, Mr Porritt and Ms Curnow left the AFP Brisbane office to clear their heads and consider the available material. Ms Curnow described the working atmosphere as 'very high pressured', where people 'were trying to make decisions in short timeframes'. It was her impression that the decision (whether to charge or not) had effectively been delegated to her and Mr Porritt. Mr Porritt was not confident there was sufficient material to meet the 'reasonable prospects' test. He subsequently told Mr Adsett that at about this time he 'was not satisfied that a narrative of evidence or anticipated evidence could be distilled from the material which could enable the CDPP [to] say that any particular charge could be successfully prosecuted'.

At 2.34 pm Commander Jabbour was informed that Dr Haneef had agreed to a second interview. The CDPP officers returned to the AFP Brisbane office and continued examining material. They were advised that a second interview with Dr Haneef was to begin soon. Mr Porritt discussed with Detective Sergeant Simms the matters he wanted the interview to cover.

The conversation with Mr Graeme Davidson

At about 3.30 pm Mr Porritt and Mr Davidson had a phone conversation lasting 30 to 45 minutes; Ms Curnow was present and took notes. Mr Porritt provided an update on developments and outlined the state of the investigation and the material said to implicate Dr Haneef. He said consideration was being given to a charge of providing support to a terrorist organisation. Davidson advised Porritt that the question of whether a charge should be laid was an operational one for the AFP. Porritt recalled Davidson specifically telling him that the CDPP 'could not advise whether there were reasonable prospects of conviction as there was no brief and if, when a brief was eventually provided it did not provide a sufficient basis for proceeding, the prosecution would be discontinued'. Davidson told Porritt it was not appropriate for the CDPP to approve the police charging Dr Haneef: the CDPP had not received a brief, and insufficient material was

available to enable an informed decision to be made. Davidson did not recall any reference to the 'arrest test' during this conversation, but Porritt believed there was such a reference. The 'arrest test' in this context referred to an assessment whether there were reasonable grounds for police to believe Dr Haneef had committed an offence. Curnow recalled Porritt making a comment about the arrest test but believed this occurred after the conversation with Davidson. I do not believe there was any reference to the 'arrest test' during this conversation: it is something I would expect Ms Curnow to have recorded and something Davidson would have remembered and reacted strongly to had it been raised. After this call Davidson rang the Director, Mr Bugg, to advise him of developments. Mr Bugg agreed that Davidson's advice to Porritt was appropriate.

Mr Porritt told the Inquiry he felt relieved after speaking with Mr Davidson because he, too, felt there was insufficient material to conclude there was a reasonable prospect of obtaining a conviction. He now believed the question was whether there were reasonable grounds to believe Dr Haneef had committed an offence—that is, whether the so-called arrest test was satisfied. He understood his role was not to identify a charge that could be successfully prosecuted; instead, he saw it as one of assisting 'by advising whether I agreed that a police officer might have reasonable grounds for believing that Haneef had [committed an offence]'. Ms Curnow said she was unsure of their exact role. She understood, though, that they 'were not applying the prosecution policy or assessing prospects of success, but applying the test in 3W [the arrest test] (in the absence of being able to say anything else)'.

At some time during the afternoon there was an informal meeting between Commander Jabbour, Superintendent Hogan, Detective Superintendent Prunty and Queensland Police Service Detective Chief Superintendent Ross Barnett. Jabbour said he thought Mr Porritt was leaning towards advising that there was enough to charge. Hogan told the group she had concerns about the reliability of any advice Porritt might give and said she did not feel there was sufficient evidence to justify charging Dr Haneef. Even if Porritt suggested there was sufficient evidence, Hogan said she would not proceed with a charge. Detective Chief Superintendent Barnett said he agreed with Hogan's view that there was insufficient evidence to charge Dr Haneef. Commander Jabbour acknowledged that such views were expressed before Mr Porritt gave any advice.

At 4.15 pm on 13 July the second interview with Dr Haneef began.

Mr Porritt's oral advice

After speaking to Mr Davidson, Mr Porritt drafted a charge and wrote it on the front page of the briefing paper. He and Ms Curnow then met with Commander Jabbour, Federal Agent Michelle Gear, Superintendent Hogan, Detective Superintendent Prunty and Detective Inspector Lawrence. Mr Porritt said to those present words to the effect of 'I think you have got enough to charge'.

Mr Porritt has subsequently said he gave this advice on the basis of an assessment under the arrest test. But he did not tell anyone this at the time—not even the police. Nor did he tell the police he had formed the view that there was insufficient material to allow him to say there were reasonable prospects of obtaining a conviction. He also did not explain that, although he thought there was 'enough to charge', this was only in relation to whether there was enough for a police officer to be satisfied that the arrest test was met; it was not in relation to the test prosecutors invariably apply when assessing the sufficiency of evidence.

Porritt did not specifically say that any decision to charge Dr Haneef was an operational decision for police or that it was not for the CDPP to approve that decision. He did say that, depending on the AFP's ultimate decision and the outcome of other investigations, Dr Haneef may be 'the one that got away'. He also told those gathered that a successful prosecution would require proof of the existence of a terrorist organisation and Dr Haneef's knowledge of that terrorist organisation. Mr Porritt seems not to have appreciated that there was no evidence at all to establish either of these things, especially its existence in July 2006, which was the relevant time. Commander Jabbour was aware that Mr Porritt had been discussing the matter with Mr Graeme Davidson and formed the view that Porritt's advice represented the organisational view of the CDPP.

Detective Superintendent Prunty told the Inquiry he was surprised by Mr Porritt's advice and sought clarification. He queried how a prosecution in Australia would affect the UK prosecutions. Porritt said he would liaise with Davidson and that the CDPP could talk with the Crown Prosecution Service in the UK to discuss that in detail. Prunty also queried the date of the charge Porritt had drafted (25 July 2006). Porritt said that was the date the SIM card was handed over. In identifying the group as a 'terrorist organisation' at that time, Porritt suggested it was 'only necessary to show Dr Haneef was aware of the extremist ideology of Sabeel Ahmed but chose to ignore it and was thus reckless'. Both Jabbour and Hogan recalled Porritt saying this 'wasn't a problem', although Porritt denied using this phrase. In any event, Jabbour understood that recklessness could be proved by circumstantial evidence of an association between Dr Haneef and Sabeel.

Ms Curnow's understanding was that the police were going to further interview Dr Haneef and that a charge was 'a definite possibility'. In Mr Porritt's mind 'it was never a certainty that the AFP would charge Dr Haneef'. He told police that if Dr Haneef were charged he (Porritt) would be available to attend a bail hearing and would need police to prepare a statement of facts. Jabbour understood from this that Porritt wanted only a brief document outlining the elements, not a lengthy or complex document.

Porritt's written advice

Following some discussion between the police and Mr Porritt, Commander Jabbour asked Porritt to provide his advice in writing. Porritt dictated a short advice to Federal Agent Gear who typed it into an email. Gear then sent this

message to Jabbour at 5.41 pm. After dictating this email Porritt and Curnow left the AFP office.

Porritt's advice was as follows:

> We have reviewed the briefing notes that have been prepared by your officers and their counterparts in the United Kingdom (UK) and supporting material, including the link charts and the table summarising [call charge record] details. We have noted that the extent of the likely pool of evidence is currently quite unknown: for instance, HANEEF's laptop computer has only been partly examined, and there is no information about the contents of laptops seized in the UK. We have also noted that the bulk of the available facts relates to what HANEEF appears to have known, and did, in early July 2007: there is very little material relating to his activities and contacts in the United Kingdom in 2006. It appears to us however that notwithstanding the limited material available, there are reasonable grounds for suspecting that HANEEF intentionally provided his digital handset and sim card to a terrorist organisation consisting of Sabeel Ahmed, Kafeel Ahmed and others, and he was reckless as to whether the organisation was a terrorist organisation (as defined in the Criminal Code (Cth)). We have drafted a charge as outlined below.

The charge Porritt had drafted was then set out. This advice was forwarded by email to Assistant Commissioner Prendergast in Canberra. At about 5.50 pm a meeting of the senior investigation team was held. Mr Rendina arrived and was shown the email advice. He had understood the earlier oral advice to the AFP was 'Good to go on charge, with the inference that … Porritt sees that we do have sufficiency'.

Mr Rendina noted that the written advice referred to 'reasonable suspicion' and that the advice did not clearly say the evidence was sufficient to support a prosecution. He told the meeting this should be clarified and called Mr Porritt. Rendina told Porritt that the AFP was seeking the CDPP's views on whether there was enough to charge and was not sure of the meaning of his advice. He queried the phrase 'reasonable grounds for suspecting', noting that 'reasonable belief' was necessary for an arrest and 'reasonable suspicion' had no role to play. Porritt confirmed that he had used the word 'suspecting' loosely, that it should be replaced with 'believing' and that 'there was indeed enough to move forward'. He subsequently said he recognised during this conversation that he was being pushed past his 'comfort zone … I suppose in discussion I recognised I was giving the tick to charge'. That is exactly what Porritt had done.

On returning to his office Porritt rang Davidson to say he had advised the AFP that, notwithstanding the limited material available, there were reasonable grounds for suspecting that Haneef had committed an offence. He also said he had suggested a form of charge to the police, that Mr Rendina had rung to clarify the advice and that he (Porritt) had told him 'reasonable grounds for suspecting' could be read as 'reasonable grounds for believing'. Davidson recalled Porritt

telling him 'the police were going to charge Haneef'. He asked Porritt to send him a copy of the material he had as soon as possible. At 6.31 pm Porritt forwarded a copy of his written advice to Davidson, although Davidson did not read this email until the morning of Monday 16 July.

After speaking to Porritt, Davidson spoke with the First Deputy Director John Thornton, to tell him of the conversation. Davidson told the Inquiry he immediately realised that inappropriate advice had been provided and that Mr Porritt might have misunderstood what he told him in the 3.30 pm conversation. Davidson did not contact Mr Bugg or Commander Jabbour that evening: he thought the decision to charge had already been made. Porritt also spoke to Mr Adsett that evening and told him of the advice he had provided. According to Adsett, Porritt was unable to tell him when a charge might be laid. Mr Bugg was not contacted that evening and first became aware of the charge when he heard a news report at around 1.00 pm the next day.

Consideration of Porritt's advice

At 5.15 pm, shortly after Mr Porritt gave his oral advice, Commander Jabbour called Assistant Commissioner Frank Prendergast in Canberra to tell him about the advice. At 5.30 pm Mr Prendergast rang Federal Agent Luke Morrish to tell him the CDPP had advised there was sufficient evidence to support a charge and that he should convey this information to Mr Peter White of the Character Assessment and War Crimes Screening Branch at the Department of Immigration and Citizenship. At 5.35 pm Morrish rang Mr White. Mr White told the Inquiry that as a result of this call he understood there was 'likely to be a charge'.

Following the clarification by Mr Rendina, the senior management team met to discuss the CDPP's advice. Among those present were Superintendent Hogan, Detective Chief Superintendent Barnett, Federal Agent Craig and Detective Superintendent Prunty. A number of views were expressed. Federal Agent Craig said there was robust discussion about the evidence and that Jabbour was 'clearly of the mind that there was enough to charge now, particularly in light of having CDPP advice'. Hogan and Barnett both said that, notwithstanding the CDPP advice, they did not consider there was enough to charge, but they acknowledged that the AFP was the lead agency in the investigation and that it was Commander Jabbour's call.

It is clear that those present did not regard Mr Porritt's advice as determinative of the question to charge, although Commander Jabbour felt it very persuasive. It was agreed that they should await the outcome of the second interview, then under way, before making a final decision. The Queensland Police Service officers were of the view that if anything incriminating came out of the interview it might be appropriate to charge Dr Haneef. Conversely, Jabbour felt it was appropriate to charge unless something exculpatory emerged in the second interview. Federal Agent Gear's notes of the meeting recorded, 'If nothing has changed significantly, may be charged (if arresting officers agree)'.

Immediately after this meeting (at about 6.00 pm) Commander Jabbour rang Assistant Commissioner Prendergast to discuss the written advice. Federal Agent Gear noted, '[Prendergast] comfortable with taking on CDPP advice. AFP should follow CDPP advice subject to outcome of [record of interview]'. (Prendergast told the Inquiry he treated the CDPP's advice as effectively determining the question of whether or not a charge should be laid, subject to any other material coming to light in the second interview with Dr Haneef. Jabbour conceded to the Inquiry that he could not think of anything Dr Haneef might have said in that second interview that would have persuaded him not to charge.) Following this conversation Prendergast informed an interagency meeting that the CDPP had provided advice that there was sufficient evidence to charge Dr Haneef with the offence of supporting terrorism.

Overnight: the Queensland Police Service

Following the discussion of the CDPP's advice, Deputy Chief Superintendent Barnett left the AFP's office in Brisbane and briefed his superiors (the Assistant Commissioner or possibly the Commissioner) on the situation. It had been impressed on Barnett that QPS members were to be told 'that there was no pressure or expectation on them to take any action that they didn't feel comfortable with'. This was relayed to Superintendent Hogan, who arranged for Detective Inspector Robert Weir (QPS) to attend the second interview in a monitoring and advising capacity. Hogan instructed Weir *not* to relay the CDPP advice to the interviewing officers, one of whom (Simms) was a QPS officer seconded to the AFP Joint Counter Terrorism Team. Simms was also the officer who had arrested Dr Haneef at Brisbane Airport on 2 July. Detective Inspector Weir told the Inquiry Hogan informed him that full support was to be provided to the QPS members of the JCTT, and no QPS member would be expected to take action about which they did not feel comfortable. Hogan explained that she had given those instructions because her view was that it was not for QPS to do the charging and she did not want the interviewing officers to feel any undue pressure while conducting the interview. Hogan said she wanted their input to any discussions 'to be unfettered and unbiased without knowing that there was a CDPP opinion that may have put them under undue pressure'.

The second interview

The second interview with Dr Haneef began at 4.15 pm on 13 July and continued until 5.57 am on 14 July. Detective Sergeant Simms and Federal Agent Neil Thompson conducted the interview in the presence of Mr Russo. There were a number of breaks taken during the interview, and during one of them Commander Jabbour advised Simms and Thompson of a 'travel convergence' in August 2006, when it was believed Dr Haneef might have met with Sabeel and Kafeel Ahmed and Dr Asif Ali at a wedding in India. Previously, Dr Haneef had said he had not met Sabeel in India between leaving the United Kingdom and travelling to Australia in September 2006. Neither Simms nor Thompson had been aware of this possible convergence. At about 1.35 am, questioning was redirected to whom Dr Haneef had met at this wedding. Dr Haneef volunteered that he had met Sabeel there. When asked why he had not said this previously,

Dr Haneef said, 'I just recollect that now. I'm sorry I didn't remember that'. Detective Inspector Weir formed a strong view that Dr Haneef, during this exchange and generally, was being evasive and that his demeanour suggested he was being less than frank.

Post-interview discussions and the decision to charge

After the 5.57 am suspension, Simms, Thompson, Jabbour, Hogan, Weir, Dart and Timms had a discussion about how to proceed. Weir expressed his opinion that Dr Haneef had not been completely truthful during the interview. In evidence, Jabbour said Weir said Dr Haneef 'just about physically fell off his chair' when the encounter in India was raised and that his 'whole demeanour and body language changed significantly'. Simms and Thompson both said they had formed the impression that Dr Haneef had been frank and truthful and suggested that any nervousness or other negative mannerisms could have been cultural. The video of the second interview does not reveal any major change in Dr Haneef's demeanour or expression at the time the travel convergence was raised.

The conversation turned to the question of whether Dr Haneef should be charged. Simms and Thompson told the Inquiry that the usual course would be for them, as the arresting officers, to make the decision about whether or not to charge and that consequently they felt 'under considerable pressure' at this time. Both said, however, that in their opinion there was insufficient evidence, and they refused to charge Dr Haneef. Commander Jabbour then produced the CDPP's advice and explained the evidentiary threshold considerations Mr Porritt had raised. Simms regarded the CDPP's advice as inconclusive considering that many parts of the evidence were yet to be finalised. Thompson said he regarded the CDPP's advice as so open ended that it actually 'reaffirmed' his view that there was not enough to charge. Neither officer was swayed by the CDPP's advice. And neither had any recollection of Hogan saying anything during the discussion to suggest that she agreed with their assessment that there was insufficient evidence to charge or that they should not take any action they were not comfortable with. They both denied that anyone ever said 'you will charge', but they did tell the Inquiry they felt a 'huge' amount of pressure to 'make a decision to charge, and we both declined'. Jabbour told them it was a matter for them and, if they did not feel comfortable, he would not expect them to move to charge. Jabbour and Hogan then left the room and had a conversation.

Jabbour recalled Hogan telling him that the CDPP's advice had changed her opinion. Hogan did not recall making such a statement, but she did tell Jabbour she could 'see why, in view of the DPP's advice, you haven't got much choice'. Jabbour and Hogan agreed that if Simms and Thompson were uncomfortable with the idea of charging they should not do it. It was also agreed that, as the lead investigating agency, the AFP should make the decision and that, as the Senior Investigating Officer, Commander Jabbour would be the most suitable person to make the decision. Jabbour took the view that he was in the best position to assess the weight of evidence as a result of his 'holistic view of all available material', and he decided there was enough to charge. He contacted Assistant

Commissioner Prendergast and told him so. Jabbour said Prendergast supported his view and so he proceeded to charge Dr Haneef. He returned to the discussion room and told those present he had made a decision to charge Dr Haneef. Detective Sergeant Simms returned to the interview room and told Dr Haneef and Mr Russo that Dr Haneef would be charged.

3.5.4 The prosecution

The court proceedings

At about 7.40 am on Saturday 14 July 2007 Dr Haneef was taken to the Queensland Police Service City Watchhouse, where he was formally charged with one offence of recklessly providing support to a terrorist organisation. The wording of the charge was identical to that drafted by Mr Porritt the previous afternoon, save that the reference to a Nokia digital handset had been removed by Commander Jabbour following the receipt of further information from the United Kingdom. The charge read as follows:

> On or about 25th day of July 2006 in the United Kingdom, Mohamed Haneef did, contrary to Section 102.7(2) of the Criminal Code (Cth) intentionally provide resources, namely a subscriber information module (SIM) card to a terrorist organisation consisting of a group of persons including Sabeel AHMED and Kafeel AHMED, being reckless as to whether the organisation was a terrorist organisation.

At about 8.00 am Jabbour called Mr Davidson. He told him Dr Haneef had been charged and that he (Jabbour) was trying to contact Mr Porritt to advise him to attend court. Mr Davidson undertook to do so. There was no discussion of Mr Porritt's advice. Porritt was contacted and attended court with Ms Curnow. Superintendent Hogan arranged for surveillance teams to be placed outside the Brisbane Magistrates Court on both 14 and 16 July in the event that Dr Haneef was released on bail.

Two AFP officers attended court for Dr Haneef's appearance and bail application and provided Mr Porritt with four brief documents, including an objection to bail affidavit and annexure sworn earlier that morning by Commander Jabbour. Although Commander Jabbour was the charging officer, he did not attend court. He told the Inquiry Superintendent Hogan had told him he did not need to attend court. He added that since no new information had come to light he did not consider his presence would add anything to a first court mention.

The documents provided to Mr Porritt contained very limited factual material in relation to Dr Haneef's alleged implication in the offence. The police who did attend court had just arrived from Sydney and had only the most limited knowledge of the investigation. They had no knowledge of the interview that had been conducted overnight. Mr Porritt was not given a copy of the charge and saw it only when shown defence counsel's copy. Mr Porritt realised when he saw the charge sheet that he had omitted to include an element of the offence. Rather than

attempt to draft an amendment on his feet, he decided he would apply to amend the charge when the matter was next in court. Nothing in the nature of a statement of the allegations implicating Dr Haneef in any criminal conduct was set out in the statement of facts, and there was no allegation that the SIM card had been used in any way by the alleged terrorist organisation.

Dr Haneef appeared before Magistrate Payne in the Brisbane Magistrates Court on 14 July 2007 and applied for bail. Because he had been charged with a terrorism offence, s. 15AA of the Crimes Act required Dr Haneef to establish that exceptional circumstances existed before bail could be granted. In seeking to do this, counsel for Dr Haneef, Mr Stephen Keim SC, relied on a number of matters, among them a suggestion that the prosecution case was so inherently weak that this itself amounted to an exceptional circumstance. In responding to these submissions, Mr Porritt said two things that were factually incorrect. The first was that the SIM card was found in the burnt Jeep in Glasgow. In fact, Dr Haneef's SIM card was found in the possession of Dr Sabeel Ahmed, over 400 kilometres from Glasgow. The second incorrect statement was that Dr Haneef had resided with Sabeel and Kafeel in the United Kingdom: this was not the case.

Mr Porritt said he did not knowingly provide false information to the court, and I accept that. I am also satisfied that Mr Porritt took prompt action to alert Mr Adsett after becoming aware of these discrepancies on about 20–21 July. It is clear that when he and Ms Curnow attended Court that morning both still genuinely believed that the SIM card had been found on the injured Kafeel Ahmed in Glasgow. That was what they had been told in graphic detail on 12 July. Although this information subsequently changed and the correct information appeared in the briefing paper, neither Mr Porritt nor Ms Curnow noticed the change. In relation to the assertion that Dr Haneef resided with Sabeel and Kafeel in the United Kingdom, this also represented Mr Porritt's understanding based on information that had been provided to him by the police. An unsigned statutory declaration by Detective Sergeant Simms, that had been provided to the defence in relation to a further s. 23CB detention application, was tendered by Mr Keim. It also contained an assertion that Dr Haneef had resided with Kafeel and Sabeel at an address in Liverpool.

The magistrate adjourned the bail application until 3 pm so that counsel could address her on the law on 'exceptional circumstances'. Mr Glenn Rice, in-house counsel for the CDPP, appeared on behalf of the prosecution that afternoon and made submissions in relation to the exceptional circumstances test. The magistrate reserved her decision on bail until 9.30 am on Monday 16 July. On that day she granted Dr Haneef bail. Her Honour concluded that exceptional circumstances did exist for the grant of bail. In reaching this conclusion, she had regard to the fact the prosecution had not alleged that Dr Haneef had any direct association with any terrorist organisation and there was no evidence that the SIM card was used or associated with any terrorist attack or activity, other than being in a vehicle that was used in a terrorist attack. Her Honour also referred to the familial relationship with Sabeel, Dr Haneef's occupation as a doctor, his previous good character, the low risk of him fleeing the country, and the fact that

he 'may be the subject of surveillance if released into the community'. The case was adjourned until 31 August 2007.

3.5.5 Review of the prosecution

The CDPP began a review of the prosecution of Dr Haneef immediately after the court proceedings on Saturday 14 July. That evening Mr Adsett telephoned Mr Davidson to advise him of the bail application and tell him Mr Rice had described the case as 'at the margins'. Mr Davidson also spoke to Commander Jabbour, telling him the case seemed very weak—particularly the material suggesting a terrorist organisation existed in 2006 and Dr Haneef's knowledge of this. Mr Davidson told Commander Jabbour, 'Between you and me, Clive went beyond what I told him'.

On 16 July Commander Jabbour met with Mr Porritt and Ms Curnow at the CDPP office. Porritt had been instructed to ask Jabbour whether the AFP wished to withdraw the charge. Jabbour said he was quite comfortable with the charge proceeding. Ms Curnow recalled Jabbour telling them that Dr Haneef had been lying and unresponsive during the second interview and could give no reasonable explanation for a meeting with the other suspects in India in 2006. Jabbour was asked to prepare a document setting out the AFP's 'best case' because CDPP head office wanted to review the material to see if the charge laid was correct and whether a review of the bail decision was appropriate. On 16 July Assistant Commissioner Prendergast phoned Mr Davidson to say he was concerned with reports that the CDPP considered the case weak. According to Mr Davidson, Prendergast said the AFP had been heavily influenced by the CDPP view that there were reasonable grounds to believe, and Commander Jabbour obviously believed he had CDPP support. Mr Davidson confirmed that on what he then knew he considered the case weak, but he was awaiting further material from the AFP. He explained that the advice Mr Porritt gave was not the prosecution test and that Mr Porritt had gone beyond what they had discussed.

On 17 July the AFP provided to the CDPP a 26-page document setting out the AFP case against Dr Haneef. This document noted that Sabeel Ahmed had been arrested and 'charged with concealing information that could have prevented an act of terrorism'. There was an oblique reference to the Kafeel email, saying that it stated 'in a series of goodbye letters … to relatives' Kafeel had used the word 'project' and so too had Dr Haneef in a chat log with his brother Mohammed Shuaib. Further reference was made to the material being gathered by UK authorities on radicalising behaviour engaged in by Sabeel, although again there was no reference to when this was said to have occurred. The document reiterated that Sabeel had resided with Dr Haneef and others at a Liverpool address. When the transcript of the first interview was provided to the CDPP the following day it emerged that Dr Haneef had not said he ever resided with Sabeel.

Mr Davidson did not think the 26-page summary advanced the case against Dr Haneef at all. In an advice sent to the Director of Public Prosecutions,

Mr Bugg, on 18 July he noted there was still no information about the existence of a terrorist organisation and that 'in this respect I note in passing that Sabeel … has not been charged in the UK with being a member of a terrorist organisation'. In expressing his opinion that there was insufficient material to justify a review of the bail decision, Davidson said 'at this stage the concern is whether there is a case at all'.

On 23 July Commander Jabbour and Mr Davidson had a lengthy discussion about the case. Davidson told Jabbour what his instructions to Porritt had been on 13 July—particularly that the CDPP could not say at that stage that there was enough evidence to begin a prosecution, especially given the limited material currently available. Jabbour said he was never told of these concerns, only that it was a matter for the AFP. He said that if he had been aware of Davidson's views on 13 July 'they would have stopped and not charged'. The pair discussed the progress of the investigation and the current evidence against Dr Haneef. Jabbour referred to the use by Kafeel of the word 'project' in a 'farewell letter', 'significant falsities' in Dr Haneef's interviews, and a brochure located in Dr Haneef's flat that 'sets the scene for an ideology'. Around this time Ms Curnow, who had listened to both taped records of interview, formed the view that Dr Haneef had been polite and cooperative during each. She did not form the impression that he had demonstrated an unresponsive attitude or that anything he said was on its face suspicious.

On Tuesday 24 July Dr Haneef's solicitors advised the CDPP that it had relisted the case for a directions hearing on Friday 27 July, on the basis that the charge laid against Dr Haneef was faulty because it failed to allege an essential element of the offence (something Porritt had noticed on 14 July). Also on 24 July Mr Adsett wrote to Commander Jabbour advising him that the CDPP had 'real concerns about obtaining evidence which supports a prima facie case' and observing that in relation to the main pieces of evidence relied on by the AFP—flight, chat logs, provision of the SIM card, and associations—there were innocent inferences available for each. He asked that the AFP 'urgently advise what further evidence, beyond that disclosed in the 17 July document, you anticipate is likely to be forthcoming to support this charge'. Commander Jabbour responded on 26 July, noting that he was 'gravely concerned' about the reservations Mr Adsett had expressed, 'particularly in light of advice provided by CDPP Brisbane office on 13 July'. He made several further references to Porritt's advice.

Late on 26 July Mr Adsett sent a minute to the Director of Public Prosecutions, recommending that the prosecution of Dr Haneef be discontinued on the basis that 'in all the circumstances there appears to be no prima facie case or reasonable prospects of conviction'. He identified the main defect in the case as the lack of evidence that when the SIM card was given to Sabeel Ahmed on 25 July 2006 there was an organisation in existence. In addition, there was nothing to show that as at July 2006 the entity to which the card was given was a terrorist organisation.

On 27 July 2007 the directions hearing in relation to the wording of the charge was stood down until the afternoon, when senior counsel appeared for the prosecution and informed the court that the Director had reviewed the matter and determined, in accordance with the Prosecution Policy, that there was no reasonable prospect of a conviction. An explanation was provided to the court of the incorrect statements made to it by Mr Porritt, with counsel noting that the Director had obtained an explanation for these and was satisfied they were inadvertent. The CDPP then formally offered no evidence against Dr Haneef and asked the court to dismiss the charge, which the magistrate did.

The Director issued a media release explaining his decision and participated in a press conference with Commissioner Keelty, answering further questions about his decision.

3.5.6 Observations on charging and prosecution

Should the CDPP have been engaged sooner?

Before the Haneef case, the AFP and the Director of Public Prosecutions had established close working relationships during major investigations. Police would approach the CDPP for advice during the course of an investigation and brief the CDPP on the status of an investigation. This relationship had extended into counter-terrorism investigations. In the Haneef case, it was not until 12 July 2007—10 days after Dr Haneef's arrest—that Commander Jabbour formally briefed the CDPP on Dr Haneef. Jabbour told the Inquiry he was not in a position to have done so earlier and, in any event, it would have been premature to have done so. With the benefit of hindsight, Jabbour accepted that it would have been preferable if the CDPP had been invited to the daily briefings from about 6 or 7 July.

The briefing paper did not contain a great deal of information obtained after 9 July, and there seems no reason why the CDPP could not have then been briefed on the material available. Even though the possibility of briefing the CDPP was mooted on 10 July 2007, no one seems to have turned their mind to preparing any briefing material until after the briefing of 12 July 2007. As the Senior Investigating Officer, Jabbour said he took a very 'hands on' approach to his role, in a way that another such officer might not. In my view, a senior investigating officer who had a more strategic overseeing role might have recognised a need to involve the CDPP from an early stage. Such an officer might also have recognised the need to start preparing a draft brief containing, for example, the transcripts of the interviews with Dr Haneef.

The delayed involvement of the CDPP does not appear to have been the result of a conscious decision to exclude. Closer involvement at an earlier time would, however, have enabled the CDPP officers to gain a better appreciation of the available evidence and perhaps led them to become aware of the police concerns about the strength of the case. It would also have resulted in better oversight

from CDPP head office: according to the CDPP, the advice Mr Porritt gave would never have been provided if it had first been passed through head office.

Contact between Porritt and CDPP head office

Until the evening of 12 July Mr Porritt had conscientiously and promptly kept Mr Davidson and Mr Adsett advised of every development in the Haneef case. This stands in stark contrast to his failure to provide any update following the AFP briefing on 12 July. At that time, Mr Porritt had been given more information in two hours than the CDPP had received in 10 days. Moreover, he had been specifically asked to return the following day in the expectation that he would provide advice on whether the AFP had sufficient evidence to charge Dr Haneef. The first time Mr Davidson became aware that the CDPP, through Mr Porritt, was being asked to advise the AFP about possibly charging Dr Haneef was when Porritt phoned him at 3.30 pm on Friday 13 July. Both Mr Davidson and the former Director, Mr Bugg, told the Inquiry it was unfortunate that Mr Porritt had not provided any update to head office on 12 July or early 13 July. They suggested that if that had happened it is unlikely the miscommunication that occurred later in the day would have occurred. I am unable to say why Mr Porritt did not report back to Mr Davidson after 12 July 2007. Even if Mr Porritt felt it unnecessary to bother his supervisors that evening, he should certainly have contacted either Mr Davidson or Mr Adsett on the morning of 13 July.

Mr Porritt told the Inquiry Mr Davidson gave him no indication that he thought his advice had been given contrary to instructions. Davidson in fact became immediately concerned that the advice Porritt had given was inappropriate and that he (Porritt) might have misunderstood his role. Yet Davidson made no mention of this during the phone call of 13 July; nor did he query what had changed since 3.30 pm, when the consensus between them was that there was insufficient evidence to apply the Prosecution Policy. Mr Davidson told the Inquiry he considered trying to rectify the situation but believed he was not in a position to do so. He said he had not seen any of the material and did not know the extent or strength of the case against Dr Haneef. He said he had been dealing with a senior officer of some 20 years' standing with CDPP. Further, he said Porritt told him 'the police were going to charge Haneef'. Davidson's understanding was that Porritt had given advice to the police, and a decision to charge had already been made. Davidson considered that the CDPP needed to quickly review the material, determine whether or not the charge was appropriate and, if it was not, take steps to redress the situation.

It is unfortunate that Mr Davidson gained the impression that the decision to charge Dr Haneef had already been made and that charging was under way. Even one or two further questions of Mr Porritt during that conversation that evening might have clarified the fact that a second interview was in progress and a final decision about charging would not be made for some hours. Davidson might then have contacted Jabbour to find out what had occurred and to explain that there had been a misunderstanding. He might also have questioned Porritt about what had happened in the past two hours to cause him to so dramatically

change the view he expressed during the 3.30 pm phone call. Commander Jabbour assumed that Mr Porritt's advice represented the CDPP's 'organisational position'. Jabbour was troubled that, if Porritt's advice was at odds with the discussion he had had with Davidson, Davidson should have telephoned him and the situation could have then been defused. These observations are, of course, matters of hindsight and, although Davidson could have taken other steps, and perhaps should have sought further particulars from Porritt during the evening, I believe he (Davidson) acted in good faith on the understanding he had at the time.

Porritt's apparent reasoning

In order to provide the advice he did, Mr Porritt seems to have adopted the following chain of reasoning:

- Sabeel Ahmed was involved in the UK terror acts and Dr Haneef had given him a SIM card and mobile phone, both of which were used in the course of carrying out the terrorist actions.
- Kafeel Ahmed was a terrorist who obviously held radical views and was in possession of Haneef's SIM card at the scene of the Glasgow attack.
- Police were confident that evidence of Sabeel holding radicalised views would be available.
- Dr Haneef had spent considerable time with both Sabeel and Kafeel during 2005 and 2006 and had lived with them for much of that period.
- Dr Haneef must have been exposed to, and aware of, their radicalised views.
- In trying to flee Australia on 2 July, Dr Haneef was exhibiting a consciousness of guilt in connection with his involvement in the attacks.

Some of the underlying assumptions in this reasoning were incorrect. Others were not supported by any evidence or were totally speculative. Many of the inferences said to flow from these assertions were little more than conjecture. The evidence of flight, for example, was equivocal at best.

Mr Porritt attached much importance to his understanding that Dr Haneef had lived with Sabeel and Kafeel Ahmed for a lengthy period before coming to Australia. In assessing whether Dr Haneef might have committed a terrorism offence, Porritt considered Sabeel's position to be 'absolutely central'. For this reason he considered that any evidence of extremist or radical beliefs on Sabeel's part would be highly relevant. The suggestion that Sabeel had attempted to radicalise others was something he gave a great deal of attention to. He seems, however, not to have considered the highly speculative nature of this material: no evidence had actually been obtained, or might ever be obtained, and there was no indication of the time frame in which this conduct had occurred. Even if Sabeel did harbour radical beliefs, this did not mean Dr Haneef was necessarily aware of

them or, more importantly, aware that Sabeel was a member of a terrorist organisation.

It is regrettable that the full transcript of the first interview was not provided to the CDPP officers. Had it been they probably would not have gained the impression that Dr Haneef and the Ahmed brothers had a much closer association than was in fact the case. The officers would also have developed a better understanding of the degree to which Dr Haneef provided detailed responses to police questions on an extensive range of subjects and—contrary to what Ms Curnow was told—had not been 'evasive and unresponsive'.

The CDPP officers should also have been given the transcript of the conversation between Dr Haneef and the arresting officers at Brisbane Airport. In his first statements to the police after being arrested, Dr Haneef volunteered information about the SIM card, his attempts to contact Mr Webster (the UK police officer) and the fact that his laptop computer was with Dr Asif Ali. Such openness on these important matters could well have been seen as inconsistent with guilt. Although I am critical of the AFP for not providing interview transcripts to the CDPP officers, I find it extraordinary that Mr Porritt, a prosecutor with over 20 years' experience, did not at least ask to see those documents before offering advice.

Why did Porritt apply the 'arrest test'?

Mr Porritt said the material he saw could not justify an assessment that there were reasonable prospects of obtaining a conviction. He was relieved when Mr Davidson expressed the same view. Mr Porritt did not understand his role as providing advice on the 'reasonable prospects' test. He had no discussions with the police about that test or indeed any test. Porritt saw it as a normal part of a prosecutor's duties to advise police on things such as to whether or not material might satisfy the arrest test. Even if this were the case, it does not explain why Mr Porritt failed to tell the police he did not think there was enough to charge according to the test prosecutors invariably apply when assessing the sufficiency of evidence. When telling the police 'you have enough to charge' he failed to say this opinion was based on an assessment under a test prosecutors do not use to assess sufficiency of evidence.

Commander Jabbour thought Porritt's advice meant what it said—'you have enough to charge'. Jabbour was aware that Porritt had spoken at length with Davidson immediately before giving his advice and formed the view that Porritt's advice had the imprimatur of CDPP. Subtleties in relation to the test Mr Porritt had in mind did not arise. Indeed, any suggestion by Porritt to the police that he was only applying the arrest test would have probably caused consternation. He had not been asked to provide advice on the arrest test. Dr Haneef was already under arrest and had been held in detention for 10 days. If police did not hold a belief or suspicion that Dr Haneef had committed a terrorism offence they would have been obliged to release him forthwith. His continued detention under s. 3W of the Criminal Code and Part 1C of the Crimes Act required that police reasonably believed or suspected that he had committed

a terrorism offence. The AFP were obviously seeking from a Commonwealth prosecutor advice on whether there was enough evidence to proceed to charge Dr Haneef—that is, to begin a prosecution.

Porritt's written advice—although reportedly based on the arrest test—conveyed the clear impression that the CDPP officers personally held the views expressed: it 'appears to us however that not withstanding the limited material available, there are reasonable grounds for suspecting …' He did not state (as the arrest test requires) that a police officer had reasonable grounds to suspect (or believe) that Dr Haneef had committed an offence. Whatever test he applied and however he expressed it, Mr Porritt accepted that the question he was being asked was 'is there enough to charge?' Ms Curnow's notes make it clear that Porritt was told by Mr Davidson that the charging decision was one to be made by the police and *not* one for the CDPP to make in the absence of a brief. It should have been apparent to Mr Porritt that it was highly likely the police might act on the basis of his advice. The fact that he went so far as to draft the wording for a charge simply strengthens this suggestion. When Mr Rendina queried the written advice, Mr Porritt did not explain that his advice was limited and did not mean there were reasonable grounds of obtaining a conviction. He told the police 'there was enough to move forward'.

Was any pressure applied to Porritt to give positive advice?

In his statement to the Inquiry Mr Porritt said he felt an 'unspoken but considerable pressure to provide positive reassurance to police … it did not however impair my judgement … [or] lead me to give the type of advice that I would not ordinarily have given'. Mr Porritt told the Inquiry he was not suggesting he was being 'driven into a corner', but he did feel 'there was pressure to produce something, to produce it today'. Commander Jabbour was very 'upbeat' and told him 'the case can only get stronger'. He gained the impression the police felt they had a 'really good case', and he was 'loath to say no'.

I accept that Mr Porritt was conscious of the extensive investigations conducted by the police and that he felt pressure to provide 'positive reassurance' to them. I also accept that the speed at which the matter was being progressed by the AFP and the optimistic view being expressed about the matter undoubtedly contributed to this reaction. Commander Jabbour acknowledged that he had presented the case to Mr Porritt in a confident and positive way.

It is regrettable that Mr Porritt did not know of the views the police held. That might have helped him gain a greater understanding of the case than could be gleaned from the briefing paper and the other ad hoc material that was provided to him. Mr Porritt told the Inquiry he was 'absolutely astonished' to learn that the police did not think there was enough to charge. Had he been aware of this, he 'would not have agreed that the evidence was sufficient to satisfy the arrest test without a great deal more discussion and consultation with those who held a contrary view'. Advising Porritt of the police view on the case would have been in keeping with the memorandum of understanding between the CDPP and the AFP. Section 2.3 of the memorandum notes that 'the AFP will inform the DPP of

any information, including details of any mitigating factors which may assist in determining whether to initiate a prosecution, as well as any views or recommendations the AFP may have in that regard'.

Although Mr Porritt said the pressure to provide 'positive reassurance' did not impair his judgment, I do not believe this to be the case. He said he was 'loath to say no' and took considerable comfort from the confidence police expressed about the case getting stronger. If the case had not been presented in such a positive manner, I do not believe Porritt would have given the advice he did. Even so, as an experienced senior prosecutor, he should have identified the obvious gaps in the evidence, regardless of how 'upbeat' the police were about the case. The advice proffered by Mr Porritt was unsupportable—on any test. No material was ever put before him that suggested there was a terrorist organisation in existence in July 2006 or that Dr Haneef might have known this. The UK authorities were not suggesting that preparation for the terrorist acts of 29 and 30 June 2007 went back more than six weeks or that the conspiracy itself started before 2007. Mr Porritt's advice was ill-conceived and wrong. A subconscious desire to provide positive reassurance seems to be the explanation for how an otherwise competent and experienced prosecutor could have given such ill-considered advice.

In relation to the draft charge prepared by Mr Porritt, there was a complete lack of evidence on crucial elements. Far too much reliance was placed on a case theory that was either speculative in nature or unsupported by the evidence. I consider that Mr Porritt provided his advice in good faith, but it should never had been given. He seems to have misunderstood what Mr Davidson had asked him to do. Even if he was only providing advice in relation to the arrest test, a matter he failed to make clear, the material still fell short of meeting that standard.

What type of advice or assistance should have been given?

In Mr Davidson's view, if there is insufficient material to satisfy the Prosecution Policy, no advice should be given, other than to remind police that any decision to charge is an operational decision for them. He said the only advice that should be given in relation to the sufficiency of evidence by a prosecutor is that the 'reasonable prospects' test is satisfied, that the reasonable prospects test is not satisfied, or that there is insufficient information available to comment. He said CDPP officers could help police identify possible offences and provide advice as to the elements of such offences, including whether specific material as a matter of law could satisfy a particular element. But advice should never be given on a matter that is an operational decision for police to make—for example, whether to arrest a person. Even if the CDPP were satisfied the reasonable prospects test had been met, it would still be a matter for police whether to proceed by charge, summons or otherwise.

Mr Porritt disagreed with the suggestion that he was not permitted to give advice about whether there were reasonable grounds for a police officer to hold a belief as to whether an offence had been committed. In his view, advice as to whether a

prosecution could be instituted 'is very different' from advice as to whether a prosecution should be continued. There is, in fact, no difference. The Prosecution Policy states, 'A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the alleged offender'. Mr Porritt referred to prosecutors' practice of giving police advice on whether they have 'reasonable grounds to believe' in relation to surveillance warrant applications, suggesting that his advice here was no different. There is a fundamental difference: advice on obtaining surveillance warrants does not involve any assessment of the sufficiency of the material for the purposes of initiating a prosecution.

In my opinion, it is important that the CDPP does provide guidance to police who are faced with circumstances similar to those that arose in the Haneef case. To simply say 'there is insufficient material for me to make an assessment under the Prosecution Policy, it is a matter for you whether to arrest or charge' is unhelpful. It is certainly appropriate for police to be reminded in plain and strong language that any decision to arrest or charge is one for them to make. Even when the CDPP is not in a position to advise on reasonable prospects, some further guidance should be able to be provided. By identifying the elements of the offence under investigation, providing advice as to whether any evidence obtained might satisfy those elements and, where there is a shortfall, identifying the type of material that might satisfy the remaining elements, the police will be in a better position to make an informed decision to charge or release.

The arrest test, in my view, is not the basis on which police should determine whether to charge an individual who has been detained for a number of days following arrest, but it is certainly a touchstone by which that decision should be made. If, after an extended period of detention of a suspect, a police officer does not hold a reasonable belief that the suspect has committed the offence, the suspect should not be charged. That is not to say that, just because a police officer does hold such a belief, charging will necessarily be appropriate or justified. In my view reasonable belief is a prerequisite to charging. The final decision depends on the individual officer's assessment of all the circumstances known to them—including any guidance the CDPP provided on the state of the evidence and that officer's own assessment of the whether sufficient evidence will ultimately be obtained to satisfy the CDPP that the prosecution should not be discontinued.

Applying that approach to Dr Haneef, Mr Porritt could have provided advice along the following lines:

- There is insufficient material currently available for me to say there are reasonable prospects of obtaining a conviction.
- There seems to be strong evidence that in July 2006 Dr Haneef provided a SIM card to Dr Sabeel Ahmed, and a SIM card could help a terrorist organisation plan or carry out a terrorist act.

- There does not at present appear to be any evidence that, when Dr Haneef provided the SIM card to Sabeel, Sabeel was a member of a terrorist organisation.

- There does not at present appear to be any evidence—even if Sabeel could be shown to be a member of a terrorist organisation—that Dr Haneef should have been aware of this and acted recklessly in giving Sabeel the SIM card.

- Such evidence might take many forms. Evidence of clear and overt radicalism by Sabeel in 2006 and a close association with Dr Haneef during this time might support an inference that Sabeel was then a member of a terrorist organisation and that Dr Haneef was reckless as to this fact. The evidence would need to be detailed and specific in order to support such an inference.

- Any decision whether to charge Dr Haneef is one for the police to make.

- If you charge Dr Haneef and subsequently the evidence you provide to the CDPP does not satisfy us that there is a reasonable prospect of obtaining a conviction, the charge will be discontinued.

- In making your decision you should take into account anything you consider relevant in the circumstances—including the matters I identify here, your own assessment of the evidence you have obtained and any evidence you reasonably expect to obtain.

- When you come to make the decision, if you do not hold a reasonable belief that Dr Haneef has committed an offence it would not be appropriate to proceed to charge him.

- Even if you do hold such a belief, it might still not be appropriate for you to charge him. This will depend on your overall assessment of the situation.

Had such advice been provided, Commander Jabbour would have been made aware that the CDPP did not believe there were at that time reasonable prospects of obtaining a conviction. Jabbour would have received some indication of where the CDPP considered there were evidential problems and the type of evidence that might resolve these problems. He could then have made an assessment of whether, realistically, evidence could be obtained to fill these holes. As of 14 July 2007, Jabbour undoubtedly believed Dr Haneef had committed a terrorism offence. Even assuming this was a reasonable belief, it would not follow that Dr Haneef should be charged. Given the view of the rest of the senior management team that there was not enough to charge, it is less likely Jabbour would have then proceeded to charge Dr Haneef if he had received this kind of advice.

The Kafeel email: why was it not provided?

Any case against Dr Haneef depended on proving that Sabeel Ahmed was involved in the terrorist acts of 29 and 30 June 2007. Without this, it could not

possibly be suggested that giving a SIM card to Sabeel carried any sinister connotation. Accordingly, the position of Sabeel was central. On the face of it, the 'Kafeel email' suggested that Sabeel was *not* involved in the UK attacks and had no foreknowledge of them. Because of the potentially—and, in my view, plainly—exculpatory value of the Kafeel email, the failure to provide this document to Mr Porritt or the CDPP was significant. Mr Porritt and Ms Curnow both told the Inquiry they would have regarded the Kafeel email as relevant to assessing the sufficiency of the evidence against Dr Haneef.

Of course, this email could have been a ruse on Kafeel's part, designed to give investigators the impression that Sabeel was not involved in the hope that he would escape suspicion and remain free to continue jihad. On the basis of his experience in counter-terrorism and other intelligence received, this was the view Commander Jabbour took: he did not entertain the possibility that it might be exculpatory. Although a senior investigating officer should approach all evidence with an inquiring and suspicious mind, Jabbour's refusal to countenance the possibility that the Kafeel email could be interpreted in ways inconsistent with the guilt of Sabeel Ahmed, or by extension Dr Haneef, was unreasonable.

UK authorities provided the Kafeel email to the AFP on Sunday 8 July 2007; Commander Jabbour said it was provided with stringent restrictions on its further dissemination. References to the existence of the email and some of its content appear, however, in a number of documents. On 11 July Commander Jabbour prepared a statutory declaration in support of the fourth application for specified time and referred to a 'series of "goodbye" letters discovered from Mr Kafeel Ahmed to his relatives'. On 23 July in a conversation with Mr Davidson Jabbour referred to a 'farewell letter' sent by Kafeel. Both references were in the context that the Kafeel email mentioned a 'project' and Dr Haneef himself had used this term in a chat log. The Kafeel email was therefore disclosed in a limited way to both a magistrate and the CDPP, in a manner that suggested it provided evidence incriminating Dr Haneef. These references to the email were inconsistent with the apparently absolute strictures placed on its further dissemination.

I accept that UK authorities did impose restrictions or caveats on the email, but other information they provided that was subject to similar caveats was included in the briefing paper. I have no basis for saying whether or not the AFP's assertions that they could not disclose the contents of the email to Mr Porritt and Ms Curnow were justified. Detective Superintendent Prunty told the Inquiry he did not know 'the circumstances upon which Mr Jabbour had the email', but if it did come with such restrictions he 'wouldn't expect the existence of that material to be acknowledged to a third party'. The CDPP officers each had high-level security clearances and, even if the full document could not be provided, Mr Porritt should have at the minimum been told there was further information touching on Sabeel's involvement that could not be disclosed to him. At least then Mr Porritt would have been on notice that he did not have the full picture. Mr Porritt placed great significance on the role of Sabeel Ahmed, and he made this clear in his discussions with police. In the light of this, I believe it likely that if the

Kafeel email had been provided to him he would have given different advice to the police.

Jihadist material found in Dr Haneef's flat

In view of the references in the AFP's public submission to the discovery of jihadist literature and 'audio files by an author who had been linked to Al Qa'ida' in Dr Haneef's flat and the media attention this attracted, I feel compelled to make some further observations.

It is clear to me that this material formed no part of the material considered by the AFP when the decision to charge was made. Commander Jabbour did not identify it as having potential relevance until 18 July 2007. According to AFP Intelligence Assessment Reports, the brochure in question, although found inside Dr Haneef's unit, was inside a bag with a baggage label in the name of Asif Ali. In his interviews Dr Haneef was not asked any questions about this material, not even whether he had any knowledge of it. The presence of this material was not disclosed to the CDPP and was not referred to in the 'SIO review of evidence' Jabbour prepared on 10 July 2007. Nor was the material referred to in the information briefs sent to the Department of Immigration and Citizenship.

The brochure was examined, and the assessments prepared on 19 and 20 July 2007 found the following:

- The organisation in question was not a proscribed organisation in Australia or the United Kingdom but was in many European and African countries.
- The organisation had been monitored since 2002 and, whilst it had engaged in the distribution of extremist propaganda material, no criminal activity had been identified.
- A 2006 assessment of the organisation found no links between it and terrorist activities
- The possession of this propaganda material did not necessarily suggest that extremist views were held by its custodians.

Examination of the audio files revealed that none had been accessed for some time and some had never been accessed.

Given the weight Mr Porritt attached to any evidence suggesting that Sabeel Ahmed held radical beliefs, it is likely that the AFP would have brought this material to his attention had the police regarded it as probative evidence that Dr Haneef held radical views.

The decision to charge

The AFP submitted that Mr Porritt's advice effectively left them with no choice but to charge Dr Haneef. It was also asserted that the only reason the charge was laid was because the CDPP had provided the advice it did. In a 'but for' sense this is probably the case. Had Mr Porritt not provided the advice he provided, I do

not think the AFP would have proceeded to charge Dr Haneef. But receipt of this advice did not oblige the AFP to charge Dr Haneef. A number of senior police with detailed knowledge of the case—among them Detective Superintendent Hogan and the two officers who had arrested and interviewed Dr Haneef, Federal Agent Thompson and Detective Sergeant Simms—did not consider Porritt's advice mandated a charge.

Commander Jabbour was aware that Detective Chief Superintendent Barnett and Detective Superintendent Hogan had queried the sufficiency of the evidence and suggested getting a second opinion, but he saw that advice as coming from the CDPP as a whole and considered that, absent any exculpatory material arising from the interviews, Dr Haneef was going to be charged. Although the final decision to charge rested with him as senior investigating officer, he thought it prudent to obtain the views of his 'line supervisor', Assistant Commissioner Prendergast and did so at about 6.00 pm. Prendergast told the Inquiry, 'I wasn't in a position to direct anyone to charge and wouldn't, but my expectation would be with that advice we would charge'.

Jabbour agreed that it was never established that Dr Haneef uttered a single untruth in the course of his interviews with the police. Although Prendergast and Jabbour asserted that no final decision to charge Dr Haneef had been taken before the conclusion of the second interview, I doubt that Dr Haneef could have said anything in that interview that would have altered Jabbour's view. By 6.30 pm it was almost inevitable that Dr Haneef was going to be charged. Indeed, a draft 'media talking points' document, prepared by the AFP Media Unit in Canberra at 11.00 pm on 13 July, referred to advice received from the CDPP and that 'based on that advice, the Southport man was charged at 8am on 14 July 2007'. Media talking points are routinely prepared in anticipation of possible developments. It is probable that after his discussion with Jabbour at 6.00 pm Prendergast updated the AFP Media Unit as to what was now likely to occur, and the talking points were prepared in anticipation of that eventuality. Jabbour agreed the talking points seemed 'premature' but said they reflected 'our firm view … as I understood it'.

Jabbour told the Inquiry that his impression was that the CDPP advice had caused Detective Superintendent Hogan to change her position in relation to charging. Hogan said that she might have told Jabbour, 'I can see why, in view of the DPP's advice you haven't got much choice'. She maintained that her personal views had not changed following the CDPP's advice and if the decision had been hers she would not have charged. Hogan might have held that personal view, but I believe that what she said to Jabbour would have given him the impression that her view had changed or softened. According to Assistant Commissioner Prendergast, Jabbour reported that the 'Queensland view' was 'absent the CDPP advice she would not charge, but given we had the CDPP advice we had no choice'. Hogan denied these words were said in her presence and said she would have intervened in the conversation if she had heard them, as they misrepresented the QPS position.

After Simms and Thompson declined to charge Dr Haneef, the final decision fell to Commander Jabbour. There is no question that receipt of the Porritt advice was an important development and that it was appropriate for Jabbour to take into account the advice of an experienced prosecutor. In determining how much weight he ought to attach to Porritt's advice, though, he needed to consider the circumstances in which it was given:

- The advice had been provided at short notice and on the basis of limited material supplemented by other ad hoc material.
- The case was presented to Porritt in a very confident manner, suggesting that the police believed they had a strong case that was only going to improve.
- Porritt had not seen all the material that had been available to Jabbour.

The senior management team themselves considered there was insufficient evidence to charge. Jabbour had been specifically counselled by Hogan to treat Porritt's advice with caution. Hogan and Barnett were still concerned about the sufficiency of the evidence. Porritt's advice came as something of a surprise, especially to Hogan and Detective Superintendent Prunty. The written advice was very different from the oral advice in that it contained no statement to the effect that 'there was enough to charge'. Indeed, the wording was so convoluted that there was confusion as to its precise meaning, even after clarification. The two officers who had spent nearly 24 hours questioning Dr Haneef regarded the advice as both inconclusive and unpersuasive and were not prepared to rely on it as a justification for charging Dr Haneef.

When he made the decision to charge on 14 July 2007 Commander Jabbour then asserted that he was not basing his decision on the CDPP's advice but was instead basing it on his 'holistic view of all the available material'. Ironically, whilst Jabbour considered he was in a better position than Thompson and Simms to make the call, they were eminently better placed than Porritt.

My impression is that Jabbour held a strong personal view that Dr Haneef was implicated in the UK terrorist acts, despite his inability to uncover any substantial piece of evidence upon which to anchor that belief. When Porritt provided his ill-considered advice, Jabbour rightly viewed the advice as a significant factor in his decision but equally had any number of reasons to discount or question that opinion. Nobody (other than perhaps Prendergast, who was not fully aware of all the circumstances in which Porritt gave the advice) considered that the advice *required* that Haneef be charged.

It seems to me that Mr Porritt's advice was relied on not because it was particularly persuasive, detailed or comprehensive (which it was not) but because it was there. It gave the AFP a basis for adopting a course that until then it could not have justified—and indeed did not consider was justifiable. Since that time the AFP has asserted it would have been 'severely criticised' if it had ignored the CDPP's advice and that to do so would have been 'without precedent', although I

note that neither of these matters was raised in the course of discussing the advice on 13 and 14 July.

Until Porritt provided his advice, the considered view of the AFP—and Commander Jabbour in particular—was that there was insufficient evidence to charge Dr Haneef. Officials from other government agencies had been informed that charging was seen as the least likely outcome, and Commissioner Keelty had told the Director of Public Prosecutions he did not think that police had enough evidence to charge Haneef. The AFP has also asserted that the Porritt advice was 'the catalyst' for the decision to charge Haneef, and I accept that it was in the sense that, without it, they would not have charged Dr Haneef. There were, however, many reasons to treat this advice with care. In my view, the Porritt advice did not so much require the AFP to charge Dr Haneef: rather, it provided the occasion to charge.

The prosecution and review

The documentation provided to Mr Porritt in court on 14 July was sub-standard. In relation to the statement of facts, Detective Superintendent Hogan and Commander Jabbour both told the Inquiry Mr Porritt had instructed them that any statement of facts should be limited to two pages. Federal Agent Gear's notes corroborate this, and Mr Porritt conceded that he had probably asked for 'a summary of the case in digestible form … not an omnibus … something short'. I accept there was a deal of confusion created by Porritt's comments, but these were senior police officers. Even allowing for a degree of confusion as to the detail Porritt asked for, the statement of facts was incapable of informing the court or the defendant of precisely what was being alleged and why the defendant was implicated.

In the light of the 12 days that had elapsed between arrest and charge, the quality of the documentation AFP prepared was extremely poor. The inadequate statement of facts might be explained, but the fact that no police officer with any comprehensive knowledge of the case was in attendance caused major problems. Mr Porritt was placed in a position where he could not seek instructions from an informed source in relation to anything raised by the defence or the magistrate. During those proceedings Mr Porritt made two factual misstatements to the court, one of which at least could have been immediately corrected if such an officer had been in attendance.

On Monday 16 July Mr Davidson told Commander Jabbour and Assistant Commissioner Prendergast the CDPP considered that Mr Porritt's advice was inappropriate and the case against Dr Haneef very weak. No action was taken to review the bail decision, a decision founded in part on the magistrate's view that the case was so weak that this amounted to an exceptional circumstance.

At no point in its dealings with the CDPP while the case was being reviewed did the AFP express the view that it also considered the case against Dr Haneef weak. Rather, the AFP—and Commander Jabbour in particular—continued to express confidence in the case and in the prospect that further material to support the

prosecution would be obtained from the United Kingdom. The only concern repeatedly expressed to the CDPP was that the AFP had relied closely on Mr Porritt's advice before moving to charge. During a 23 July discussion between Commander Jabbour and Mr Davidson reference was made to further material that had not been available to Mr Porritt including the reference by Kafeel Ahmed to a 'project' in a 'farewell letter', a jihadist brochure found in a bag in Dr Haneef's flat, and 'significant falsities in the [record of interview]', particularly concerning finances. The Kafeel email and the jihadist brochure, as discussed, added nothing, and the AFP did not place anything before the CDPP to support the contention that Dr Haneef had lied about his financial transactions. In fact, Commander Jabbour told the Inquiry that the AFP could not point to anything Dr Haneef said during either of the interviews as being untrue.

The Commonwealth Director of Public Prosecutions began its review of the prosecution on the day Dr Haneef was charged. It was another 12 days before the charge was dropped, but I am satisfied that the CDPP acted expeditiously in reviewing the evidence and giving the AFP every opportunity to express its views and provide further material before the decision was taken to discontinue the prosecution.

3.6 Visa cancellation

At about 1.00 pm on 16 July 2007 the then Minister of Immigration and Citizenship, the Hon. Kevin Andrews MP, decided to cancel Dr Mohamed Haneef's visa under s. 501(3) of the *Migration Act 1958*. As a result, Dr Haneef became an unlawful non-citizen and became liable to immigration detention pending his removal from Australia.

On 21 August 2007 the Federal Court set aside the cancellation decision, holding that the Minister had fallen into jurisdictional error by applying the wrong test on the meaning of 'association' in s. 501(6)(b) of the Act.[2] Justice Spender nonetheless considered that if the Minister had applied the correct test it would have been competent for him to make the same decision on the basis of the information that was before him. In addition to the matters on which the Minister had relied, the information contained advice from the UK Metropolitan Police Service that Dr Haneef was a person of interest to its investigation, as well as the fact that Dr Haneef had been charged with an offence under s. 102.7(2) of the *Criminal Code Act 1995*. As Justice Spender noted, those circumstances had since changed. Justice Spender's decision was subsequently upheld by a Full Court of the Federal Court.[3]

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

3 *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203.

3.6.1 The development of options by DIAC

As early as 1 July 2007 the Department of Immigration and Citizenship had been involved in the whole-of-government response to the attempted car bombing attacks in London on 29 June 2007 and the attack on Glasgow Airport on 30 June 2007. DIAC officers from the Border Security Division attended a meeting of the Australian Government Counter-Terrorism Committee to discuss matters arising from the incidents. Although the UK incidents were of concern to the Australian Government, no immediate implications for DIAC were identified.

On Monday 2 July DIAC officers attended a meeting of the National Counter-Terrorism Committee, at which they received a briefing on the incidents from the Australian Federal Police, ASIO and other agencies. In connection with concerns about media reporting of 'home-grown' terrorists, DIAC was asked to look into the possible impacts on the domestic Islamic community and to prepare 'whole-of-government talking points' on that subject. It was noted at this meeting that Dr Haneef had been identified as a person of interest in the UK investigations.

Later that day DIAC responded to a request from the AFP for urgent access to Dr Haneef's incoming passenger card and records of his movements. Dr Haneef had entered Australia on 11 September 2006 on a subclass 457 business visa that was valid until 30 August 2010.

DIAC was notified of Dr Haneef's arrest at a National Counter-Terrorism Committee meeting on Tuesday 3 July. It was acknowledged at this meeting that the screening of overseas-trained doctors and the subclass 457 visa application system were likely to attract media interest. DIAC undertook to prepare whole-of-government talking points on the visa application and security checking processes and on character assessments for overseas-trained doctors. It was also asked to provide information about possible visa cancellation options for Dr Haneef; this would form part of an options paper being prepared by the Department of the Prime Minister and Cabinet for discussion at the next NCTC meeting.

The implications of the AFP investigation for Dr Haneef's immigration status, including potential visa cancellation, were again discussed at a meeting of Australian government representatives held later that day.

DIAC provided to the Attorney-General's Department draft talking points, in which it was noted that DIAC would consider cancellation of Dr Haneef's visa only 'if necessary' once the AFP investigations were completed and if no charges had been laid. Because the matter was being investigated by law enforcement authorities, the most pressing concern for DIAC at that time was dealing with the implications in relation to border security and screening processes.

On the afternoon of 3 July Mr Peter White, Assistant Secretary of the Character Assessment and War Crimes Screening Branch of DIAC, telephoned Federal Agent Ingrid Tomanovits (Co-ordinator Counter Terrorism, AFP Canberra) and said the AFP might be asked to provide information to help DIAC 'make a

decision about the desirability of these persons [Dr Haneef and Dr Asif Ali] being allowed to remain in Australia'. (At this point, Dr Asif Ali had also been identified as a person of interest to the AFP and his visa status was being considered.) It was noted that this would become a concern only if the AFP decided to release Dr Haneef and Dr Asif Ali without charge.

The following morning Mr White met with Federal Agent James Anderson, Acting National Co-ordinator Counter Terrorism, and briefed him on the powers and processes involved in a cancellation decision under s. 501 of the Migration Act. In particular, he discussed with Anderson the types of documents DIAC would be seeking to receive from the AFP in the event that the department decided to advance to the Minister a submission in relation to cancellation of Dr Haneef's visa. He explained that DIAC was looking for information showing an association between Dr Haneef and the UK suspects and that the UK suspects were involved in criminal activity. Federal Agent Anderson told Mr White the AFP was unlikely to provide to DIAC any original source documents (including records of interview) because they contained security-classified information it wished to avoid having disclosed. White drew Anderson's attention to s. 503A of the Migration Act, which could be used to protect confidential material from disclosure, and suggested that the AFP could provide the information in two parts—information that could be disclosed to Dr Haneef and information the AFP wanted to be kept confidential. White emphasised how important it was that any information known to Dr Haneef or that ought to be shared with Dr Haneef should not be included as part of the protected information in order to avoid giving rise to a potential jurisdictional error. Anderson stressed that the AFP preferred that DIAC not consider cancellation of Dr Haneef's visa too early and wanted time to allow its investigation to run.

Later that afternoon, Federal Agent Kylie Weldon notified the Counter-Terrorism Liaison Officer in the AFP London office that they were in the process of preparing 'a request for cancellation of the Visas for ALI and HANEEF ready for when and if we choose to take this course of action post interview'. It was noted that DIAC had asked that material be provided by the AFP by Thursday 5 July 'to enable [DIAC] to put it in the form they need to for their Minister in case HANEEF is released on Friday'. The AFP sent an overseas liaison communication to the AFP London office seeking relevant information for inclusion in the AFP material, in which it noted that the avenue of visa cancellation was 'being explored and developed in the event that all other law enforcement avenues have been exhausted', which could be 'as early as pm Friday 6 July 2007'.

On 4 July DIAC produced a paper entitled 'Possible cancellation powers' that set out the available powers and grounds for visa cancellation, including character grounds under s. 501 and various grounds prescribed under s. 116. Particular consideration was given to cancellation under s. 501(6)(b) on the ground of 'association'. The paper contemplated the use of this ground in circumstances where the visa holder did not have a criminal conviction but had an association with a person, group or organisation involved in criminal activity, which consequently reflected adversely on the visa applicant's character. It also noted

that the Minister could cancel a visa without natural justice if he was satisfied that it was in the 'national interest' to do so and that such a cancellation would take effect immediately.

The 'Possible cancellation powers' paper was based on the following premise:

> Should the Australian Federal Police (AFP) decide that they do not have enough to criminally charge MR HANEEF and the Australian Security Intelligence Organisation (ASIO) decides that it does not have enough evidence to issue an adverse security assessment the Government may seek options from [DIAC] regarding possible visa cancellation.

The paper was forwarded to the Department of the Prime Minister and Cabinet for incorporation in an options paper that was being prepared for distribution to departments and agencies to inform them of possible actions arising from the UK incidents. It was not sent to Minister Andrews or to his office.

On 4 July ASIO issued a security intelligence report stating it had no information to suggest Dr Haneef had any involvement in or foreknowledge of the UK incidents but that it remained concerned about Dr Haneef's connections and activities. The Deputy Secretary of the Borders, Compliance, Detention and Technology Group in DIAC, Mr Bob Correll, received a copy of the report. The report was not forwarded to the Minister's Office.

At an interagency meeting on the afternoon of 4 July DIAC outlined the powers available for cancellation of Dr Haneef's visa 'should this have to be considered more closely at the end of this week'. DIAC noted its preference for any cancellation to take place as the result of an adverse security assessment by ASIO, rather than on character grounds under s. 501 of the Migration Act. The representative of the Department of Foreign Affairs and Trade outlined the power of the Minister for Foreign Affairs to seek cancellation of a subclass 457 visa on foreign policy grounds but noted it was unclear whether this power would be available in Dr Haneef's case. The ASIO representative told the meeting that at that time ASIO did not have enough information to make an adverse security assessment in relation to Dr Haneef. It does not appear that the contents of the security intelligence report were discussed.

Following that meeting DIAC circulated a further options paper entitled 'DIAC–DFAT options', which contained the contents of the 'Possible cancellation powers' paper and an additional section dealing with cancellation on foreign policy grounds.

On 5 July DIAC sent to the Minister's Office an information brief entitled 'National security investigation into Queensland 457 visa holders'. The brief advised that Dr Haneef and other named subclass 457 visa holders were being investigated by the AFP in connection with the UK incidents and set out detailed information about security and penal checking arrangements in relation to subclass 457 visas, with particular reference to overseas medical practitioners. The brief noted that options for visa cancellation might need to be considered

'dependent on the outcome of current AFP, ASIO and UK investigations' and that any decision 'would have to be tailored to the circumstances extant following AFP/ASIO action'.

As a result of ASIO's position in relation to the security assessment of Dr Haneef, DIAC perceived that it was more likely that any consideration of cancelling Dr Haneef's visa would be referred to DIAC's Character Section and began preparing an issues paper on cancellation. Mr White's team began liaising with Mr Steven Dreezer, Assistant Secretary of the Detention Operations and Client Service Branch, in connection with management of contingencies for detention and removal should the visa be cancelled.

On 5 July the Department of the Prime Minister and Cabinet sent a draft options paper to the AFP, DIAC, the Attorney-General's Department, ASIO and the Department of Foreign Affairs and Trade, outlining possible courses of action in relation to the continued detention of Dr Haneef. The draft discussed options for the cancellation of Dr Haneef's visa 'to facilitate removal from Australia or prevent re-entry to Australia' in circumstances where 'the AFP and ASIO have no further powers to detain Dr Haneef and the AFP is not in a position to charge Dr Haneef'. Four cancellation options were discussed:

- a failure to meet employment and sponsorship requirements
- an adverse security assessment by ASIO
- a determination by the Minister for Foreign Affairs in relation to Australia's foreign policy interests
- the 'association' aspect of the character test under s. 501 of the Act.

The paper noted that DIAC was working with the AFP to assess whether there was material that would meet the character test and the national interest requirement. A question was raised as to whether there would be sufficient material to meet the national interest test if there was not enough evidence for the AFP to charge Dr Haneef with a criminal offence or for ASIO to issue an adverse assessment. On the facsimile cover sheet Ms Rebecca Irwin of the Department of the Prime Minister and Cabinet noted that the 'timeframes for progressing this will depend on the outcome of the AFP's application to the Brisbane magistrates' court this afternoon'—that is, the application for a further specified period under Part 1C of the *Crimes Act 1914*.

On 6 July DIAC sent to the Minister a further information brief, entitled 'Response to national security investigation into Queensland Subclass 457 visa holders—immigration issues'. This brief provided information on systemic problems with security checking processes under the subclass 457 visa program and did not specifically discuss Dr Haneef's case.

On the same day, in the light of discussion at meetings of the National Counter-Terrorism Committee, DIAC asked Mr Ian Deane, Australian Government

Solicitor Special Counsel, to provide legal advice on questions relating to Criminal Justice Stay Certificates and Criminal Justice Stay Visas.

On 8 July the AFP delivered information to DIAC for use in considering the cancellation of Dr Haneef's visa under s. 501 of the Migration Act. In the covering letter Assistant Commissioner Frank Prendergast confirmed that the information was provided to DIAC 'on the understanding that the AFP executive will be consulted prior to any action being taken with respect to the cancellation of Dr Haneef's visa'.

The information was in two parts. Part A contained information the AFP understood would be provided to Dr Haneef in the event that the Minister decided to cancel his visa; Part B contained additional information the AFP had classified as confidential under s. 503A of the Migration Act and that was provided on the condition that its contents not be disclosed without the AFP's written consent.

On the morning of 9 July, following a National Counter-Terrorism Committee update meeting, Mr White telephoned the Minister's Chief of Staff, Mr Michael Toby, and gave him a 'run through' of developments to date and the possible visa-cancellation scenarios. This appears to be the first direct contact between the Character Section of DIAC and the Minister's Office in connection with the possibility of a visa cancellation under s. 501. That afternoon Mr White emailed the DIAC–DFAT options paper to Mr Toby, noting, 'I have reviewed information over the weekend and am of the opinion that there is sufficient information to progress a [submission] to the Minister (in the national interest—i.e. without natural justice)'.

Mr White confirmed that the information he was referring to was the Part A and Part B material provided by the AFP on 8 July. He did not furnish to the Minister a submission seeking a decision on cancellation at that stage because the material was still being drafted and reviewed and because the caveats imposed by the AFP remained operative (that is, the AFP investigation was in progress).

Because of the extensive media coverage of the matter, Mr White considered it appropriate for DIAC to brief the Minister's Office on the options available to the Minister. Accordingly, in the afternoon of 9 July he emailed to Mr Toby an information brief entitled 'Options for visa cancellation consideration for Dr Mohammed Haneef'. The brief envisaged that the Minister might need to consider cancellation of Dr Haneef's visa on character grounds if the AFP decided not to charge Dr Haneef and ASIO decided not to issue an adverse security assessment—noting that cancellation was mandatory if an adverse assessment was issued. The brief raised three options:

- cancellation by the Minister personally without natural justice under s. 501(3)
- cancellation by the Minister personally with natural justice under s. 501(2)
- cancellation by a delegate with natural justice under s. 501(2).

It was noted that cancellation by the Minister under s. 501(3) 'would permit visa cancellation considerations prior to Dr Haneef re-entering the community following any release from police detention'. In relation to cancellation under s. 501(2), the brief pointed out that it would take at least two months to prepare a submission and to give Dr Haneef an opportunity to respond to a notice of intention to consider cancellation. Further, if the decision was made by a delegate under s. 501(2), the decision would be reviewable by the Administrative Appeals Tribunal, which would not be able to consider information that was protected under s. 503A. The brief attached a short advice from the Australian Government Solicitor Special Counsel on the meaning of 'national interest' under s. 501(3) but did not include the Part A or Part B information.

The Minister read a copy of this information brief on 10 July. He told the Inquiry that this was the first time he had been informed of the possibility that he may need to consider whether to cancel Dr Haneef's visa on character grounds.

3.6.2 11 July 2007

On Wednesday 11 July Mr Toby received an update from Mr Correll following a teleconference between representatives of the Department of the Prime Minister and Cabinet, DIAC, the Department of Foreign Affairs and Trade, ASIO and the AFP. Mr Correll briefed Mr Toby on the content of the teleconference, including ASIO's advice that it did not have any basis on which to issue an adverse assessment of Dr Haneef.

About this time, the Detention Operations and Client Services Branch of DIAC was tasked with coordinating the contingency planning in relation to Dr Haneef's detention and removal from Australia in the event that his visa was cancelled. Because there was no dedicated immigration detention centre in Queensland, consideration was given to other options, including temporary accommodation at the Brisbane City Watchhouse, transfer to the Arthur Gorrie Correctional Centre (subject to the agreement of Queensland Corrective Services) and transfer to Villawood Immigration Detention Centre in Sydney.

ASIO issued another security intelligence report on 11 July, saying it currently had no information to suggest that Dr Haneef had any involvement in or foreknowledge of the UK incidents or that he was engaged in planning for a terrorist attack in Australia or elsewhere. ASIO noted that it was continuing to assist the AFP with its investigation and that some elements of the investigation had not been finalised. In particular, ASIO referred to the reasons given by Dr Haneef for seeking to leave Australia on 2 July and 'the issue of how his mobile telephone and SIM card came to be used by those involved in the UK'. This security intelligence report was delivered to Mr Correll, who was at that time acting as Secretary of DIAC in Mr Metcalfe's absence. Mr Correll did not circulate the report to anyone else in DIAC or to the Minister.

Shortly after 3.00 pm on 11 July the AFP provided to DIAC updated Part A and Part B information, again 'on the understanding that the AFP executive will be

consulted prior to any action being taken with respect to the cancellation of Dr Haneef's visa'. In the covering letter, however, Assistant Commissioner Prendergast imposed an additional caveat:

> I also advise that we would not want any decision reached with respect to Dr Haneef to take effect until the conclusion of the investigation period and necessary law enforcement action has ceased. I will advise you of such a conclusion as soon as possible.

Following receipt of the material, DIAC updated the draft issues paper and began drafting a statement of reasons for consideration by the Minister in connection with any cancellation decision. The material before the Inquiry suggests that a submission and issues paper concerning the possible cancellation of Dr Haneef's visa were forwarded to the Minister's Office on 11 July. The Inquiry did not receive copies of these documents, but the information brief sent to the Minister's Office on 12 July made reference to the documents having been provided 'as a contingency, should you wish to consider Dr Haneef for visa cancellation (without natural justice)'.

At that time the AFP was making an application to a magistrate in Brisbane for a further specified period under Part 1C of the Crimes Act. Were the application not granted, the AFP would have been required to resume questioning Dr Haneef—and ultimately to release him if it was unable to lay a criminal charge.

A number of documents provided to the Inquiry are consistent with arrangements having been made by DIAC and the Minister's Office to ensure that the Minister was in a position to consider whether to cancel Dr Haneef's visa in the event that the AFP application was unsuccessful and the AFP was required to release Dr Haneef on or soon after the evening of 11 July.

A draft media release and talking points had been prepared in order to accommodate the possibility of the Minister deciding to cancel Dr Haneef's visa that evening. DIAC had also stationed an officer at the Brisbane City Watchhouse in case it became necessary to take Dr Haneef into immigration detention following a cancellation decision. The Cancellations and People Trafficking Section had prepared a draft decision and letter in relation to the consequential cancellation of Dr Haneef's wife's visa; these were forwarded to Mr White 'just in case you need to make a decision tonight'.

DIAC had prepared a draft information brief entitled 'Cancellation, detention and removal of Dr Haneef: operational planning', which dealt with the steps involved in the removal of Dr Haneef 'in anticipation of Dr H coming into immigration detention in the near future'. The plan contemplated that Dr Haneef would be held in immigration detention at the Brisbane City Watchhouse until arrangements could be made to remove him from Australia. There was also a back-up plan for transferring him to the Arthur Gorrie Correctional Centre, Villawood or Baxter Immigration Detention Centre 'should he initiate protracted legal action'. The planning documents, entitled 'Operational plan—removal of

Dr Haneef' and 'Key actions', anticipated that a decision could be made to cancel Dr Haneef's visa after the AFP had advised that Dr Haneef 'will not be charged with an offence and a Criminal Justice Stay Certificate will not be issued' and ASIO had confirmed that no adverse security assessment would be issued. This was expected to happen before 6.00 pm on 11 July.

At 6.18 pm on 11 July Mr White sent an email to Mr Toby in the Minister's Office, noting that the AFP's application under Part 1C of the Crimes Act had been adjourned and that there was 'no obligation to release Dr Haneef (and therefore no urgency in the Minister making the decision this evening)'.

In his interview with the Inquiry Mr White confirmed that the actions described were taken on the assumption that the AFP investigation might be concluded by that evening, whereupon a submission on cancellation would be forwarded to the Minister for decision. Mr Andrews stated, however, that he was unaware that these steps were being taken by the department or by his office in anticipation of a cancellation submission being forwarded to him for consideration at that time.

3.6.3 12 July 2007

At 8.15 am on Thursday 12 July DIAC participated in a teleconference with representatives of the Department of the Prime Minister and Cabinet, ASIO and the AFP ahead of the National Counter-Terrorism Committee meeting scheduled for later that day. During the teleconference ASIO confirmed that it had no information on which to make an adverse security assessment. DIAC advised that it had forwarded an information brief to the Minister's Office and provided an update about its contingency plans for the removal of Dr Haneef in the event of his visa cancellation. Mr Correll briefed Mr Toby following this meeting.

At the NCTC meeting, which began at 12.30 pm, the AFP informed those present that its application would be back before the magistrate on 13 July 2007 at 2.15 pm. It said it was still analysing information but reported 'no smoking gun' and that a criminal charge was the 'least likely' outcome. Later that morning Mr White telephoned Mr Toby to provide an update. Mr Toby reportedly told him the Minister 'may consider making a decision tomorrow'.

Meanwhile, the AFP had asked ASIO to review the Part B document that had been provided to DIAC on 11 July 2007 'with a view to harmonizing the assessment between ASIO and AFP'. Because it had not made an adverse security assessment against Dr Haneef, ASIO considered it inappropriate for it to contribute to or endorse a document provided to DIAC in connection with consideration of cancellation of Dr Haneef's visa on character grounds. Nevertheless, an ASIO officer asked the AFP to remove from the Part B document some information derived from ASIO material. The ASIO officer subsequently told Mr White of DIAC that he had asked that the material be removed but did not otherwise express any concerns about the contents of the Part B document. The ASIO officer did, however, tell Mr White ASIO was not prepared to provide information to DIAC for consideration under s. 501 and remained concerned

about the potential disclosure of any material provided (notwithstanding the protections afforded by s. 503A). Mr White said that following this discussion he did not make any further approaches to ASIO for information relevant to the cancellation of Dr Haneef's visa. The AFP informed Mr White that it had agreed to remove the ASIO material from the Part B document and would provide an amended Part B.

DIAC sent to the Minister another information brief, this one entitled 'Update on options for visa cancellation consideration for Dr Haneef to Minister'. The brief referred to two matters that had been raised earlier that day at the meeting of Australian government officials:

- First, Department of Foreign Affairs and Trade representatives had noted that a decision to cancel Dr Haneef's visa 'could have bilateral relationship implications' (between Australia and India) and that the Minister for Foreign Affairs might seek to discuss such implications with Mr Andrews. In this context, DIAC had agreed to liaise with DFAT 'on the timing of any visa cancellation consideration and associated public announcement'.

- Second, the AFP had indicated that, if Dr Haneef agreed to remain in Australia to assist with the AFP investigation, the Minister for Justice and Customs might ask that the Minister for Immigration and Citizenship not consider visa cancellation at that time.

Mr Andrews was advised that it was open to him to consider representations from either the Minister for Foreign Affairs or the Minister for Justice and Customs before deciding whether to cancel Dr Haneef's visa. Mr Andrews told the Inquiry no such representations were made to him.

The 12 July information brief also discussed the 'potential scenarios' before and after the 'court decision' on the AFP's application under Part 1C for further time to detain Dr Haneef while conducting its inquiries.

The first scenario involved the AFP deciding not to pursue the application for specified time, in which case it would need to decide whether to charge Dr Haneef once it had finished questioning him. The brief noted:

> Preliminary advice from the AFP is that there is insufficient evidence to support a criminal charge at this time. The AFP has indicated that they will provide advice to DIAC prior to Dr Haneef being released into the community. If Dr Haneef is released into the community he may voluntarily depart Australia (and may return).

Under this scenario, the Minister's options were to consider exercising his power under s. 501 or to take no action at that time.

The second scenario involved the magistrate deciding to grant the AFP's application for further specified time or the application being adjourned—for example, if the magistrate disqualified himself from hearing the application and

referred it to a new magistrate. Under this scenario, the Minister had the same options as before 'when any additional time period expires'.

Under the third scenario, if the Minister decided to cancel Dr Haneef's visa the AFP could issue a Criminal Justice Stay Certificate to prevent Dr Haneef's removal from Australia 'until any investigation/criminal justice process had concluded'. In this regard, the brief stated, 'Preliminary advice from the AFP is that they would not issue a CJC [Criminal Justice Certificate] or seek a Criminal Justice Visa to allow Dr Haneef to remain in Australia if his visa is cancelled'. Mr White said he had been given this 'preliminary advice' in the course of a discussion with Assistant Commissioner Prendergast after the National Counter-Terrorism Committee meeting held earlier that afternoon. The advice seems to be based on an implicit assumption that Dr Haneef would not have been charged with a criminal offence, which is consistent with Prendergast's understanding and expectation at that time.

Throughout the day, DIAC officers in Brisbane circulated emails detailing contingency plans for Dr Haneef's possible detention and removal. DIAC's Brisbane office had discussions with the Queensland Police Service about logistics and points of contact.

3.6.4 13 July 2007

At about 8.15 am on 13 July DIAC participated in a teleconference with representatives of the Department of the Prime Minister and Cabinet, ASIO and the AFP. The focus of the teleconference was whether Dr Haneef would be charged or released. The AFP said it expected to obtain by noon from the Commonwealth Director of Public Prosecutions advice on whether there was sufficient evidence to charge. Although further applications for specified time had not been ruled out, it was possible that Dr Haneef would be released that afternoon or the following morning.

Mr White told the Inquiry that comments made by Assistant Commissioner Prendergast led him to think the caveats imposed by the AFP on the use of the Part A and Part B information had been removed and DIAC could now move forward with a submission to the Minister on the cancellation of Dr Haneef's visa, without the need for further AFP approval. The AFP, however, denied that the caveats had been removed at this time and said it still expected to be consulted by DIAC before DIAC took any action that might be contrary to the AFP's interests.

The AFP delivered another updated Part B document to DIAC at about 12.35 pm. A covering letter and another Part A document were not provided. DIAC reviewed and updated the draft issues paper and statement of reasons and sought advice from the Australian Government Solicitor Special Counsel on both these documents.

Throughout the day the AFP updated DIAC on the outstanding advice of the Commonwealth Director of Public Prosecutions and sought information about

the arrangements for Dr Haneef's detention should a decision to cancel his visa be made. At about 2.00 pm the AFP informed DIAC that it expected to receive the advice from the CDPP by 4.00 pm that afternoon and that it was withdrawing its application for specified time and would start interviewing Dr Haneef. Mr White relayed this information to Mr Toby at the Minister's Office.

Later that afternoon the situation was discussed at a teleconference between representatives of the Department of the Prime Minister and Cabinet, DIAC, ASIO and the AFP. There appears to have been some discussion of the obligation to remove Dr Haneef once a decision was made to cancel his visa. The AFP's advice at this time was that it had no objection to Dr Haneef being removed from Australia.

During the day an updated version of the s. 501 issues paper and draft statement of reasons had been faxed to Mr Toby at the Minister's Office. The cover page specified, 'Peter White will advise you personally if the submission needs to be advanced to the Minister for a decision'. The Part A and Part B documents attached to the issues paper were probably the versions dated 11 July, not the updated Part B document that had been received at 12.35 pm on 13 July.

Although it does not appear that Mr White instructed Mr Toby to forward the issues paper to the Minister on 13 July, Mr Andrews told the Inquiry that on that day he reviewed the paper together with a copy of the information brief dated 12 July 2007. Mr Andrews said he had formed a preliminary view at that time that there was sufficient material before him to allow him to exercise his discretion to cancel Dr Haneef's visa but that he decided to defer making a decision until the AFP had decided whether to charge Dr Haneef and until he had received a briefing from Commissioner Keelty at a meeting of the National Security Committee, scheduled for Monday 16 July.

At about 2.40 pm on the Friday Mr Toby told Mr White and Mr Correll by telephone that the Minister was inclined to await the outcome of the NSC meeting before making his decision.

During the afternoon revised contingency plans for Dr Haneef's detention and removal were circulated in DIAC. These plans envisaged that the Minister would consider cancellation if Dr Haneef was released from criminal custody without charge. In the event that Dr Haneef was 'unable to be removed from Australia ex-Brisbane within 72 hours following release from criminal detention' the revised contingency plan provided for his transfer to Villawood Immigration Detention Centre.

Late in the afternoon (at about 5.36 pm) a file note was circulated in the Character Section for inclusion in the 'removals bible' in relation to Dr Haneef. It said, 'If the Australian Federal Police (AFP) lays criminal charges against Dr HANEEF, the department will be so advised, and no further action will be taken with regard to the consideration of Dr HANEEF's visa under s501'. The file note assumed that cancellation would be considered only if Dr Haneef was released from detention without charge and ASIO had not issued an adverse assessment. Mr White

confirmed to the Inquiry that the file note properly summarised DIAC's position at that time.

The contingency plans and the file note were not forwarded to the Minister's Office or the Minister. Mr Andrews told the Inquiry he was unaware that his department had taken the position that cancellation would not be considered if Dr Haneef was charged and said he did not share that view.

In any event, DIAC's position appears to have changed following the receipt of advice from the AFP that it was now likely that a charge would be brought against Dr Haneef. This advice was confirmed in a teleconference involving the Department of the Prime Minister and Cabinet, DIAC, ASIO and the AFP at 6.00 pm. After the teleconference Mr Correll and Mr White phoned Mr Toby at the Minister's Office to discuss whether the Minister intended to consider cancellation of Dr Haneef's visa. Mr Toby told them the Minister was not proposing to make a decision that day but would be available the next morning (Saturday) if required. Otherwise, the Minister was inclined to wait until Monday. Mr Correll assumed that the Minister intended to consult his ministerial colleagues at the National Security Committee meeting.

Soon afterwards Mr Correll and Mr White had a telephone conversation with Mr Andrews, who told them he was inclined to wait until Monday before making a decision. Mr Correll and Mr White reminded the Minister that he should consider only the information that was placed before him in relation to the cancellation decision and that the criminal process and the administrative process should be kept separate. Mr Andrews told the Inquiry he had been well aware of this distinction.

3.6.5 14 July 2007

On 14 July Dr Haneef was charged with an offence under s. 102.7(2) of the Criminal Code. DIAC was notified of the charge through a voicemail message Federal Agent Luke Morrish left for Mr White at about 7.25 am. Mr White subsequently notified Mr Toby and DIAC's office in New Delhi. An email sent to DIAC officers involved in the contingency planning for the detention and removal of Dr Haneef stated, 'Dr Haneef was charged by the AFP this morning. As such no further action is required at this stage'.

Mr Andrews recalled being informed of the charge at some stage on 14 July. Because he had already decided to await Commissioner Keelty's briefing at the National Security Committee meeting on the Monday, he did not turn his mind to whether he should consider the cancellation at that time. Nor was he asked to do so.

A National Counter-Terrorism Committee teleconference was held at 10.30 am, at which the AFP notified participants that Dr Haneef had been charged with a terrorism offence and that an application for bail was being considered by the magistrate. The bail application was subsequently adjourned until Monday

16 July at 9.30 am, and Dr Haneef was remanded in custody. Federal Agent Morrish updated Mr White on developments with the bail application during the day.

At 5.22 pm Federal Agent David Craig, Coordinator of the Joint Counter Terrorism Team, sent an email to Assistant Commissioner Prendergast, Commander Ramzi Jabbour and Federal Agent Morrish in which he commented, 'Contingencies for containing Mr HANEEF and detaining him under the Migration Act, if it is the case he is granted bail on Monday, are in place as per arrangements today'. Craig told the Inquiry the word 'contingencies' related to AFP and local police operational plans, not to any arrangement with DIAC, and that 'contingencies for containing Mr Haneef' referred to the arrangements he had made for Dr Haneef to be under surveillance if he was granted bail. ('Containing' is a word commonly used by the AFP when referring to surveillance placed on a target: the target is 'boxed in' or 'contained'.) The second part of the sentence—'and detaining him under the Migration Act'—referred to the separate arrangements that had been made to cover the possibility that the AFP might be asked to physically detain Dr Haneef as an unlawful non-citizen under the Migration Act in the event that his visa was cancelled.

By 'as per arrangements today' Federal Agent Craig said he was referring to discussions he had had with Morrish earlier that day, in which Morrish had asked him to ensure that all operational outcomes arising from a grant of bail had a planned AFP response, taking into account whether Dr Haneef's visa was or was not cancelled. It did not refer to any arrangement with DIAC. Federal Agent Morrish separately gave evidence to the same effect. Similarly, Mr White denied knowledge of any arrangement with the AFP for containing Dr Haneef and detaining him under the Migration Act in the event that he was to be granted bail.

Assistant Commissioner Prendergast accepted that once Dr Haneef had been charged any concerns the AFP had about a cancellation decision adversely affecting its investigation were removed.

3.6.6 15 July 2007

On 15 July Mr White advised Mr Dreezer, Assistant Secretary of the Detention Operations and Client Service Branch of DIAC, that it was possible that Dr Haneef would be granted bail the following day. They discussed contingency plans for Dr Haneef's detention if his visa was cancelled.

3.6.7 16 July 2007

On the morning of 16 July DIAC officers attended Brisbane City Watchhouse in case the Minister decided to cancel Dr Haneef's visa and it became necessary to take him into immigration detention.

Mr White called Federal Agent Morrish and sought clarification of the exact wording of the charge in order to ensure that the most accurate information was put before the Minister. At 8.10 am Morrish sent White an email setting out the wording of the charge. Mr White forwarded the email to Ms Zoe Clarke, who was in the process of updating the issues paper and statement of reasons to take account of the updated Part B information that had been received from the AFP on 13 July.

Ms Clarke faxed the updated Part A (received on 11 July) and the updated Part B (received on 13 July) to Mr Andrew Parsons, Departmental Liaison Officer in the Minister's Office. Ms Clarke made some further changes to the issues paper, incorporating comments from Mr Deane, the Australian Government Solicitor Special Counsel. She then emailed the updated issues paper to Mr Parsons at 10.23 am. The email noted that the issues paper was 'for use if Dr Haneef is granted bail this morning'. At 10.59 am Ms Clarke emailed an updated statement of reasons to Mr Parsons, asking him to 'give this to [Mr White] when he gets out of the PM's office'.

Meanwhile, at about 10.30 am Mr Correll and Mr White had gone to the Minister's Office at Parliament House to brief him on the visa cancellation. Before they met Mr Andrews, Federal Agent Morrish called Mr White and told him Dr Haneef had been granted bail subject to a number of conditions.

Mr White said he called Ms Clarke and asked her to prepare a revised issues paper and statement of reasons to take account of this development. Ms Clarke said she did so and emailed the updated documents to Mr Parsons at 12.02 pm. The amendments made at this time related, however, to the 'expectations of the community' and did not refer to the grant of conditional bail.

Mr Correll and Mr White met Mr Andrews, who said he was considering making a decision shortly. During their meeting Mr Andrews received a telephone call from the Prime Minister's Office, asking him to meet with the Prime Minister, the Hon. John Howard MP. Mr Correll and Mr White accompanied Mr Andrews to the Prime Minister's Office but were asked to wait outside.

Mr Howard, Attorney-General the Hon. Philip Ruddock MP, and Mr Tony Nutt (Mr Howard's Chief of Staff) were at the meeting. According to Mr Andrews, a 'brief conversation' followed, in which Mr Ruddock told Mr Howard Dr Haneef had been charged but that the investigation was continuing. Mr Andrews then told Mr Howard he had received an issues paper containing information on the basis of which he was able to exercise his discretion to cancel Dr Haneef's visa, but he was yet to make a final decision on the matter. He said he had been asked to attend a briefing by Commissioner Keelty at the National Security Committee meeting that morning. Mr Howard reportedly advised Mr Andrews that the decision was one for him (Mr Andrews) to take and that 'we will hear from Mr Keelty at the NSC meeting'.

Mr Howard declined to provide a statement to the Inquiry or to make himself available to attend an interview. In a letter to the Inquiry he stated, 'My position

and that of my senior colleagues at the time was that the cancellation or otherwise of Dr Haneef's visa was solely within the discretion of the Minister for Immigration'.

Mr Ruddock also declined to provide a statement. In a letter to the Inquiry he denied attending any meeting with Mr Howard and/or Mr Andrews on the morning of 16 July. In his interview with the Inquiry he also denied having spoken to Mr Andrews or his colleagues about the decision to cancel Dr Haneef's visa. The Inquiry did not speak to Mr Nutt.

After the meeting with the Prime Minister Mr Correll and Mr White accompanied Mr Andrews to the Cabinet Room for the National Security Committee meeting. Mr Andrews was not a permanent member of the NSC and had been asked to attend only that part of the meeting involving Commissioner Keelty's briefing. This was reportedly the last item on the agenda.

Mr Andrews told the Inquiry that the by the time he entered the meeting discussion of Dr Haneef had already begun. He recalled that Commissioner Keelty was briefing the meeting about the AFP investigation generally—including such matters as surveillance and continuing investigations concerning Dr Haneef, Dr Asif Ali and other potential suspects. At the conclusion of the briefing Mr Andrews informed the meeting that on the basis of the material before him he was inclined to cancel Dr Haneef's visa. Mr Howard reportedly repeated at that time that the decision was one for Mr Andrews. The meeting then concluded.

Mr Andrews said that on leaving the NSC meeting he spoke briefly with Commissioner Keelty and sought from him an assurance about whether he was satisfied with the material the AFP had provided to DIAC and on which he would be basing his decision. Commissioner Keelty replied, 'Yes'. The Commissioner then advised Mr Andrews that if Dr Haneef's visa was cancelled the AFP would consider approaching the Attorney-General about a Criminal Justice Stay Certificate.

Commissioner Keelty denied having any direct contact with Mr Andrews, saying that all communication was through Mr Andrews' Office.

Once the National Security Committee meeting had concluded, at about noon, Mr Correll and Mr White accompanied Mr Andrews back to his office. Mr Correll recollected that Mr Andrews observed that Commissioner Keelty had made strong comments at the meeting. Once back in his office, Mr Andrews read and considered the updated issues paper and attachments. He recalled Mr White telling him that the issues paper had been updated to reflect the charge brought against Dr Haneef and had been checked by the Australian Government Solicitor Special Counsel. Mr White said he reminded Mr Andrews that his decision had to be based on the material before him.

At about 1.00 pm Mr Andrews decided to cancel Dr Haneef's visa under s. 501(3) of the Act. Mr Andrews told the Inquiry he had taken comfort from the fact that

the issues paper had been checked by DIAC and by AGS Special Counsel and from the assurances he had received from Commissioner Keelty in relation to the AFP material.

The Brisbane office of DIAC was notified of the Minister's decision at 1.15 pm and proceeded to prepare a 'Request to Hold' addressed to the officer in charge at the City Watchhouse. A copy of the signed decision and statement of reasons was faxed to Ms Clarke from the Minister's Office at 1.22 pm, and she in turn faxed a complete set of the materials (other than the Part B protected information) to Mr Adrian McCabe, Deputy State Director in the DIAC Queensland office. The letter notifying Dr Haneef of the cancellation decision was signed by Mr White. It was subsequently decided to cancel the visa held by Dr Haneef's wife under s. 128 as a consequence of the cancellation of Dr Haneef's visa.

At 1.45 pm Mr Andrews held a press conference at which he announced that he had cancelled Dr Haneef's visa and that the AFP was going to issue a Criminal Justice Stay Certificate, which would require Dr Haneef to remain in detention in Australia while the criminal proceedings took their course.

At 2.37 pm Federal Agent Morrish advised Mr White that Dr Haneef had not yet met the conditions of his bail and that the AFP intended to apply for a Criminal Justice Stay Certificate. The DIAC officers agreed that if Dr Haneef did not post bail and remained in criminal custody there was no requirement to take him into immigration detention. Alternatively, if Dr Haneef posted bail arrangements had been made to take him into immigration detention at the Brisbane City Watchhouse and then transfer him to Villawood pending his removal from Australia. These scenarios were discussed in an information brief entitled 'Dr Mohammed Haneef—possible transfer to Villawood IDC [Immigration Detention Centre]', which was forwarded to the Minister's Office the following morning.

At 2.55 pm on 16 July Mr McCabe served a Request to Hold on the Senior Sergeant at the Brisbane City Watchhouse. (The Request to Hold was dated 14 July 2007. On discovering the error later that afternoon, DIAC in Queensland faxed a new request to the watchhouse.)

At about 3.10 pm Mr McCabe advised Dr Haneef's solicitor, Mr Peter Russo, that Dr Haneef's visa had been cancelled. He invited Mr Russo to come to the watchhouse in order to be present when the cancellation papers were served on Dr Haneef, which occurred shortly before 3.45 pm. The Notice of Visa Cancellation expressly invited Dr Haneef to make representations to the Minister seeking revocation of the decision within seven days.

At 6.30 that evening Assistant Commissioner Prendergast signed a request to the Attorney-General for the issue of a Commonwealth Criminal Justice Stay Certificate under s. 147 of the Migration Act. The application noted:

> … There is currently no available information held by law enforcement to suggest that Dr Haneef has been involved in, or engaged in planning of, violent/terrorist conduct in Australia.
>
> … there is no information available to law enforcement at this time to indicate he presents a danger to the community or that he would engage in acts of violence.

3.6.8 17 July 2007

At about 10.30 am on 17 July Attorney-General Ruddock signed a Criminal Justice Stay Certificate, the effect of which was to prevent Dr Haneef's removal from Australia. A copy of the certificate was sent to DIAC at 10.45 am and to Mr Andrews' Office at 11.09 am.

Anticipating that Dr Haneef might meet his bail conditions, DIAC prepared for the Minister a draft submission on whether to issue a Criminal Justice Stay Visa, which would allow Dr Haneef to be released from immigration detention during the criminal proceedings. A submission was signed on 19 July, recommending that the Minister not grant a Criminal Justice Stay Visa because of the seriousness of the charge and noting that the grant of a visa could be inconsistent with the decision to cancel Dr Haneef's subclass 457 visa under s. 502(3). This submission was never considered by Mr Andrews, apparently because Dr Haneef did not seek to meet his bail conditions.

The Director of Queensland Correctional Services declined a request from DIAC to transfer Dr Haneef to the Arthur Gorrie Correctional Centre. DIAC began to consider the logistics of transferring Dr Haneef to Villawood.

At about midday Dr Haneef's lawyers announced that Dr Haneef would be seeking judicial review of the decision to cancel his visa and that he sought immediate removal to India pursuant to s. 198(1) of the Migration Act.

That evening Mr White and Assistant Commissioner Prendergast brief the Opposition's immigration spokesman, Mr Tony Burke, at Parliament House. In response to a question about the timing of the decision, Mr White said the decision was ultimately for Mr Andrews but had been made in the context of the whole-of-government National Counter-Terrorism Committee. When asked whether the submission would have been advanced to the Minister if bail had not been granted, Mr White said that it might not have been.

3.6.9 After the cancellation

In the week following the cancellation decision questions were raised in the media about the accuracy of information provided to the Brisbane Magistrates Court on the hearing of the bail application. DIAC sought and received clarification from the AFP and considered what effect any such inaccuracies might have had on the Minister's decision to cancel Dr Haneef's visa.

On 26 July the AFP provided to DIAC some additional documents, including the transcript of the interview with Dr Haneef and a full transcript of the Yahoo! chat room conversation referred to in the Part B material.

On Friday 27 July the Commonwealth Director of Public Prosecutions withdrew the charge against Dr Haneef and the Attorney-General cancelled the Criminal Justice Stay Certificate. On the previous day DIAC had been warned that the charge might be withdrawn and had prepared for the Minister an information brief dealing with the operational planning in relation to the detention and removal of Dr Haneef. The brief noted that the most likely scenario was voluntary removal to India since this had previously been requested by Dr Haneef's lawyers, but it also considered the possibility of transfer to Villawood.

As an unlawful non-citizen, Dr Haneef was required to be taken into immigration detention under s. 189 of the Migration Act as soon as he was released from criminal custody. On 27 July Minister Andrews made a residence determination under s. 197AB; this allowed Dr Haneef to be held in community-based detention.

DIAC sought legal advice about whether the withdrawal of the charge against Dr Haneef had any implications for the Minister's decision to cancel Dr Haneef's visa. Mr Henry Burmester QC, AGS Chief General Counsel, advised the Minister that withdrawal of the charge was a matter of some significance. The Minister obtained further advice from the Solicitor-General, Mr David Bennett QC, to the effect that the cancellation decision had been open to the Minister and that it remained open to the Minister to reach the same conclusion notwithstanding that the charge against Dr Haneef had been withdrawn. Following receipt of this advice, the Minister issued a statement on 28 July.

Dr Haneef voluntarily left Australia and returned to Bangalore, India, on the night of 28 July.

On 30 July the Solicitor-General provided a written opinion confirming his earlier advice. On 31 July, after a meeting with the Solicitor-General in Sydney to discuss the opinion, the Minister issued a further statement and publicly released the opinion at a media conference.

In anticipation of a decision from the Federal Court, DIAC asked the AFP to provide updated Part A and Part B information. This was provided on 20 August. The AFP provided further updated Part A and Part B information to DIAC on 13 November.

On 21 August Justice Spender of the Federal Court set aside the Minister's decision to cancel Dr Haneef's visa. The Minister lodged an appeal to the Full Federal Court.

In early December DIAC prepared a brief for the new Minister for Immigration and Citizenship, Senator Chris Evans, setting out the options that would be available to him following the Full Federal Court's decision on the appeal. On

19 December DIAC sent a further submission to the Minister, advising him that the Full Federal Court would hand down its decision on 21 December.

To enable the Minister to reconsider whether to cancel Dr Haneef's visa in the event that the appeal was dismissed, DIAC prepared an issues paper in anticipation of the Full Court's decision. The AFP advised the Part A and Part B information it provided on 13 November was still current. DIAC sought to obtain ASIO's advice for inclusion in the submission to the Minister. ASIO declined, however, to provide any comment: '… such advice would constitute a security assessment. ASIO can only provide a security assessment in a formal statutory context and therefore we are unable to comment'.

The Inquiry understands this further submission was not advanced and was not considered by the new Minister.

On 21 December 2007 the Full Federal Court dismissed the previous Minister's appeal and affirmed Justice Spender's decision. Following a review of the Full Federal Court decision, the new Minister decided it was not necessary to consider cancellation of Dr Haneef's visa.

3.6.10 The timing of the cancellation decision

There has been speculation in the media and elsewhere that the government was determined to ensure that Dr Haneef was kept in detention, regardless of whether or not he was granted bail, and that the Australian Federal Police and the Department of Immigration and Citizenship conspired to bring about the cancellation of his visa in order to achieve that end.

To assess whether such suggestions have any legitimacy, it is first necessary to examine the history of DIAC's involvement in the development and consideration of options relating to visa cancellation, including its dealings with the AFP.

What initiated DIAC's involvement in the Haneef matter?

DIAC became involved in the Haneef matter as early as 1 July 2007, as part of the broader whole-of-government response to the UK incidents and discussion of the possible implications for Australia.

I am satisfied that consideration of the possible cancellation of Dr Haneef's visa arose legitimately as part of this broader security context from as early as 4 July—once Dr Haneef had been identified as a person of interest in connection with the UK incidents and it had been confirmed that he was in Australia on a subclass 457 visa.

Consideration of cancellation: before 14 July 2007

It is evident that, at least until 13 July, DIAC's position was that visa cancellation on character grounds would need to be considered only if two circumstances arose:

- No other basis of cancellation had become available and, in particular, ASIO had not issued an adverse security assessment requiring the mandatory cancellation of Dr Haneef's visa.

- The AFP released Dr Haneef without charge.

Section 501 as a 'last resort'
The 'Possible cancellation powers' paper dated 4 July, the 'DIAC–DFAT options paper' and the paper prepared by the Department of the Prime Minister and Cabinet circulated to government agencies on 5 July identified four possible options that could lead to the cancellation of Dr Haneef's visa. One of these was the discretionary power to cancel a visa under s. 501 of the Migration Act on character grounds.

Mr Peter White from DIAC said the two papers reflected DIAC's preferred position at that time—that cancellation under s. 501(3) should be used only in 'exceptional circumstances' and as a 'last resort' once all other cancellation options had been eliminated.

Consideration only on 'release without charge'
Documents such as the 'Possible cancellation powers' paper, the DIAC–DFAT options paper and an information brief dated 9 July reflected the premise that cancellation under s. 501 would be considered only if Dr Haneef was released without being charged with a criminal offence. The premise of 'release without charge' was also reflected in the DIAC file note circulated at 4.56 pm on 13 July, which Mr White confirmed as having accurately summarised the department's position at that time.

A similar assumption was incorporated in the draft documents circulated after 11 July that set out contingency plans for the possible removal and detention of Dr Haneef in the event that his visa was to be cancelled. Those documents proceeded on the basis that Dr Haneef would no longer be held in criminal custody and that the Minister for Immigration and Citizenship would consider cancellation of his visa before his release into the community.

From DIAC's perspective, Dr Haneef's potential release from detention effectively became one of the primary 'triggers' for the matter to be put before the Minister in order that he might consider cancellation. Because Dr Haneef was being detained under Part 1C of the Crimes Act, the timing of his potential release was linked to the AFP's applications for further specified periods under s. 23CB of that Act. Accordingly, DIAC had prepared issues papers to advance to the Minister ahead of each of the s. 23CB applications, on 9, 11 and 13 July in anticipation that the applications might be unsuccessful and that as a consequence Dr Haneef would be released.

The contingency plans for the detention and removal of Dr Haneef following any cancellation of his visa also took into account the timing of the s. 23CB applications and Dr Haneef's potential release from detention. The draft information brief circulated on 11 July contemplated that any visa cancellation

would take place 'prior to [Dr Haneef's] criminal detention ceasing (possibly by 1800hrs on Wednesday 11 July)', referring to the time at which the third specified period under s. 23CB would end. The attached 'Operational plan' and 'Key actions' documents similarly placed emphasis on the cessation of Dr Haneef's detention under Part 1C of the Crimes Act. The 'Operational plan' was based on a hypothesis that 'Minister Andrews will cancel Dr Haneef's visa no later than 1600hrs 11 July 2007 on character grounds', two hours before Dr Haneef might have been released from AFP custody. The 'Key actions' document was later updated and circulated on 13 July to provide that:

> DIAC requires advanced notice from the Australian Federal Police (AFP) regarding Dr Haneef's court matters. *This action will provide the trigger for the Minister to consider cancelling Dr Haneef's visa*. [Inquiry's emphasis]
>
> Should Dr Haneef be released from Criminal custody, the Minister will then consider his visa cancellation. A submission on visa cancellation options is currently with the Minister.

AFP and DIAC officers regularly consulted on the progress and timing of the applications under s. 23CB of the Crimes Act. This allowed DIAC to coordinate its preparations for advancing an issues paper to the Minister for consideration in the event that Dr Haneef was about to be released. Even though DIAC—and specifically Mr White—had formed the view by 9 July that there was sufficient information to support a decision to cancel Dr Haneef's visa, it was not necessary to advance the issues paper to the Minister for consideration on 9 or 11 July because the s. 23CB applications made by the AFP were not refused and Dr Haneef remained in detention under Part 1C of the Crimes Act.

The connection that is apparent between Dr Haneef's potential release and consideration of visa cancellation does not demonstrate that the purpose of any cancellation would be to keep Dr Haneef in detention. Rather, it reveals a set of assumptions about the timing of any cancellation decision—including that it would be neither necessary nor appropriate for the Minister to deal with cancellation while the AFP was continuing to investigate Dr Haneef and to hold him in detention for such a purpose. If the AFP decided to release Dr Haneef without charge, the Minister could then consider whether to cancel his visa. The consequence of cancellation would be to bring about Dr Haneef's removal from Australia, and any continuation of his detention would be for that purpose alone. Accordingly, until 13 July the contingency planning to give effect to any decision to cancel Dr Haneef's visa focused on his removal from Australia as soon as practicable after the decision, and immigration detention was considered in the context of facilitating that.

There are in some documents references that could give rise to an implication that the AFP and DIAC had developed a plan to secure the cancellation of Dr Haneef's visa as a fallback option for keeping him in custody. For example, a ministerial briefing dated 10 July from the AFP to the Attorney-General stated:

> In the event the application for further specified time is not approved, and Mr Haneef ceases to cooperate with police and declines to be questioned further, other options for Mr Haneef's continued detention may be pursued. The AFP is preparing a submission to the Minister for Immigration re Haneef's visa, in the event that all other law enforcement options are exhausted.

It is possible that the AFP regarded visa cancellation as a matter that would be dealt with as a contingency in the event that Dr Haneef was no longer detained under Part 1C of the Crimes Act. To that end, the AFP sought to ensure that it had provided all necessary assistance to allow DIAC to advance the matter to the Minister for consideration if Dr Haneef was released. It is unlikely, however, that the AFP would have treated visa cancellation as an 'option' for continued detention in circumstances where Dr Haneef was released without charge: the cancellation would result in Dr Haneef's removal from Australia.

The potential impact of a Criminal Justice Stay Certificate

The competing requirements of s. 198 of the Migration Act (which obliges DIAC to remove Dr Haneef as soon as practicable following a cancellation) and s. 150 of that Act (which stays any removal if a Criminal Justice Stay Certificate is issued) were raised by DIAC at an interdepartmental meeting on 5 July. DIAC subsequently (on 9 July) received advice from AGS Special Counsel confirming that, unless and until a court declared otherwise, s. 150 prevailed over s. 198. The advice noted that if a Criminal Justice Stay Certificate was issued and the Minister refused to grant a Criminal Justice Stay Visa the person would remain in detention and would not be able to be removed from Australia.

DIAC was aware that the cancellation of Dr Haneef's visa while the AFP investigation or any enforcement proceedings were in progress might result in Dr Haneef's continuing detention, rather than his removal, as a consequence of the Attorney-General issuing a Criminal Justice Stay Certificate. DIAC had taken into account the potential issuing of such a certificate in its contingency planning, but until 13 July such action was not considered likely. The draft information brief and contingency documents circulated on 11 July were based on the premise that: 'iii. The AFP will not issue a Criminal Justice Stay Certificate for Dr Haneef; and iv. Dr Haneef will be removed to India via commercial flight directly from Brisbane and will not contest his removal'. The brief clearly noted that DIAC's intention was to 'cancel, detain and remove Dr Haneef from Australia as soon as reasonably practicable upon cessation of his criminal detention'.

Although a Criminal Justice Stay Certificate had been acknowledged as a possible outcome of cancelling Dr Haneef's visa in earlier information briefs, the information brief dated 12 July noted, 'Preliminary advice from the AFP is that they would not issue a CJC or seek a Criminal Justice Visa to allow Dr Haneef to remain in Australia if his visa is cancelled'.

The AFP repeated this advice at the National Counter-Terrorism Committee meeting on 13 July, noting that it had no need for Dr Haneef to be held in

Australia and no objection to his being removed. Later that day, DIAC obtained from AGS Special Counsel advice on how soon after Dr Haneef's visa was cancelled DIAC could effect his removal. The advice was provided on the assumption that no Criminal Justice Stay Certificate would be issued.

Mr Andrews' position

Mr Andrews told the Inquiry he was unaware that DIAC had adopted a position that no action would be taken if Dr Haneef was charged and that he had not taken the same position.

By 13 July the Minister had read the information briefs dated 9 and 12 July, as well as the issues paper and attachments, and had formed a preliminary view that there was sufficient material before him to enable him to exercise his discretion to cancel Dr Haneef's visa. He had also decided to defer making any decision on the matter until after the AFP investigation had been largely completed and a decision had been made on whether to charge Dr Haneef and after he had received a briefing from Commissioner Keelty, scheduled for Monday 16 July at the meeting of the National Security Committee.

Mr Andrews said he considered that a charge would have been an 'added factor' to support cancellation.

Consideration of cancellation: 14 to 16 July 2007

Dr Haneef was charged on 14 July 2007. At some point, DIAC had changed its position, as outlined in the file note circulated at 4.56 pm on 13 July, that no action would be taken if Dr Haneef was charged.

By the evening of 13 July DIAC had been informed that it was more likely that Dr Haneef would be charged. During the afternoon the department had been told the Minister had formed a preliminary view that there was sufficient material to justify cancellation but had decided to make a decision after the National Security Committee meeting on 16 July.

DIAC held an internal meeting to discuss possible scenarios resulting the charge—including that a Criminal Justice Stay Certificate might be issued and the Minister might consider whether or not to grant a Criminal Justice Stay Visa. Mr White told the Inquiry this discussion arose in the context that, previously, all the indications from the AFP had been that a charge was the least likely outcome and the AFP's preliminary advice (as noted in the 12 July brief) was that it was not intending to seek a Criminal Justice Stay Certificate. But, considering that a charge had now been laid, a Criminal Justice Stay Certificate seemed more likely and was something DIAC needed to take into account.

DIAC did not seek to update the issues paper or the draft statement of reasons to incorporate details of the charge and forward them to the Minister's Office until the morning of 16 July. Nor was the updated Part B protected information received by DIAC at about midday on 13 July forwarded to the Minister's Office until the morning of 16 July. Apart from a single discussion between Mr White and the Minister's Chief of Staff, Mr Toby, at about 8.00 am on 14 July to confirm

that Dr Haneef had been charged—before the application for bail had been made—the Inquiry had no evidence of any other contact with the Minister's Office on this date.

'Contingencies'

Contingency planning for the possible detention and removal of Dr Haneef—which had previously been based on the premise that Dr Haneef would be released without charge—was put on hold after DIAC was told of the charge. This might have been because DIAC understood there was a presumption against bail and that it was thus unlikely it would become necessary to take Dr Haneef into immigration detention or to remove him if his visa was cancelled.

If the potential grant of bail had become the 'trigger' for considering cancellation of Dr Haneef's visa, one would expect to see evidence of DIAC and the Minister's Office making preparations to place the Minister in a position in which he could consider the matter on Saturday 14 July, when it was possible that Dr Haneef might have been granted bail. Instead, it seems the Minister was content to defer making a decision until Monday 16 July.

AFP and DIAC officers had at least two discussions on 14 July. The first was to inform DIAC of developments concerning the bail application hearing and the possibility of continued surveillance of Dr Haneef if he was released on bail. The second was at about 4.30 pm, to advise DIAC that the bail decision had been adjourned until 16 July.

At about 12.30 pm on 14 July Commander Jabbour spoke to Federal Agent Craig by telephone, and they discussed the steps that would be taken if Dr Haneef was granted bail. Craig made the following diary note of the conversation:

> 12.30 call from SIO [Senior Investigating Officer]
>
> If Haneef gets bail:
>
> (1) Ring Luke Morrish.
>
> (2) Luke to notify DIAC—consider visa revocation.
>
> (3) DIAC to notify Russo Lawyers of revocation and that AFP and immigration officers will detain under the Migration Act and deliver to immigration detention.

This discussion was also recorded in an AFP case note representing the running log for 14 July.

The diary entry shows that Craig passed these instructions on to Mr Shane Meaker, an AFP officer posted with DIAC:

> Instructions from SIO at 12.30
>
> (1) If Haneef gets bail, call Luke Morrish, who will contact DIAC. They will consider the status of Haneef's visa, if it is revoked.

> (2) Luke will contact me and I am (through other AFP members) to detain Haneef under Migration Act.
>
> Luke has informed me that the Minister has been briefed so has the Prime Minister, so we need to get this right. DIAC will get back to us within 10 to 15 minutes. I described the plan to Luke Morrish as above. Aim is to detain away from media, i.e., in watch-house or dogs [that is, surveillance] to a public place where no media.

Meaker and another officer attended the Magistrates Court that afternoon in order to detain Dr Haneef in the event that he was released on bail and the Minister subsequently cancelled his visa.

Later that afternoon, at 5.22 pm, Craig sent an email to Assistant Commissioner Prendergast, Commander Jabbour and Federal Agent Morrish in which he commented, 'Contingencies for containing Mr HANEEF and detaining him under the Migration Act, if it is the case he is granted bail on Monday, are in place as per arrangements today'. Craig told the Inquiry that the previous day the AFP had planned for the contingency that Dr Haneef would be released without charge and that part of that planning included making arrangements for Dr Haneef to be placed under full surveillance, both physical and electronic. When Dr Haneef was charged on 14 July Commander Jabbour asked Craig to make similar arrangements for the possibility that Dr Haneef might be released on bail.

This contingency planning allowed for the possibility that the Minister might cancel Dr Haneef's visa either before Dr Haneef's release on bail or some time after his release. In the former instance, the plan provided for the relevant parties to be notified so that Dr Haneef could be taken into immigration detention under the Migration Act as soon as he met his bail conditions. In the latter, the AFP would place Dr Haneef under surveillance so that it would be in a position to take him into immigration detention once notified of the cancellation decision. Craig informed the Inquiry that this contingency planning was required because the AFP would 'look pretty silly if they revoked the visa and we said "we don't know where he is" and he's a suspected terrorist'.

Both Craig and Morrish offered a similar explanation for the email of 14 July. Craig confirmed that the 'contingencies' and 'arrangements' referred to in the email were related to the AFP and local police operational plans and did not refer to any arrangement with DIAC. The 'contingencies for containing Mr Haneef' referred to the arrangements for Dr Haneef to be placed under surveillance if he was released on bail. Craig pointed out that 'containing' was a word commonly used by the AFP when referring to surveillance and was not a reference to detention. The second part of the sentence—'and detaining him under the Migration Act'—referred, he said, to the separate arrangements he had made with Federal Agent Meaker to cover the possibility of the AFP having to assist in taking Dr Haneef into immigration detention as an unlawful non-citizen in the event that his visa was cancelled. The reference to 'as per arrangements today'

was a direct reference to the AFP contingency arrangements discussed and outlined in his diary note, as just quoted.

Mr White, who was the main point of contact between DIAC and the AFP in relation to the visa cancellation, denied having ever spoken to Federal Agent Craig or Commander Jabbour about Dr Haneef, including on 14 July. He also denied entering into any arrangement with Federal Agent Morrish or anyone else in the AFP for 'containing' Dr Haneef and detaining him under the Migration Act in the event that he was to be granted bail. His notes confirm, however, that on 13 July he did discuss with the AFP surveillance of Dr Haneef were he to be released from criminal detention.

The relevance of the bail application

By the evening of 14 July DIAC was on notice that bail was now a possibility. Communications between Mr White and Mr Dreezer the following morning reveal that contingency planning for the cancellation and subsequent detention and removal of Dr Haneef (which had been placed on hold after the charge was announced) was reactivated. Mr Dreezer told the Inquiry this was in anticipation of the bail application being successful.

Both the issues paper and the statement of reasons forwarded by DIAC to the Minister's Office on the morning of 16 July were prepared on the assumption that bail would be granted. The covering email noted that the documents were 'for use if Dr Haneef is granted bail this morning'.

Mr White told the Inquiry he understood an issues paper had been prepared providing for the alternative scenario (that is, if Dr Haneef was refused bail), which would have enabled the Minister to consider cancellation regardless of whether bail was granted. The Inquiry did not, however, receive a copy of any alternative issues paper, and the evidence of Ms Clarke, who prepared the draft issues papers, does not support this view.

An internal email summarising the available detention options was circulated within DIAC at 11.30 am on 16 July and was specifically based on the assumption that the Minister would consider cancellation only if Dr Haneef was granted bail.

Subsequent comments made by Mr White to the joint briefing to Opposition spokesperson for immigration, Mr Tony Burke, on 17 July—in which he said the submission might not have been forwarded to the Minister if bail had not been granted—further support the view that, in DIAC's mind, the cancellation decision was at least in part linked to Dr Haneef being granted bail.

This view is also consistent with DIAC's original position—that consideration of cancellation of Dr Haneef's visa would be triggered on Dr Haneef's release into the community—but the trigger was now release either on bail or, perhaps, following a withdrawal of the charges or an acquittal.

The evidence of the AFP lends support to this view. Federal Agent Craig advised the Inquiry he understood cancellation would not be considered if Dr Haneef was

refused bail, although he stressed that no one ever told him this was the case. He also stressed that, although he expected the visa question to be considered only if bail was granted, the AFP did not view cancellation as a foregone conclusion—hence the need to have the alternative plans, as reflected in his diary notes.

Federal Agent Morrish gave evidence that he considered the caveats on the use of the AFP information were still operable as at 16 July and that it was necessary for him to inform DIAC officers that it was appropriate for them to 'commence their … decision-making process' if Dr Haneef was bailed. Nevertheless, it appears that the process was already under way, and Morrish did not recall actually giving the 'green light' to DIAC once bail had been granted. He was also unable to say that the caveats would have remained (and the decision not proceeded) if bail had been refused.

Assistant Commissioner Prendergast said the caveats had in fact been removed after Dr Haneef was charged and that he understood the matter was going to be considered if Dr Haneef was granted bail and released. He did not, however, understand this to mean that DIAC (or, more properly, the Minister) would *not* have considered the matter if bail had been refused, although he accepted that the urgency surrounding the decision might have changed, depending on whether or not Dr Haneef was released into the community.

The material before the Inquiry suggests that both the AFP and DIAC accepted the decision to consider a cancellation was not a fait accompli and was still subject to the Minister's discretion. From DIAC's perspective, it sought and obtained legal advice about its obligations in the event that Dr Haneef's visa was cancelled and either bail was not granted or his bail conditions were not met. The planning for his detention also allowed for this possibility. The AFP also had contingency plans allowing for the possibility that Dr Haneef's visa would not be cancelled upon his being granted bail, as discussed.

The relevance of the Criminal Justice Stay Certificate

Both the AFP and DIAC discussed the possibility of a Criminal Justice Stay Certificate, although it was in the context of facilitating planning by both entities for all possible eventualities. The plans developed before 13 July (which allowed for Dr Haneef's detention and removal, as noted) continued to be relied on by DIAC after the charge, although an email circulated within the department at 11.30 am on 16 July suggested that the playing field in relation to removal had now changed:

> … as his detention engages the department's obligation to remove him from Australia as soon as reasonably practicable, the Attorney-General must issue a Criminal Justice Stay Certificate to prevent his removal (it is then open to the Minister to grant him a Criminal Justice Visa).

DIAC's planning after 15 July also appeared more focused on the most suitable means of detaining of Dr Haneef before his removal (that is, how and where), particularly in the following circumstances:

- There was no dedicated immigration detention centre in Brisbane.
- DIAC had received legal advice that, in the absence of an application for revocation being made, removal could not take place until after the seven-day notice period had expired.
- The Arthur Gorrie Correctional Centre had declined to accommodate Dr Haneef in immigration detention.

Although the possibility of a Criminal Justice Stay Certificate is raised in these planning documents, so is the possibility of Dr Haneef being released on a Criminal Justice Stay Visa.

DIAC did not include any reference to the possibility or likely effect of a Criminal Justice Stay Certificate in the issues paper or draft statement of reasons put before the Minister for consideration on 16 July. Mr White told the Inquiry it was not included because it was not relevant to the decision that needed to be contemplated by the Minister and confirmed that any discussions or advice sought by DIAC in connection with the possibility of a Criminal Justice Stay Certificate were purely in the context of planning and being prepared to respond to all possible contingencies. This is consistent with the fact that between 4 and 9 July Federal Agent Anderson was asked to research the process involved in obtaining a Criminal Justice Stay Certificate, but no further action was taken on the matter until he briefed Assistant Commissioner Prendergast about that process on 16 July.

An AFP case note dated 16 July stated:

> About 1200 hours a critical decision was made to request a Criminal Justice Stay Certificate (CJSC) for Mohamed Haneef following advice from the Department of Immigration and Citizenship that they were cancelling Dr Haneef's visa. FA Weldon was tasked with preparing documentation.

This suggests that the AFP had decided to apply for a Criminal Justice Stay Certificate at noon, whereas the Minister's decision to cancel the visa was not made until about 1.00 pm. Federal Agent Morrish, who was liaising with DIAC on the cancellation, said the decision to apply for a Criminal Justice Stay Certificate was not made until after the Minister had decided to cancel Dr Haneef's visa. Assistant Commissioner Prendergast was unable to explain the timing specified in the case note. He suggested that, since he was aware that the Minister was going to consider the matter by noon, he might have asked for work to start on the application ahead of learning of the Minister's final decision, although he could not recall doing this. He remained certain that work on any application would not have actually started until after he had been informed that the Minister had decided to cancel Dr Haneef's visa.

Although there is no clear evidence of the existence of an active arrangement between the AFP and DIAC to bring about the cancellation of Dr Haneef's visa, the evidence does suggest that the AFP and DIAC expected this would be the

most likely outcome. The AFP sought to help DIAC to put the Minister in a position to cancel Dr Haneef's visa if he was released. In doing so, the AFP placed caveats on the use of the information it provided to DIAC in order to ensure that any cancellation decision did not adversely affect the AFP's investigation. These caveats might not have been binding in a strict sense, but they reflected a mutual understanding between the AFP and DIAC about the timing of any consideration of visa cancellation.

Mr Andrews gave evidence that he was aware from his discussion with Commissioner Keelty after the National Security Committee meeting on 16 July that the AFP would consider approaching the Attorney-General for a Criminal Justice Stay Certificate if he (Mr Andrews) decided to cancel Dr Haneef's visa and accepted that it was probable a certificate would be granted if requested.

Mr Andrews said, however, he did not take this into account when making his decision. He regarded the issuing of a Criminal Justice Stay Certificate as an entirely separate matter, one that was not relevant to what he was obliged to consider under the legislation when deciding whether to cancel Dr Haneef's visa. It was not referred to in the issues paper as something that needed to be taken into account.

Mr Andrews disagreed that the ordinary effect of a Criminal Justice Stay Certificate would be to enforce Dr Haneef's ongoing detention. He noted that his decision was not final, that it was subject to revocation on his being satisfied that Dr Haneef did pass the character test. He noted further that Dr Haneef had been informed of his right to make representations seeking a revocation of his decision and that he fully expected Dr Haneef's representatives would do this—and was surprised when they had not.

Mr Andrews also noted that it remained open to him to make a residence determination under s. 197AB of the Migration Act to allow Dr Haneef to be held in community-based detention or to issue a Criminal Justice Stay Visa enabling him to be released into the community rather than be detained. He did not regard either of those actions as necessarily inconsistent with the cancellation of Dr Haneef's visa on national interest grounds. He said that any such action would take into account advice from the AFP and security agencies and that he expected the AFP might indeed advise him that it preferred Dr Haneef to be in the community (rather than in an immigration detention facility) so it could continue to carry out surveillance and proceed with its investigations.

Additionally, Mr Andrews took the view that the AFP would not have provided the information if it was concerned that a decision to cancel Dr Haneef's visa and remove him from the country would interfere with its investigation or prosecution, and he noted that the AFP did not raise that with him before he made his decision.

Conclusions

It was, I believe, the language and timing of some of the correspondence just discussed that seem to have given rise to speculation about the AFP and DIAC conspiring to bring about the cancellation of Dr Haneef's visa.

Each of the relevant DIAC and AFP officers—including Mr White, Assistant Commissioner Prendergast and Federal Agents Jabbour, Morrish and Craig—denied the existence of any such conspiracy, arrangement or understanding.

I gave the matter much consideration, and I am satisfied on the material before the Inquiry that there was no improper arrangement between the AFP and DIAC and that the officers was simply doing their job in what were difficult conditions. Although there was no testing of their evidence in the form of cross-examination, the questioning at interview was robust at times and enabled me to assess the veracity and reliability of their evidence.

Further, I do not accept that the Minister was simply going to do the bidding of his department. In my opinion, Mr White and those working with him knew the Minister would bring an independent mind to the task of evaluating the material provided to him.

That brings me to the 'contingency' email and the period between 13 and 16 July, the events of which led to even more vigorous claims of a conspiracy. The claims are understandable, but I accept the denials of any improper purpose.

Between Friday 13 July and Monday 16 July there remained some uncertainty about the possible outcome for Dr Haneef. On 13 July DIAC was aware that the Minister had decided he would make his decision on 16 July after attending the National Security Committee meeting. In the meantime, it was uncertain whether Dr Haneef would be granted bail. Following the bail hearing on the Saturday, the AFP might well have made an assessment that it was becoming more likely that bail would be granted. These circumstances created the need for operational planning to take account of the possible situations that might arise, including the grant of bail. To that end, the AFP had made arrangements for the surveillance of Dr Haneef if he were released from custody or for assisting DIAC in taking Dr Haneef into immigration detention if his visa was cancelled. I accept that it was in that sense that there were arrangements for 'contingencies', as referred to by Federal Agent Craig in his email of 14 July.

3.6.11 The Minister's decision: 16 July 2007

As detailed, before cancelling Dr Haneef's visa on 16 July Mr Andrews attended a meeting in the Prime Minister's Office and participated in part of the National Security Committee meeting of Cabinet.

The Inquiry received little detail about the earlier meeting between Mr Andrews and the former Prime Minister, the Hon. John Howard MP. Mr Andrews said the former Attorney-General, the Hon. Philip Ruddock MP, was also present at this meeting, as was the Prime Minister's Chief of Staff. Mr Ruddock did not

remember the meeting. Mr Andrews gave a fairly bland account of it: Mr Ruddock informed the Prime Minister that Dr Haneef had been charged, and Mr Andrews said he had been given sufficient information to exercise his discretion to cancel Dr Haneef's visa but was yet to make a final decision. Mr Howard said words to the effect that the decision was one for Mr Andrews and that they would hear from Commissioner Keelty at the National Security Committee meeting. Mr Howard did not give evidence to the Inquiry, but in a letter he made it clear that his position at the time was that 'the cancellation or otherwise of Dr Haneef's visa was solely within the discretion of the Minister for Immigration'; in other words, Mr Andrews would reach his own conclusions.

Similarly, because of the convention on Cabinet confidentiality, limited evidence, documentary or oral, of what transpired at the National Security Committee meeting was made available to the Inquiry.

The available evidence confirms that a number of matters were to be discussed, although only one of them related to Dr Haneef—an outline of legislative considerations arising from the Haneef investigation and a proposal for a review of the existing counter-terrorism laws. This was reportedly the last matter for discussion. Updates from Commissioner Keelty and ASIO were foreshadowed as part of this.

Mr Andrews was not a permanent member of the National Security Committee and had been asked to attend only that part of the meeting relating to the briefing by Commissioner Keelty. He told the Inquiry Commissioner Keelty had already begun by the time he entered the meeting. At the conclusion of Commissioner Keelty's briefing, Mr Andrews said he informed the meeting that, on the basis of the material before him, he was inclined to cancel Dr Haneef's visa. Mr Howard reportedly repeated that the decision was one for Mr Andrews. The meeting then concluded.

Mr Andrews said he spoke briefly with Commissioner Keelty as he was leaving the meeting and asked him whether he was satisfied with the material the AFP had provided to DIAC and on which he would be basing his decision. According to Mr Andrews, Commissioner Keelty said 'Yes'. The commissioner then advised Mr Andrews that if he did decide to cancel Dr Haneef's visa the AFP would consider approaching the Attorney-General about a Criminal Justice Stay Certificate.

For his part, Commissioner Keelty denied having any direct contact with Mr Andrews on the matter and suggested that all communication went through Mr Andrews' Office.

Subsequent media reports about the National Security Committee meeting[4] quoted Mr Howard as having confirmed that 'he had discussed Haneef's visa

[4] http://www.smh.com.au/news/national/i-did-not-pressure-andrews/2007/07/24/11850.

with Mr Andrews and senior members of cabinet, but had left it to the minister to decide on a course of action'. Mr Howard is also reported to have said:

> We discussed it and it was discussed at a meeting of the National Security Committee of cabinet, but the final decision was taken by Kevin Andrews …
>
> He exercised his discretion and we didn't seek to direct him.
>
> But often in these situations … the minister will seek the views of his colleagues and then go away and make his or her decision, there's nothing unusual about that.

I do not accept that Mr Andrews made the decision to cancel Dr Haneef's visa in a vacuum and without seeking or having regard to the opinion of his colleagues. I expect that what was discussed at this meeting was probably closer to what Mr Howard is reported to have said—that Mr Andrews sought the views of his colleagues and that those views were provided. I do not consider this action unreasonable in the circumstances.

An email sent from the Prime Minister's Office to Mr Steve Ingram (the Attorney-General's Chief of Staff) and Mr Jamie Fox (the Prime Minister's Senior Advisor) at 1.01 pm on 16 July—advising that the Solicitor-General and Mr Tom Howe of the Australian Government Solicitor had confirmed there was 'no contempt issue if Mr Andrews were to consider Dr Haneef's visa'—suggests that the Prime Minister's Office was also looking into the possible impact of a cancellation decision and might be thought indicative of the political consideration being given to the cancellation decision. (The available evidence suggests that neither DIAC nor the Attorney-General's Department was party to these inquiries.) Whether this request for advice arose from the discussions in the Prime Minister's Office earlier that morning or from the subsequent National Security Committee meeting is unknown.

Notwithstanding this, I found no evidence to suggest that any political pressure or influence was brought to bear on Mr Andrews or that he made his decision to cancel Dr Haneef's visa in order to achieve some actual or perceived political advantage or in the interest of expediency.

After the National Security Committee meeting Mr Andrews returned to his office, considered the issues paper and cancelled the visa. He said he thought it was in the national interest to make the decision at that time, by which I took him to mean that he was required to make a decision because the matter was before him and that there was a risk in allowing Dr Haneef to return to the community. The latter point does not, however, seem to have been a dominant consideration: Mr Andrews said he would have made a decision even if Dr Haneef had been refused bail and had remained in custody. I formed an impression that the Minister had almost decided to cancel the visa on Friday 13 July and that the die was cast once the charge was laid. The charge was a very important factor, as the Minister himself said.

It is not in dispute that it was legally open to the Minister to exercise his discretion to cancel Dr Haneef's visa, both on the understanding of the law at the time of his decision and in the light of the subsequent decisions by the Federal Court. But I find it difficult to understand why the Minister found it so important to make the decision on 16 July. If bail had been refused Dr Haneef would have remained in custody and there would have been no need for urgent action to cancel his visa. If bail had been granted (as it was), it was highly likely that a Criminal Justice Stay Certificate would be granted, meaning that Dr Haneef could not be removed from Australia, which was after all the purpose of cancelling the visa. Although the Minister seems to have thought Dr Haneef might be a risk to the community if he was released on bail, that view takes no account of the ASIO assessments or of the views formed by the magistrate in granting bail.

When this question was discussed at the interview Minister Andrews said he would have been criticised regardless of whether or not he made a decision on 16 July:

> There was no perfect timing to this. I had material before me on the Friday. As I say in my submission, I believe that that material enlivened my discretion, if I can put it that way. I could have made a decision then. I could have made a decision when Haneef had been charged. If I had done that, I would have been said to be usurping the power of the magistrate in relation to this matter. I made a decision on the Monday. Had I waited until later, I would have been criticised for saying, 'Well, why did you wait this long before making a decision, when you had that material before you a week or so ago?' As I said, there was no perfect timing to this.

Mr Andrews went on to say, 'I think it would have been a dereliction of duty not to have made a decision when I had that material before me'. With respect, I find this proposition difficult to accept: it would have been perfectly defensible to defer the decision until the criminal proceedings were resolved, or least further advanced, when the case against Dr Haneef would have been clearer than was demonstrated by the information the AFP had provided at that time. If the Minister was going to be criticised in any event, all things were equal. I cannot accept that the Minister would have been the subject of as much criticism for deferring his decision as he was likely to receive if he acted to cancel the visa immediately after Dr Haneef had been granted bail.

Dr Haneef's supplementary submission referred to a file note of a conversation between Federal Agent Shane Meaker and DIAC's Compliance Manager in Brisbane, Mr Jason Dean, at 8.10 am on 14 July. In the course of the conversation Meaker expressed his belief that 'a person's visa would not normally be cancelled as a result of criminal charges having been laid'. Mr Dean agreed and undertook to seek guidance from 'more senior officers'. The stated belief is probably justifiable as a general proposition—particularly where cancellation is being considered under s. 501(6)(c) on the basis of the visa holder's past and present criminal or general conduct, where DIAC would ordinarily await the outcome of any criminal charges before proceeding to consider cancellation. I do not,

however, regard the conversation between Meaker and Dean as an exhaustive or definitive statement of DIAC's position. In any event, although the fact of the charge was obviously relevant to the Minister's consideration of cancellation, Dr Haneef's visa was not cancelled 'as a result of criminal charges having been laid'. It was cancelled because of his suspected association with people suspected of being involved in criminal conduct.

The combination of the circumstances just described led to the widely reported suspicion that the Minister had acted improperly to ensure that Dr Haneef remained in detention. Although the facts presented in the foregoing paragraph contributed to my difficulty in understanding the timing of the decision, the totality of the factual material is insufficient to support an inference that the Minister was acting for an improper purpose. Rather, I consider that the material in the Part B document—particularly in relation to Dr Haneef's attempted urgent departure and his known relationships with Sabeel and Kafeel Ahmed—persuaded the Minister to cancel the visa despite the fact that it was almost certain that Dr Haneef could not be removed at least until the criminal proceedings had concluded.

But was it in the national interest to cancel the visa at that time, as Mr Andrews has consistently asserted? If Dr Haneef was not granted bail and remained in criminal custody he was no danger to the community; if he was granted bail, there were the consistent assessments from ASIO, of which the Minister was aware, that there was no evidence to suggest he posed a risk to the community.

There was, in the light of the ASIO assessments, a large question about whether suspicions expressed by the AFP in the Part B material were well founded, based as they were on little more than extracts from chat room and telephone discussions and the circumstances of Dr Haneef's attempted departure from Australia. This was undoubtedly a high-profile case. Nevertheless, prudence could perhaps have led Mr Andrews to defer his consideration—as he had done once already—and to seek clarification of a number of things. There was no pressing need to make a decision at that very moment.

In making these observations, I recognise that I am analysing the situation that existed on the 16 July at a time when the drama is long past and when the memory of those events has dimmed. The Minister was faced with considering a question that had been under discussion among officers since 3 or 4 July, and against the background of community concern about the spectre of terrorism in which—wrongly as it turned out—Dr Haneef was implicated. The most likely reason the Minister acted to cancel Dr Haneef's visa is that he had grave suspicions about Dr Haneef as a result of the material put before him and he genuinely believed the community wanted him to act decisively.

Although the Minister's actions remain a puzzle to me, there is no evidence supporting the conclusion that he acted improperly in cancelling Dr Haneef's visa.

3.6.12 The material before the Minister

The ASIO Security Intelligence Assessment

From the outset, DIAC took the position that it was necessary to put the matter before the Minister for consideration of a visa cancellation under s. 501 only if ASIO declined to issue an adverse security assessment. The reason for that was if ASIO had issued an adverse security assessment cancellation of the visa would be mandatory pursuant to s. 116(3) of the Migration Act.

The 'Possible cancellation powers' paper prepared on 4 July specifically noted that s. 501 would be considered only if ASIO decided that it did not have enough evidence to issue an adverse security assessment. The paper went on to note, '… The Minister may be reluctant to use his national interest power where both the AFP and ASIO have indicated that there was insufficient information to establish that this person was a national security threat'.

Notwithstanding this position, ASIO's views—and, more particularly, those expressed in its security intelligence reports of 4 and 11 July 2007—were not included in subsequent information briefs to the Minister and the issues paper that went before the Minister for consideration on 16 July 2007.

The then Acting Secretary of DIAC, Mr Correll, who received the security intelligence report dated 11 July, said he did not circulate the document to anyone else in DIAC or the Minister's Office because he took the view that the report simply advised that ASIO did not have sufficient information to issue an adverse assessment (for s. 116 purposes) and was not relevant to the consideration of a visa cancellation on character grounds. This view was echoed by Mr Correll, who, as Acting Secretary of DIAC, received the 11 July report, and appears to stem from the understanding that ASIO and AFP had different remits.

DIAC, and most departments and agencies participating in the National Counter-Terrorism Committee and interagency meetings, understood that ASIO was looking at the limited question of whether to issue an adverse security assessment because of a threat Dr Haneef posed to Australia. Although it was acknowledged that ASIO was assisting the AFP with its investigations, it was understood that the AFP was the lead investigating agency. DIAC did not know whether ASIO had all relevant information (or largely the same information as was before the AFP) available to it when making its assessment. As a result, in DIAC's view, once ASIO had declined to issue an adverse security assessment, it was necessary for the Minister to consider cancellation under s. 501 and, on its understanding, ASIO could offer no advice relevant to this consideration.

This appears to have been a common misconception on the part of DIAC and others who participated in the National Counter-Terrorism Committee and interagency meetings—and it might have been reinforced by DIAC's understanding that ASIO had indicated on a number of occasions (both before and after the Minister had decided to cancel Dr Haneef's visa)—that ASIO was not prepared to provide to DIAC any information for use in the s. 501 process, notwithstanding the protections afforded by s. 503A.

Mr Correll also said he did not circulate the security intelligence report dated 11 July to anyone in DIAC because the document carried a security classification of Secret and would normally only be circulated on a need-to-know basis. Mr Correll considered that the DIAC officers preparing the issues paper would already have been familiar with the information in the report because Mr White had attended the previous National Counter-Terrorism Committee meetings and the teleconference on 11 July in which ASIO's views were discussed.

Similarly, Mr Correll did not provide a copy of the security intelligence report to the Minister or the Minister's Office: it was not usual practice for DIAC to forward such reports to the Minister. Had DIAC wanted the Minister to receive a copy of the document, DIAC would have approached ASIO in the first instance and asked it to put the Minister on the distribution list. Mr Correll also expected that the Minister's Office would be aware of ASIO's views on Dr Haneef through the earlier briefings he gave to Mr Toby, the Minister's Chief of Staff. He said he thought Mr Toby would have, in turn, passed the briefings on to the Minister.

In the security intelligence report dated 11 July ASIO stated that at that time it had no information to suggest that Dr Haneef had any involvement in or foreknowledge of the incidents in the United Kingdom and that his relationship with Sabeel and Kafeel Ahmed was solely familial. This statement was at odds with the suspicions expressed by the AFP in the successive versions of the Part B document. After setting out a large amount of disjointed information about the UK incidents and Dr Haneef's association with Sabeel, Kafeel and Dr Asif Ali, the Part B document concluded with a 'summary' in which it was asserted that AFP investigators suspected the circumstances of Dr Haneef's attempted urgent departure and the chat room conversation between Dr Haneef and his brother (limited portions of which had been reproduced out of their full context in the Part B document) could be evidence of Dr Haneef's awareness of the conspiracy to plan and prepare for the terrorist incidents in the United Kingdom.

As noted, the 11 July security intelligence report was delivered to Mr Correll as Acting Secretary of DIAC; he did not regard it as relevant to the consideration of cancellation because it was not an adverse security assessment under s. 37 of the ASIO Act, which would lead to automatic visa cancellation under s. 116(3) of the Migration Act. As a consequence, Mr Correll did not forward a copy of the report to the Minister, who did not see it before he made his decision, although he conceded that he was aware—presumably from the National Security Committee meeting—of the general nature of ASIO's views.

Should the Acting Secretary have treated the security intelligence report in this way? I think not. Here was an ASIO-produced document that was effectively equivalent to a non-adverse assessment. Considering that an adverse assessment by Australia's premier domestic intelligence organisation leads to automatic visa cancellation, I find it troubling that a non-adverse one is simply put to one side.

The explanation lies, I believe, in the entrenched view that ASIO had a different role to that of the AFP—namely, that ASIO dealt with intelligence and security, while the AFP was concerned with law enforcement and was the lead

investigating agency. Notwithstanding the different roles of ASIO and the AFP, the underlying premise of ASIO's assessment was inconsistent with the AFP's suspicions about Dr Haneef's involvement in the UK incidents, although the same information was available to each of the agencies. This does not appear to have been understood by the Acting Secretary, the Minister or a number of people who attended the National Counter-Terrorism Committee meetings and were generally aware of the differing views.

In my opinion the Acting Secretary was wrong to act as he did. His actions were, however, in keeping with a widely held misconception, and it is somewhat unfair to single him out for criticism.

Some insight into the source of what appears to be DIAC's view is to be found in a submission by DIAC to the Inquiry in which it said, 'There is no such thing as a positive security assessment; a security assessment is by definition negative in some way (i.e. a 'qualified security assessment' or an 'adverse security assessment' within the meaning of the *ASIO Act*)'. This statement worried me because, on first impression, s. 37 of the ASIO Act seemed to be at odds with this view. In order to better understand the contention, the Inquiry sought ASIO's reaction. It was to the effect that it could give a positive security assessment.

It is true that a positive security assessment might in some circumstances be of little value, but we know that in Dr Haneef's case the visa cancellation was considered at the time in part 'because he may be a risk to the community'. The intelligence agency said otherwise, but nobody listened.

This reveals a serious state of affairs.

As noted, the Minister shared the Acting Secretary's views. He knew about ASIO's advice but gave it no weight. He said he was not aware that ASIO had found no evidence of Dr Haneef's foreknowledge of or involvement in the UK incidents. Somewhat astoundingly, though, he said even if he had known he didn't think it would have made any difference.

I should mention that the Attorney-General, Mr Ruddock, was aware of the differing views of ASIO and the AFP but justified his acceptance of that situation on the basis of their different roles and pointed out that intelligence and law enforcement are different functions. He said he knew ASIO had 'nothing' but was not surprised by the AFP's views and actions. He knew the two agencies were working together, but he did not understand that they were analysing the same material. So he asked no questions. Having regard to the fact that both organisations fell within his portfolio responsibility, his lack of concern for this fundamental difference in opinion might be considered concerning.

What lessons should be learnt from this episode? There were many misconceptions, particularly about ASIO's role and the importance of the security intelligence reports. The misconceptions seem to have arisen from a general misunderstanding not only about ASIO's role in carrying out its parallel intelligence investigation but also more generally about the relevance of an ASIO

security intelligence report and the importance of intelligence from ASIO in the context of conclusions based on the analysis or interpretation of information. Both ASIO and the AFP analysed similar information and came to diametrically opposed conclusions, and yet ASIO's contrary view was not considered. Had it been considered, it might have given rise to many questions and it might well be that Dr Haneef's visa was not cancelled.

There is a need to develop and improve processes for communication between all agencies and departments engaged in security operations—especially between the AFP, ASIO and DIAC.

The issues paper and attachments

There has been much comment about the information placed before the Minister on 16 July, largely because of inaccuracies subsequently discovered in some of the material and the fact that the Minister sought to rely on unknown information that was protected under s. 503A of the *Migration Act 1958*.

Dr Haneef's submission drew attention to a number of deficiencies in the issues paper and the Part A material, in particular the following:

- failure to quote the exact wording of the charge laid against Dr Haneef—including the date on which Dr Haneef was alleged to have committed the offence of providing the resources (25 July 2006) and the nature of what he was alleged to have provided (a SIM card)
- limited references to the fact that bail had been granted and the failure to identify the magistrate's reasons for granting bail
- inaccuracies in the summary of the record of interview with Dr Haneef
- failure to include arguably exculpatory material—such as Dr Haneef's numerous attempts to contact Mr Tony Webster of the UK Metropolitan Police Service on 2 July 2007 and the Kafeel email
- failure to update the Part A and Part B material to take account of developments between 13 and 16 July—including the less serious charge brought against Sabeel Ahmed and the second interview of Dr Haneef on 13 and 14 July.

Dr Haneef's submission has also suggested that the summary of the chat log conversation between him and his brother Shuaib before Dr Haneef's attempt to leave Australia on 2 July was inaccurate and incomplete and did not take account of the fact that Dr Haneef had tried to correct the translation in his second interview.

The issues paper

I note that the issues paper adopted a very broad definition of the character test, stating that in order to fail the character test all that was required was an 'association' with persons 'reasonably suspected of criminal conduct'. On the

reasoning in *Re Chan and Minister for Immigration and Multicultural and Indigenous Affairs*[5], this was at the time correct.

Despite the broader position adopted by *Chan*, DIAC policy and procedure documents at that time reflected a narrower position on 'association' and required more than a mere innocent association between the person concerned and the people involved in the criminal conduct.[6]

DIAC explained that it did not consider it necessary to make the Minister aware of the existence of the narrower policy position adopted by the department when considering such matters, since it was merely internal department policy—not governmental policy—and to have highlighted the stricter test being applied by delegates might have improperly suggested to the Minister that he was required to similarly curtail his power.

In my view, DIAC cannot be criticised for applying the precedential decision of *Chan* but could have also referred in the issues paper to the narrower policy position that was being adopted by the department (notwithstanding *Chan*). I do, however, note the Minister's comments that, despite the broad position reflected in the issues paper, he took the view that more than an innocent association was required before he would decide to cancel Dr Haneef's visa. Had the association been an innocent one in the sense that Dr Haneef and Sabeel and Kafeel Ahmed were simply second cousins only, he would not have come to the decision that he did. He made it clear that he arrived at his decision because he believed, on the material before him, that there was a real suspicion and concern about Dr Haneef's activities. Ultimately, DIAC's failure to outline the broader policy position in the issues paper was of no practical effect.

I am more troubled by DIAC's failure to include the precise wording of the charge in the issues paper. The department provided no adequate explanation for this. The issues paper identified the charge as a fact relevant to each of the matters to be considered by the Minister—that is, the 'character test', the 'national interest', and whether the Minister should exercise his discretion to cancel Dr Haneef's visa under s. 501(3)(b) of the Migration Act without natural justice.

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5 [1997] 50 ALD 507.

6 Page 10 of the *Section 501 Policy Handbook* (which post-dated the Chan decision) provided, 'Under policy, to fail the character test on 'association' grounds, a non-citizen should have a direct link both to the relevant person, group or organisation and to the criminal activities they are believed to be involved in. Where a non-citizen is not involved in, or does not have specific knowledge of, the criminal activities the association should be considered to be innocent. Innocent associations will not be sufficient to enliven the discretion to refuse to grant or to cancel a visa'; see also p. 58 of the *Procedures Advice Manual*, which superseded the *Policy Handbook* and set out the policy guidelines for 'what is an "association"' as follows: 'The degree of association required by the legislation is not fettered, therefore, the association does not necessarily have to be a strong link. Whether the person does not pass the character test on the basis of a relatively distant association depends on the circumstances of the case. However, delegates should not consider a person's innocent associations, such as those with relatives, partners or friends, unless the delegate reasonably suspects such a relationship is more than an innocent association'.

DIAC had specifically asked for, and received, what it understood to be the exact wording of the charge on the morning of 16 July[7] and had the opportunity to include it considering that the issues paper was updated twice thereafter. What made this and the following matters important was that DIAC had presented to the Minister a mass of selected details provided by the AFP. It was essential that there were no factual inaccuracies in that material, that there was a proper balance, and that there were no important omissions.

I also consider that the conditions of bail and the magistrate's reasons for granting bail were matters relevant to both the Minister's consideration of the character test and his exercise of discretion; in the circumstances, it would have been helpful if these matters had been drawn to the Minister's attention.

Mr White told the Inquiry that, because DIAC had understood the presumption of bail was against Dr Haneef, he considered the fact that Dr Haneef had been granted bail 'a significant development' and one that he specifically wanted incorporated in the issues paper in order to afford fairness to Dr Haneef. Which is why, after receiving confirmation from Mr Morrish that Dr Haneef had been granted bail, Mr White says he immediately contacted Ms Clarke and asked her to prepare a revised issues paper and statement of reasons. Although Ms Clarke informed the Inquiry that she did this and emailed the revised documents to Mr Parsons at the Minister's Office at 12.02 pm, neither the email itself nor the amendments made referred to the magistrate's decision to grant bail.

Although I do not consider DIAC deliberately excluded this material from the issues paper in order to mislead the Minister, the exclusions meant that a balanced view was not presented. Having spoken directly to the Minister on the matter, though, I am not convinced that this information, had it been available, would have had any impact on the Minister's ultimate decision.

Parts A and B

As for the material supplied by the AFP, I note that the Part A material contained a number of inaccuracies. The AFP's response to this criticism is that the information was considered accurate at the time.

Federal Agent Anderson said that, when preparing the original draft of the Part A document he relied on a contemporaneous note, or 'synopsis', of the record of interview prepared by the interviewing officer, Detective Sergeant Simms, and not the transcript of the taped interview. He gave a number of reasons for relying on the synopsis:

- The transcript was not uploaded onto the AFP computer system until after 7.00 pm on 6 July.
- The transcript was not forwarded to him until 10 July—after the original deadline imposed on him for preparing the Part A and Part B material.

[7] The wording provided was in fact incorrect, but DIAC was not aware of this at the time.

- The transcript had not been checked against the taped record of interview at that point (and was not checked until 21 August) and was therefore unreliable. The deadline imposed on him for completing the Part A and Part B material meant that he did not have time to cross-reference the information in the synopsis against the transcript.

- He did not have any reason to believe the synopsis prepared by Federal Agent Simms was anything other than an accurate record of the answers provided by Dr Haneef.

It is apparent that no one at the AFP sought to check the synopsis or the summary of the record of interview prepared by Federal Agent Anderson against the transcript—despite the unchecked transcript having been available on the AFP computer system since 6 July. These errors resulted, in my opinion, from the failure of the AFP to ensure that the taped record of interview was transcribed and checked at an early date or to ensure that the synopsis of the interview was accurate and a failure to use a system of information management that updated information to ensure accuracy.

As for the summary of the chat log conversation between Dr Haneef and his brother Shuaib, contained in the Part B document, I note the following:

- The order in which the summary is presented does not correspond directly with the order in which the conversation took place.

- The summary purports to quote directly from an AFP translation of the chat log conversation, but a number of the phrases in quotation marks are not direct quotes.

- The summary is incomplete and fails to include reference to a number of matters that were discussed.

The inaccurate and excluded matters appear to have had both positive and negative implications for Dr Haneef. The AFP updated this summary of the chat log on 13 July. It is unclear why, having done so, the AFP could still manage to incorporate numerous misquotations in the final version. One misquotation could be put down to human error or an oversight; several misquotations imply that the summary was amended hastily and without being checked against the translation.

I note, too, that the translation of the chat log conversation was put to Dr Haneef in his interview on 13 July, at which time he sought to correct a number of errors in the translation and to explain the context in which some of the comments were made. He was not given a full opportunity to do so. The summary makes no mention of the chat log conversation having been put to Dr Haneef and the responses given.

Inclusion of these references to the chat room transcript might have aroused suspicions in the Minister's mind about Dr Haneef's foreknowledge of the UK

incidents but it was completely unfair to Dr Haneef that inaccurate excerpts taken out of context should have appeared in such an important document.

As for the failure to include potentially exculpatory material, Federal Agent Anderson confirmed that the synopsis he relied on in preparing the Part A document did include references to the fact that during the interview Dr Haneef had said Sabeel Ahmed's mother had contacted him and advised him to in turn contact a person named 'Tim' in the United Kingdom about the recent UK terrorist attacks and that Dr Haneef said he understood 'Tim' to possibly be a police officer. The synopsis also noted that Dr Haneef said he tried to contact this person at least three times but could not get through to him. The synopsis contained a bracketed reference after this statement: '(This was confirmed by CCRs)'. Federal Agent Anderson understood this reference to mean that call charge records had confirmed that Dr Haneef had tried to call a UK telephone number on at least three occasions but was unsuccessful.[8]

When asked why he did not include this information in the Part A summary of the record of interview or in the Part A or Part B document, Federal Agent Anderson said that at the time of drafting the document he had not formed a view about whether the attempted telephone calls were exculpatory or otherwise but that, in any event, he did not consider the telephone call relevant to the matters he had been asked to cover in preparing the documents. This was because he had understood from DIAC that he was only to include information about whether Dr Haneef had an association with people suspected of having been involved in the UK attacks and was not asked to include information about whether Dr Haneef was guilty of a criminal offence.

Commander Ramzi Jabbour, who checked the Part A and Part B material, similarly advised the Inquiry that he did not consider Dr Haneef's attempts to contact Tony Webster were significant—let alone potentially exculpatory—at the time. In his view, it was not uncommon for people involved in criminal activity to try to contact law enforcement in an effort to find out the extent of the knowledge law enforcement had against them in relation to their activities and potentially distance themselves from those activities.

In relation to the 'Kafeel email', Federal Agent Anderson said he was not aware of the existence of the Kafeel email at the time of drafting the documents and that the first time he learnt of the email was through media reporting on 25 August.

The evidence shows that the AFP's Brisbane office first received a copy of the Kafeel email in the early hours of 8 July—although the UK Metropolitan Police Service had advised the AFP that it had obtained what it referred to as a 'last will and testament of Kafeel Ahmed' (that is, the Kafeel email) before this date. Commander Jabbour, who was in charge of the investigation in Brisbane and was aware of the Kafeel email, did not include the email in the Part A or Part B

[8] The evidence shows that the AFP had made attempts to ascertain who Mr Webster was and his connection (if any) with the UK police but that this was not confirmed by the United Kingdom until about 8 or 9 July 2007.

documents because he did not consider it relevant to the matters being put to the Minister. Although he accepted that, on one view, the letter could be considered exculpatory of Sabeel Ahmed, he said that on the information available to him at the time he was satisfied that aspects of the letter indicated the contrary—that is, that Sabeel Ahmed had foreknowledge of the UK incidents.

Commander Jabbour also informed the Inquiry that the Metropolitan Police Service provided the Kafeel email to the AFP on the understanding that it would be retained by the AFP for intelligence purposes only. So, even if the AFP had considered the email relevant to the matters being put before the Minister, it was not in a position to disclose or otherwise rely on that information at that time. This claim is, however, inconsistent with the AFP's reference to 'a series of "goodbye" letters discovered from Mr Kafeel Ahmed to his relatives' in a classified affidavit that was put before the magistrate on 11 July in support of a further application for specified time and the AFP's subsequent referral to the goodbye letters in the information it provided to the Commonwealth Director of Public Prosecutions on 17 and 23 July.

I accept that the Part A material that was put before the Minister on 16 July was last updated at 12.00 pm on 11 July and the Part B material was last updated sometime on the morning of 13 July. Developments between 13 and 16 July were not included.

It is noteworthy that a large portion of the Part A and Part B material concentrated on the continuing association between Dr Haneef and Sabeel Ahmed and Sabeel Ahmed's alleged involvement in the London and UK attacks. The summary in the Part B material specifically noted that Sabeel Ahmed had been arrested on suspicion of being involved in the commission, preparation or instigation of the London or Glasgow attacks.

On 14 July, however, Sabeel Ahmed was charged with a lesser offence of having information that could have helped police prevent an act of terrorism or helped police arrest and prosecute someone for terrorism offences; this information was the Kafeel email, or 'goodbye letters'.

The news of Sabeel Ahmed's charge reached the AFP at about 12.30 am on 15 July. Despite the fact that DIAC contacted the AFP on the morning of 16 July to ask whether there had been any developments that required the Part B material to be updated before it went to the Minister, the AFP failed to update the material to confirm that Sabeel Ahmed had been charged and describe precisely what the charge was.

DIAC was unaware of the inaccuracies in the Part A or Part B material or of the fact that material had been excluded.

Mr White told the Inquiry DIAC had asked for full transcripts of interviews, statements, and so on, at its first meeting with the AFP, on 4 July 2007. The AFP advised him, however, that the information derived from any interviews and investigations would be too sensitive to release and that as a result the AFP

would not be providing to DIAC copies of the transcripts or other source materials. The AFP would be providing only 'redacted' or summarised information.

Mr White said he did not harbour any concern about relying on a summary of the record of interview with Dr Haneef or other summarised material without having sighted the source documents. He noted that DIAC was entirely reliant on the AFP to provide accurate and complete information and was not in a position to conduct its own investigation alongside that of the AFP or to check the accuracy of the information provided (nor would DIAC consider it appropriate to do so).

DIAC did, however, repeatedly seek confirmation from the AFP that the information was accurate and up to date. On at least one occasion DIAC questioned the accuracy of a reference in the Part B document to Dr Haneef having being arrested at the airport following advice from the Commonwealth Director of Public Prosecutions. The AFP subsequently confirmed that the reference was inaccurate and amended it.

Because of the large volume of material that was being received, generated and considered by the AFP as part of Operation Rain, in practical terms it became impossible for the AFP to make all source materials available to DIAC. It was therefore not unreasonable for the AFP to provide to DIAC a summary of its investigation. Similarly, it was not unreasonable for DIAC to rely on the AFP to ensure that the information contained in any summary represented an accurate and balanced account of the investigation.

I discuss these matters here in response to the submissions on behalf of Dr Haneef. I emphasise, however, that in my view the AFP went to a great deal of trouble to present detailed information. It is regrettable that there were errors. I consider it would have been far more helpful if the AFP had presented a more focused, shorter brief.

There is no doubt in my mind that the cumulative effect of these errors and omissions resulted in a less than balanced brief going before the Minister. I am unable to say, however, that if none of these errors had appeared in the information provided to Mr Andrews he would not have proceeded to cancel Dr Haneef's visa.

4 The administrative and policy response

4.1 Overview

After the terrorist incidents in London and Glasgow on 29 and 30 June 2007, mechanisms were activated in the Australian Government with the stated aim of evaluating developments and considering the need for action here. In addition to the criminal and intelligence investigations that were initiated by the Australian Federal Police and the Australian Security Intelligence Organisation, special-purpose structures within the bureaucracy, including committees and meetings of government representatives, were established. The purpose was to enable the relevant government departments and agencies to exchange information on developments and to formulate an effective, coordinated response.

The 'whole-of-government' action implemented either was broadly consistent with the provisions of the national counter-terrorism policy framework or took place as a consequence of the coordinating functions of the Department of the Prime Minister and Cabinet and the Attorney-General's Department. Throughout July 2007 various meetings were convened to coordinate the Government's response to the Haneef case and to ensure the prompt provision of advice and information to the Prime Minister and Cabinet. The term 'whole-of-government' is analogous to such terms as 'interagency' and 'joined-up' government. It refers to the process of seeking a comprehensive response from government and coordinating the activities of relevant departments or agencies of government affected by a particular event or situation.

Concerns have been publicly expressed about the role government played in the Haneef case. 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. This chapter describes the high-level arrangements of government as they pertained to Dr Haneef, having particular regard to the special coordinating roles of the Department of the Prime Minister and Cabinet and the Attorney-General's Department and relevant aspects of the national counter-terrorism policy framework. Importantly, it examines the whole-of-government action taken and some of the main committees and meetings that were convened.

4.2 The counter-terrorism administrative framework

The administrative framework in Australia for responding to terrorist incidents relies on collaboration and coordination between the Commonwealth and the state and territory governments. Through the Council of Australian Governments, the nine governments in Australia have developed intergovernmental policy for security and counter-terrorism. COAG's role is to initiate, develop and monitor the implementation of policy reforms that are of national significance and that require cooperative action by the nine governments. Where COAG reaches formal agreement, this is embodied in intergovernmental agreements.

On 24 October 2002 the then Prime Minister and the leaders of the states and territories signed an intergovernmental agreement formalising a new national framework for counter-terrorism arrangements.[1] Under the terms of the agreement, the Commonwealth and the state and territory governments acknowledged their joint responsibility in contributing to the development and maintenance of a nationwide counter-terrorism capability and the importance of cooperating fully. Among other things, the agreement reconstituted the old SAC-PAV (the Standing Advisory Committee on Commonwealth/State Cooperation for Protection Against Violence[2]) as the National Counter-Terrorism Committee, 'with a broader mandate to cover prevention and consequence management issues and with ministerial oversight arrangements'. The agreement also established the National Counter-Terrorism Plan as the 'primary document on Australia's national counter-terrorism policy and arrangements'.[3]

The NCTP sets out Australia's high-level strategy for preventing and dealing with acts of terrorism in Australia and its territories. It outlines responsibilities, authorities and the mechanisms for preventing or, if they occur, managing acts of terrorism and their consequences.[4] The NCTP is supported by documentation such as the *National Counter-Terrorism Handbook*, which is a classified document that sets out in detail the procedures, structures and coordination arrangements necessary to ensure the prevention of, response to, and investigation and management of the consequences of terrorism on a national basis. Within the broader intergovernmental framework contemplated by the NCTP, a number of bodies and committees have responsibilities for strategic-level coordination of counter-terrorism policy and related security responses.[5]

The initiating provisions of the NCTP were invoked by the UK attacks of 29 and 30 June 2007. Those provisions broadly defined what constituted a 'terrorist act'

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1 'An Agreement on Australia's National Counter-Terrorism Arrangements'.

2 SAC-PAV was established to respond to terrorism following the bombing of the Hilton Hotel in Sydney in 1978. It held its first meeting in 1979. The National Anti-Terrorist Plan was developed in 1980 and was based on cooperation between the Commonwealth, states and territories.

3 Paragraph 4.1 of the agreement.

4 Chapter 1 of the plan.

5 Chapter 2 of the handbook.

and a 'terrorist incident'.[6] Mechanisms within government were then activated and continued to operate throughout July 2007 in relation to the Haneef investigation. One such mechanism was meetings of the National Counter-Terrorism Committee. The NCTC routinely meets four times a year. Meetings called beyond these occasions (which means all NCTC meetings concerning the Haneef investigation) are referred to as 'extraordinary' meetings of the NCTC. Other government meetings were also convened but were not necessarily founded on specific provisions within the NCTP or the broader counter-terrorism administrative framework. Further, meetings were held in accordance with the functions of particular departments or agencies (such as the Department of the Prime Minister and Cabinet and the Attorney-General's Department) to conduct the general business of government. The meetings were convened and chaired by the Commonwealth (PM&C).[7] Representatives of Canberra-based departments and agencies met in the offices of the Attorney-General's Department's Protective Security Coordination Centre. State and territory representatives would then join the meeting by telephone. Meetings of the NCTC and Australian government representatives only were supported by the NCTC Secretariat, which was then located in the National Security Division of the Department of the Prime Minister and Cabinet.

4.3 Whole-of-government action

In summary, the following action was taken at the whole-of-government level in connection with Dr Haneef:

- one meeting of the Australian Government Counter-Terrorism Committee held on 1 July 2007
- four meetings of the NCTC, on 2, 3, 6 and 9 July 2007; four meetings of Australian government representatives only, on 3, 5, 11 and 12 July 2007; and two meetings of representatives of First Ministers' departments, on 5 and 26 July 2007
- about 27 teleconferences coordinated by the Department of the Prime Minister and Cabinet, involving representatives of select Commonwealth agencies and departments and referred to as 'key issues updates' or 'operational updates'
- one meeting of the National Security Committee of Cabinet, on 16 July 2007
- several interagency or interdepartmental meetings, including those held on 3 July at 6.30 pm (Department of the Prime Minister and Cabinet and Department of Immigration and Citizenship), 4 July at 6.00 am (PM&C, the AFP and the Attorney-General's Department), 4 July at 12.30 pm (PM&C, the

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6 NCTP, Chapter 1.

7 Usually, the NCTC was co-chaired by the Deputy Secretary in PM&C and by rotation with a representative of First Ministers' departments: Duncan Lewis statement, par. 71.

AFP, ASIO, the Department of Immigration and Citizenship and the Department of Foreign Affairs and Trade) and 10 July (PM&C, the Attorney-General's Department, the AFP and ASIO).

Relevant government departments and agencies prepared or contributed to the preparation of written information briefs as well as papers dealing with specific topics or discussed various options for action. Whole-of-government talking points were also prepared, and on occasions oral briefings were given to the respective ministers of particular departments and agencies.

4.3.1 The Australian Government Counter-Terrorism Committee

The Australian Government Counter-Terrorism Committee is a working-level committee that meets to review and consider the public counter-terrorism alert level in Australia. The core members of the committee are the Attorney-General's Department, ASIO and other intelligence agencies, the AFP, the Department of the Prime Minister and Cabinet, the Department of Immigration and Citizenship, the Department of Foreign Affairs and Trade, the Australian Customs Service, the Department of Defence, Emergency Management Australia and the Department of Health and Ageing. Other members are co-opted as required. The committee meets routinely and in response to incidents. It is chaired by the Attorney-General's Department's Protective Security Coordination Centre, shares information between member agencies, and regularly reviews the level of the national counter-terrorism alert to advise ministers on whether changes to the alert level should be considered.

A meeting of the Australian Government Counter-Terrorism Committee was held on Sunday 1 July 2007 at 12.00 pm at the Protective Security Coordination Centre. People from the Department of the Prime Minister and Cabinet, the Attorney-General's Department and the AFP attended. The meeting pre-dated the arrest and detention of Dr Haneef and was called in response to the London and Glasgow attacks. The committee met to consider threat levels in Australia, travel advice, APEC, matters such as the security of places of mass gatherings, and aviation security. The AFP presented a report on the UK incidents, and the meeting also discussed the development of whole-of-government talking points to deal with media inquiries. It was agreed that only these talking points would be used and that the Public Affairs Branch of the Attorney-General's Department would coordinate them. Naturally, the Haneef matter was not on the agenda for the meeting and was not discussed.

4.3.2 The National Counter-Terrorism Committee

The NCTC is a high-level government committee of representatives of the Commonwealth and the states and territories. It is co-chaired by the Department of the Prime Minister and Cabinet and a state or territory official and comprises senior representatives of relevant Australian government agencies, premiers and

chief ministers departments, and police services from each jurisdiction.[8] The NCTC's function is to implement the national counter-terrorism framework set out in the Inter-Governmental Agreement on Counter-Terrorism. The NCTC is required to:

- maintain the National Counter-Terrorism Plan and associated documentation—including the *National Counter-Terrorism Handbook*
- provide expert strategic and policy advice to heads of government and relevant ministers
- coordinate an effective nationwide counter-terrorism capability
- maintain effective arrangements for the sharing of relevant intelligence and information between all relevant agencies in all jurisdictions
- advise on the administration of the Special Fund established to maintain and develop the nationwide counter-terrorism capability.

A further responsibility of the NCTC is to ensure that the necessary apparatus and policy settings exist to facilitate information sharing between the Commonwealth and the states and territories.[9]

Although membership of the NCTC and the National Crisis Committee is essentially the same, Mr Duncan Lewis (from the Department of the Prime Minister and Cabinet) said that meetings convened in connection with the UK incidents and Dr Haneef were never characterised as meetings of the National Crisis Committee. He explained that the NCTC is a policy committee and the National Crisis Committee is effectively its operational arm. The Haneef matter was never considered so serious as to warrant a level of response throughout the Commonwealth or to warrant the National Crisis Committee being convened. The NCTC focused on policy settings; operations were left to the major agencies that had a stake in the matters at hand.

Throughout July 2007 the NCTC was the main forum for the Commonwealth to liaise with the states and territories in relation to the Haneef investigation. It was said to have enabled relevant Australian government departments and agencies to exchange information and coordinate action. At interview, Mr Lewis said the decision to call an NCTC meeting in response to a terrorist incident or act involved 'a series of judgments', having regard to such matters as how obviously or apparently serious the incident was or might become and the potential impact on Australians or Australian interests. Mr Lewis explained that the NCTC was activated for two reasons: first, to ensure that all the agencies and institutions that had a role to play 'were switched on' and focusing attention on the matter; and,

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[8] The Inter-Governmental Agreement, par. 3.2. Senior New Zealand representatives occasionally attended NCTC meetings as observers but did not in relation to the meetings concerning Dr Haneef.

[9] The Inter-Governmental Agreement, par. 3.3, and Chapter 2 of the *National Counter-Terrorism Handbook*.

second, to ensure that Australia's political leadership 'was advised of what was happening'.

Mr Lewis said the NCTC process was used throughout the course of the Haneef matter 'to ensure a whole-of-government approach to the incident'. He said:

> As the case developed, it became clear that the detention of Dr Haneef meant the focus was on a potential terrorist investigation in Australia with international links, rather than a terrorist incident in Australia. While the NCTC processes were developed primarily for response to an incident, we adapted them as appropriate to this case.

The first of four NCTC meetings convened in connection with the UK incidents or Dr Haneef was held on 2 July at 3.00 pm; it was predominantly concerned with the UK incidents. Meetings were convened in relation to the Haneef investigation on 3 July at 10.00 am, 6 July at 9.00 am and 9 July 2007 at 10.00 am.

4.3.3 Other meetings of government representatives

Smaller meetings of NCTC members were also held to discuss the Haneef matter during July 2007. These involved either solely representatives of the relevant Australian government departments and agencies or representatives of the First Ministers' departments. Records of the meetings show they were generically referred to as NCTC meetings, although this term was used simply as a way of indicating which departments and agencies were involved. Strictly speaking, the term 'NCTC' applies only to meetings that include representatives of the states and territories.

Four meetings solely of Australian government representatives were held, on 3 July at 10.00 am, 5 July at 9.00 am, 11 July at 3.30 pm and 12 July at 12.30 pm. The Inquiry was informed that representatives of Canberra-based Commonwealth agencies routinely met to ensure there was a common understanding and coordination among Commonwealth agencies.

Two meetings of representatives of the First Ministers' departments were also held, on 5 July at 2.00 pm and 26 July at 11.30 am. Mr Lewis explained that these meetings were regular fortnightly telephone hook-ups between the chair of the NCTC (usually Mr Lewis) and the NCTC representatives of each state and territory (one officer from the First Minister's office and one senior policeman, generally the Deputy Commissioner). The meetings were convened when a matter was essentially the responsibility of First Ministers' offices.

4.3.4 Operational updates by telephone

On most days during July 2007, the Department of the Prime Minister and Cabinet also arranged telephone hook-ups between representatives of selected Commonwealth departments and agencies. Sometimes they occurred twice daily. Between 2 July and 10 July these 'operational updates' were between the

Department of the Prime Minister and Cabinet, ASIO and the AFP. From 11 July the Department of Immigration and Citizenship also attended, and from 16 July the Department of Foreign Affairs and Trade and the Attorney-General's Department participated as well. Sometimes the hook-ups were held before NCTC meetings in order to brief the PM&C chair or to decide whether there was a need for Commonwealth departments and agencies only to meet or to include the state and territory representatives. Mr Lewis explained that the purpose of the hook-ups was to facilitate a whole-of-government approach, not for decision making. The operational updates were essentially the Commonwealth's vehicle for exchanging information as it was emerging.

During the telephone hook-ups senior officers from each department or agency would provide a short update on their organisation's activities and a brief forecast of what might be coming next. On each occasion the AFP would report first, followed by ASIO. Where synchronisation of actions or public comment was required, the terms of that would be agreed. At the conclusion of these updates, representatives would use the information provided to brief their respective organisations to ensure that among the relevant Commonwealth departments and agencies there was a common understanding about what was occurring and what might occur. Records show regular operational updates by telephone were conducted.[10]

4.3.5 The National Security Committee of Cabinet

The National Security Committee of Cabinet is the primary Australian government decision-making body in connection with national security. It deals with strategic developments and important matters of medium- to long-term relevance to Australia's national security interests. At the time in question, the members of the NSC were the Prime Minister (chair), the Deputy Prime Minister, the Treasurer, the Minister for Foreign Affairs, the Attorney-General and the Minister for Defence. Other ministers are co-opted when specific matters are being dealt with.

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[10] 2 July 2007 at 2.00 pm and 5.30 pm (PM&C, ASIO and the AFP); 3 July 2007 at 8.30 am and 4.00 pm (PM&C, ASIO and the AFP); 4 July 2007 at 8.30 am and 5.00 pm (PM&C, ASIO and the AFP); 5 July 2007 at 8.30 am and 5.00 pm (PM&C, ASIO and the AFP); 6 July 2007 at 8.30 am (PM&C, ASIO and the AFP); 9 July 2007 at 8.30 am (PM&C, ASIO and the AFP); 10 July 2007 at 8.30 am (PM&C, ASIO and the AFP); 11 July 2007 at 9.30 am, (PM&C, ASIO, the AFP and DIAC); 12 July 2007 at 8.30 am (PM&C, ASIO, the AFP and DIAC); 13 July 2007 at 8.30 am and 1.00 pm (PM&C, ASIO, the AFP and DIAC); 14 July 2007 at 10.00 am (PM&C, ASIO, the AFP and DIAC); 16 July 2007 at 3.30 pm (PM&C, ASIO, the AFP, DIAC, DFAT and AGD); 17 July 2007 at 4.00 pm (PM&C, ASIO, the AFP, DIAC, DFAT and AGD); 18 July 2007 at 4.00 pm (PM&C, ASIO, the AFP, DIAC, DFAT and AGD); 19 July 2007 at 4.00 pm (PM&C, ASIO, the AFP, DFAT and AGD); 20 July 2007 at 4.00 pm (PM&C, ASIO, the AFP, DIAC, DFAT and AGD); 23 July 2007 at 3.45 pm (PM&C, ASIO, the AFP, DIAC, DFAT and AGD); 24 July 2007 at 4.00 pm (PM&C, ASIO, the AFP, DIAC, DFAT and AGD); 26 July 2007 at 10.30 am and 4.00 pm (PM&C, ASIO, the AFP, DIAC, DFAT and AGD); and 27 July 2007 at 10.00 am and 5.30 pm (PM&C, ASIO, the AFP, DIAC, DFAT and AGD).

During the period in question one NSC meeting was held, on 16 July 2007. Among those who attended were the Prime Minister, the Attorney-General, the Minister for Foreign Affairs, the Minister for Immigration and Citizenship, and representatives of the AFP, ASIO and other intelligence agencies. The convention on Cabinet confidentiality prevents disclosure to a subsequent government or the general public of the deliberations at this meeting. Throughout the course of this Inquiry the Department of the Prime Minister and Cabinet placed great emphasis on the constraints imposed by this convention.

The NSC is supported and advised by the Secretaries Committee on National Security. The SCNS meeting held on 2 July 2007 did not consider any matters relevant to the Inquiry but did consider a variety of other national security business that went forward to the scheduled NSC meeting on 16 July.

A meeting of the Standing Committee of Attorneys-General was held from 26 to 27 July. At this meeting, one state attorney-general expressed concern about the manner in which the Haneef case was being conducted. The then Commonwealth Attorney-General (the Hon. Philip Ruddock MP) responded to this in general terms by asserting his confidence in the AFP's handling of the investigation.[11]

4.3.6 Interagency or interdepartmental meetings

In addition to the various meetings of NCTC members and the telephone operational updates held in July 2007, there was contact between the specific government departments and agencies concerning the Haneef investigation. This included telephone calls, emails and various meetings. The purpose was to facilitate the exchange of information about processes, assess developments, consider potential outcomes and coordinate the activities of the organisations concerned.

Among the prominent interdepartmental meetings concerning Dr Haneef were the following:

- a meeting on 3 July at about 6.30 pm between the Department of the Prime Minister and Cabinet (Mr Angus Campbell, Ms Rebecca Irwin and Ms Perry) and the Department of Immigration and Citizenship
- an update telephone discussion on 4 July at about 6.00 am between PM&C (Mr Campbell), the AFP and the Public Affairs Branch of the Attorney-General's Department
- a meeting on 4 July at 12.30 pm to discuss passport and visa matters, convened by PM&C (Ms Irwin and Mr Donovan of the Immigration Branch) and involving representatives of the AFP, ASIO, the Department of Immigration and Citizenship and the Department of Foreign Affairs and Trade

[11] AGD.132.

- a meeting held on 10 July 2007 between PM&C (Ms Irwin, chair, and Mr Andrew Joyce), the Attorney-General's Department, ASIO and the AFP for the purpose of discussing counter-terrorism policy.

4.3.7 Briefs, papers, talking points and other communications

Oral and written information briefs, issues papers and 'talking points' were said by many government officers who gave evidence to the Inquiry to have been produced by Commonwealth departments and agencies to keep government abreast of developments in the Haneef case and to enable it to respond quickly. For example, senior executive officers of PM&C provided briefs to the Prime Minister and also prepared issues papers drawing on information provided by the various concerned departments and agencies. The AFP and ASIO each sent several ministerial briefs or submissions to the Attorney-General. PM&C also assisted the Public Affairs Branch of the Attorney-General's Department in preparing whole-of-government talking points dealing with developments. These were then disseminated across government. In addition, regular communication by email and telephone occurred between the various Commonwealth departments and their respective ministers or ministerial offices. For example, the Department of the Prime Minister and Cabinet kept in regular contact with the Office of the Prime Minister, and there was frequent communication between the Attorney-General's Department (usually Mr Geoff McDonald) and the Office of the Attorney-General.

Because PM&C had the lead role in coordinating the whole-of-government action, it is useful to examine the information and materials it provided to the then Prime Minister or his office. On 3 July 2007 PM&C officers provided an oral briefing to Mr Howard concerning the facts of and legal basis for Dr Haneef's detention, the nature of other terrorism powers (such as control orders and preventative detention), the contents of various press conferences given that day, and whether Mr Howard should also address the media.

PM&C also prepared five written briefs that were sent to the Prime Minister between 2 and 29 July. Three additional briefs (one dated 6 July and two dated 13 July) were drafted but were overtaken by events and never sent. The five briefs sent were dated 3 July (noted by Mr Howard on 22 July), 3 July (noted on 5 July), 4 July (noted on 4 July), 6 July (noted on 9 July) and 6 July (it is unclear whether this brief was read by Mr Howard). The five briefs were information briefs and did not make recommendations or seek any particular action on the part of the Prime Minister. PM&C officers told the Inquiry the briefs were intended to provide an update on the status of the Haneef case 'and to try and anticipate as widely as possible the outcomes that could potentially arise, even tenuous outcomes'. Advice to government was said to require an examination of the possible options and sequences of action that might develop from a particular event, to provide a forecast and so enable government to be 'forward thinking'.

During the period in question, PM&C officers also engaged in informal exchanges of information by email, telephone, briefs and updates with staff in the Office of

the Prime Minister. For example, Mr Lewis regularly telephoned the Office of the Prime Minister after the operational updates to pass on the information discussed during those hook-ups.

In addition, PM&C drafted a number of papers, including:

- a paper for internal use that compared the Australian and UK counter-terrorism powers (two versions)
- a background brief setting out the legislative provisions relating to control orders, preventative detention and ASIO questioning warrants (three drafts)
- a draft options paper (dated 5 July 2007) summarising the potential outcomes
- three papers (sent on 11 July) dealing with the UK incidents, the Australian investigations and policy implications, revocation of Australian citizenship and the broader policy implications of the UK incidents and the Australian investigations.

PM&C also received from other departments and agencies a number of papers—among them talking points, press releases, Department of Foreign Affairs and Trade cables, ASIO and National Threat Assessment Centre reports, and briefing papers to their ministers. The 'DIAC–DFAT options paper' received on 4 July 2007 is an example (see Section 3.4.2). In addition, PM&C had a role in commenting on, and in some instances clearing, whole-of-government talking points. A central element of the NCTC process is to ensure a whole-of-government approach to any media comment. This is set out in the NCTP and elaborated on in the National Security Public Information Guidelines, which specifically refer to departments and agencies developing talking points in response to possible scenarios. The aim was to ensure that an appropriate public response was considered before an event occurred. The NCTC minutes of 11 July 2007 note that talking points were prepared to cover possible scenarios. The Public Affairs Branch of the Attorney-General's Department had the lead in coordinating talking points, using input from relevant departments and agencies. Twenty-seven versions of these talking points were released between 29 June and 29 July 2007. Dr Haneef is first mentioned in version 4, dated 3 July 2007. The documents demonstrate the mechanisms by which government was kept informed. It was reasonable for the agencies of government to take such action in the context of a counter-terrorism investigation.

4.4 Meetings and teleconferences

A brief outline of notable meetings of government representatives held during July 2007 is provided here to illustrate the scope and content of the discussions and to assess their relevance to the action taken against Dr Haneef. Not all the meetings or teleconferences that were held are discussed.

4.4.1 3 July 2007

At the operational update teleconferences held at 8.30 am and again at 4.00 pm on 3 July 2007 between PM&C, the AFP and ASIO, Deputy Commissioner John Lawler and Assistant Commissioner Frank Prendergast, both from the AFP, reported on Dr Haneef's arrest, the searches carried out under warrant in relation to his car, office, home and computer, and their ability to seek a magistrate's approval to extend Dr Haneef's detention. Ms Irwin (from PM&C) raised the question of informing the media and asked about the need to cancel Dr Haneef's visa. This was agreed to be a matter for discussion, but it was noted that if Dr Haneef were released he would leave Australia as quickly as possible. Even at this early stage, Dr Haneef's visa status was raised in a government meeting. Having regard to the remit of this whole-of-government forum to contemplate all possible options for action, however, this fact alone suggests nothing untoward.

The minutes of the first NCTC meeting that focused primarily on Dr Haneef, held on at 10.00 am on 3 July 2007, record the substance of the discussions between the participating departments and agencies. The AFP (again, Lawler and Prendergast) reported on the lead information received from the UK Metropolitan Police Service, the AFP's inquiries of ASIO and Queensland police, and the subsequent arrest of Dr Haneef. The AFP informed the meeting that the UK authorities believed Dr Haneef was intricately involved in the UK attacks. The Metropolitan Police Service believed Dr Haneef had provided a mobile telephone registered in his name to the UK terrorist group in September 2006 and that the phone was used extensively in the lead-up to the London and Glasgow incidents. The UK had 'less interest' in the suspect now that some details were known and was not seeking extradition at this stage. The AFP confirmed it would seek 'dead time' (also known as down time or specified time[12]) to interview Dr Haneef, although to that point he had not been formally interviewed. The AFP did not at that stage intend to use a control order or preventative detention and said its actions had been prompted by Dr Haneef's attempt to leave the country. A subsequent Department of Foreign Affairs and Trade email about this meeting confirmed the information supplied by the AFP. It also mentioned the involvement of Queensland police, provided details about Dr Haneef, and outlined the reports given by other departments and agencies. According to Mr Geoff McDonald (from the Attorney-General's Department), at this meeting the AFP provided details of the arrest of Dr Haneef and was concerned 'to ensure that no evidence, whether exculpatory or incriminating, was overlooked in the very large volume of material they were examining'. He said the AFP had stressed the possibility that Dr Haneef could be exonerated or that there would be insufficient grounds or evidence to continue to detain or charge him.

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[12] After someone is arrested for a terrorism offence they can be detained in police custody for 48 hours, after which charges must be laid or the person must be released. Applications to specify periods as dead time can be made to a judicial officer to effectively suspend the 48-hour period or any extension of it. See Chapter 5 for further details.

It is apparent from the records of this meeting that reliance was placed on early information obtained from the UK Metropolitan Police Service. Some of the details of that information subsequently turned out to be inaccurate, and there was continuing uncertainty about whether Dr Haneef had provided to his cousin a SIM card, a mobile phone, or both. It is also noteworthy that the AFP had already registered at this meeting that the MPS had a declining interest in Dr Haneef. Notwithstanding, the AFP foreshadowed continued applications to extend Dr Haneef's detention.

The first meeting solely of Australian government representatives that discussed Dr Haneef was held at 5.00 pm on 3 July. It included representatives from PM&C, the AFP, ASIO, the Attorney-General's Department, the Department of Foreign Affairs and Trade, the Department of Immigration and Citizenship and other departments. The meeting noted the intense media coverage of the case and discussed the development of updated talking points and proposed media appearances by the then Attorney-General and AFP Commissioner Mick Keelty. The AFP, ASIO and DIAC provided individual updates. The AFP confirmed that links had been found between Dr Haneef and the individuals involved in the UK incidents—but not links between Dr Haneef and the UK incidents. The AFP also noted the following:

- Dr Haneef had been offered consular assistance and legal representation.
- The initial basis of the UK inquiry was a phone number suggesting an address connection with Dr Haneef in Australia and information that he might have been in the United Kingdom recently.
- The United Kingdom at this time had not evinced a desire to arrest Dr Haneef but had expressed interest in the computer and email records seized by the AFP.

ASIO noted, 'There was no further information or analysis to suggest any change to the current National Alert Level', which remained at medium. ASIO also noted that when Dr Haneef arrived in Australia his name had registered on an alert database, but the review process had immediately determined that this was because he had a name similar to that of a person on the list and he was not that person.

In a Department of Foreign Affairs and Trade email reporting on this meeting Deputy Commissioner John Lawler of the AFP is recorded as having confirmed that Dr Haneef's interview would terminate shortly and that the AFP would seek dead time before a magistrate in order to analyse the material it had seized and gather more information from overseas. The AFP would then re-interview Dr Haneef on the basis of that information. The DFAT email also said the AFP had indicated that at this stage 'there appeared to be no "smoking gun"', but a considerable amount of material pointed to Dr Haneef having had contact with a UK group, although this might not be incriminating. The email recorded that the AFP contemplated a number of possible outcomes, ranging from prosecution on the basis of evidence found (although this was considered 'unlikely' at this stage)

to suspicion without sufficient evidence but possibly enough for a control order or a finding that Dr Haneef had no real involvement and was simply released. There was also some desultory discussion about whether in the latter two instances Dr Haneef's subclass 457 business visa could be revoked or whether the government could actually stop him from leaving—although it was noted that this would be difficult because Dr Haneef had an Indian passport, despite the power that existed to cancel a foreign passport in certain circumstances.

The DFAT email also made reference to the fact that Dr Haneef's name had come up in a report created in June 2007. The report concerned a visitor who had arrived in Australia and had listed Dr Haneef as his contact person. Further, the email provided details of the DIAC report presented at the meeting, which outlined details of Dr Haneef's visa and the nature of the checks involved in obtaining such a visa and provided general information about the number of overseas doctors practising in Australia. Additionally, the email noted that the Attorney-General's Department and PM&C were still controlling the whole-of-government talking points and that concern had been expressed that too much comment or too much detail at this stage could jeopardise any subsequent case that might be brought.

It is apparent that at this early stage a comprehensive range of options and possible outcomes were being considered at the whole-of-government level. These included the possibility that Dr Haneef would ultimately be exonerated and various outcomes associated with his visa status.

4.4.2 4 July 2007

At 12.30 pm on 4 July an interagency meeting between PM&C, the Department of Foreign Affairs and Trade, ASIO, the AFP and DIAC began. The meeting was chaired by Ms Irwin (from PM&C) and was said to have been called to discuss passport and visa matters. This requirement arose, it was said, as a consequence of discussions at the NCTC meeting held on 3 July, which outlined possible 'end results' for the Haneef investigation. It was considered necessary for PM&C to be briefed in more detail on matters concerning passports and visas. For this reason a representative of PM&C's Immigration Branch (Mr Donovan) and representatives of other relevant agencies were involved. PM&C officers said the meeting did not seek to make or influence operational decisions that were the responsibility of individual departments, agencies and their ministers: it was designed to be 'an information gathering exercise' for PM&C to obtain 'a more detailed brief on the roles and responsibilities of individual agencies' involved in visa and passport matters.

Department of Foreign Affairs and Trade records show that the meeting was intended 'to ensure that all agencies were clear on current powers available for the cancellation of Haneef's visa should this have to be considered more closely later this week'. The focus of the meeting was the available powers to cancel visas. Discussion included ASIO's power to make an adverse assessment in relation to Dr Haneef, which would lead to automatic cancellation of his visa, as

well as DIAC's options for cancellation under s. 501 of the *Migration Act 1958* (Cth). DIAC was tasked at the meeting with preparing a paper summarising the options for visa cancellation. The paper was to be presented to the NCTC meeting scheduled for the following week; it became known as the 'DIAC–DFAT options paper'.

The Department of Foreign Affairs and Trade also provided to the meeting some information about the powers of the Minister for Foreign Affairs to seek cancellation of a visa on foreign policy grounds (Migration Regulation 2.43) but noted that the requisite foreign policy interest was not yet apparent in the Haneef case. It also noted the power of the Minister for Foreign Affairs to seek surrender or seizure of a foreign passport under the *Foreign Passport (Law Enforcement and Security) Act 2005* but said this would become relevant only if there was a desire to prevent Dr Haneef from leaving the country.

Later that day, Mr Peter White (from DIAC) sent an email to Ms Irwin (at PM&C), copied to all agencies that attended the 12.30 pm meeting, attaching the DIAC–DFAT options paper. The eight-page paper set out the various legislative tests and thresholds in relation to visa cancellation under the Migration Act and the seizure or surrender of foreign passports under the *Passports Act 2005*.

4.4.3 5 July 2007

The second meeting solely of Australian government representatives began at 9.00 am on 5 July. It involved representatives of various departments and agencies, among them PM&C, the AFP, ASIO, the Attorney-General's Department, the Department of Foreign Affairs and Trade and DIAC. At this meeting, the AFP reported that Dr Haneef remained in custody in Brisbane, examination of recovered data was continuing, and collaboration with the UK authorities was continuing. DIAC was also working with the AFP to obtain relevant information and background details. The AFP confirmed that a Chief Inspector from the UK Metropolitan Police Service was arriving in Brisbane that morning to assist with the investigation and that two AFP officers had been sent to work with the UK team to further improve information exchange. The AFP also reported that investigations were proceeding but were complicated. It expected that a further extension of dead time to detain Dr Haneef would be necessary.

Updates were also provided on the UK incidents, domestic threat and alert levels, Foreign Affairs travel advice, APEC, and aspects of public information such as talking points and media releases. A number of possible 'future options' in relation to Dr Haneef were also canvassed. They included that Dr Haneef was innocent, that he continued to be detained under Part 1C of the Crimes Act whilst the police investigated, that he could no longer be detained but there was insufficient evidence to charge him, or that he was charged with a criminal offence under Australian or UK law (this last raising the question of extradition). Dr Haneef's visa status was also discussed; this included the various bases on

which his visa might be liable to be cancelled as well as available powers concerning his passport.

DIAC and the Department of Foreign Affairs and Trade addressed this meeting on the visa and passport questions raised at the meeting held on 4 July. As a result of that meeting, DIAC had prepared the DIAC–DFAT options paper. Following the 4 July meeting Ms Irwin (from PM&C) had drafted a further 'options paper' summarising the actions that could be taken by operational agencies should various scenarios eventuate. Ms Irwin used as a basis for her paper the DIAC–DFAT options paper and another paper prepared by PM&C dealing with counter-terrorism law provisions. The options contemplated in Ms Irwin's draft paper ranged from Dr Haneef being free to go to cancellation of his visa and his removal from Australia. Ms Irwin said the paper was intended to be a neutral presentation of possible situations or further actions if Dr Haneef was released from detention on 6 July 2007. She added that the paper 'was drafted on the basis that each of the scenarios may eventuate depending on the outcome of the investigations by the proper authorities'. Her options paper did not contain recommendations or express a preference for any particular option, but it did contain a number of questions for follow-up action or clarification. Ms Irwin circulated the draft paper for comment to the Attorney-General's Department, ASIO, DIAC, the AFP and the Department of Foreign Affairs and Trade at about 4.40 pm on 5 July.

Although comments on Ms Irwin's paper were received from some agencies, they were not incorporated in the document and the draft document was never finalised or sent to any ministers' offices. PM&C did, however, use it to inform subsequent written briefs to the Prime Minister—for example, the 6 July 2007 brief. Mr Lewis (from PM&C) explained that the options papers prepared very early in the NCTC process were designed to inform government about how things might unfold and to prepare ministers in terms of the public statements that might need to be made or any measures the government might need to take further down the track. Mr Lewis noted that a consistent feature of the options papers developed in relation to the Haneef case was that they were presented to government for noting and did not request specific action.

4.4.4 6 July 2007

The third NCTC meeting began at 9.00 am on 6 July and involved Commonwealth, state and territory members. The AFP reported that its investigation was progressing well in cooperation with the Queensland Police Service and ASIO and that work was continuing and was based on data recovered from warrants. Information was also provided about emerging lines of inquiry, the extension of the investigation to Western Australia, and a proposal to issue warrants there. It was further noted that considerable resources had been made available by Queensland and Western Australian police. The AFP confirmed that it had sent 25 investigators to Perth from other states to sustain '24/7' investigations, that 100 police were now involved in the Australian

investigation, and that the Brisbane magistrate had granted a further specified period of 96 hours in relation to Dr Haneef's detention. This period would expire at about 7.00 pm on Monday 9 July 2007. Although a further 12 hours might be available after this time, the AFP noted that Dr Haneef could refuse to answer questions and would have to be released if no other arrangements were made. The AFP also said a further detention would be applied for if required and that Dr Haneef had asked for and been granted legal representation. Additionally, the AFP confirmed that it continued to support the UK investigation, was focusing on corroborating or refuting the statements made to date by Dr Haneef and his colleague at the Gold Coast hospital, Dr Asif Ali, and that its suspicions had not abated since Dr Haneef's arrest.

ASIO reported that it was focusing on completing a chronology of events but that its investigation to date had not revealed any threat-related information. The ASIO information and that of the AFP were being compared, but there was no further information or analysis to warrant any change to the National Alert Level, which remained at medium. Nor did ASIO consider exercising any of its special powers (such as questioning and detention warrants): Dr Haneef was already in detention and was cooperating with police. ASIO confirmed that no adverse security assessment could be made. It was also noted that the UK National Threat Level had been lowered.

4.4.5 9 July 2007

A range of matters concerning Dr Haneef were discussed at the final NCTC meeting, which began at 10.00 am on 9 July. The stated aim of the meeting was to discuss Dr Haneef's detention and the border security concerns raised by the Prime Minister and the Attorney-General in the press on 8 July. This was the first NCTC meeting chaired by Mr Lewis (from PM&C). At meetings until this point ASIO had consistently reported that it did not have information to suggest that Dr Haneef had any involvement in or foreknowledge of the UK terrorist acts or that he was involved in planning for a terrorist attack in Australia. ASIO Officer C gave evidence to the Inquiry that, following ASIO's update report at this NCTC meeting, Mr Lewis questioned how the AFP and ASIO could have arrived at such different assessments. According to Officer C, Ms Irwin (from PM&C) replied that it was because of the different legislative tests being applied by ASIO and the AFP. Officer C offered to elaborate on the reasons for ASIO's assessment, but Mr Lewis essentially replied that further explanation was not required.

The AFP reported that Australian and UK authorities were continuing their analysis of all materials seized and that more than 250 people were deployed to the Australian joint counter-terrorism investigations in Australia and the United Kingdom. Liaison with key overseas authorities, analysis of financial records, and examination of options for continued detention were continuing. ASIO confirmed that it was examining the products seized and that, whilst its immediate priority had been the time the UK incidents occurred, this had now broadened to include pre-incident information. The meeting also discussed possible 'future options',

but they were considered to be dependent on the outcome of the AFP's application for further dead time, being heard in Brisbane Magistrates Court that day. In essence, the investigation would continue if the extension was granted, whereas 'a number of steps' would be discussed in a separate forum with relevant agencies if the extension was rejected.

Further information was provided in relation to public information, domestic threat and alert levels, Foreign Affairs travel advice, APEC, border control (having regard to the joint press conference held by the Prime Minister and the Attorney-General earlier that day and the announcement of border security initiatives), radicalisation and community engagement, and other business items such as the cooperation between Western Australia Police, the Queensland Police Service and the AFP. AFP and ASIO also provided further information about the UK incidents, noting that the UK authorities were continuing their investigations and searches were being carried out. It was also noted that it would take several weeks to review the material seized. ASIO said it was working with UK authorities, but the only identified link at present was Dr Haneef, and there was no evidence to support media speculation about a phone link from Australia.

An email circulated within the Department of Foreign Affairs and Trade and reporting on the 9 July NCTC meeting outlined some additional information provided at the meeting. It noted that if the magistrate refused the AFP's application for more dead time there were two options for action—a preventative detention order of up to 14 days or visa revocation, although this was noted to be 'the least desirable option'. The email also noted that Deputy Commissioner Lawler of the AFP had said that a preventative detention order was being prepared and that a joint ministerial submission was being prepared for the Attorney-General and the Minister for Immigration in relation to visa revocation for Dr Haneef (and Dr Asif Ali). The email recorded that it was 'likely that DIAC and AFP will recommend a revocation using the "dubious character" assessment, citing his [Dr Haneef's] links with people with known terrorist associations or involved in terrorist activity'.

4.4.6 11 July 2007

At 9.30 am on Wednesday 11 July 2007 representatives of PM&C, ASIO and the AFP began an operational update teleconference. This was about the twelfth such teleconference that had been held in relation to Dr Haneef, and DIAC was participating for the first time.

The third meeting solely of Australian government representatives was held at 3.30 pm on the same day. It involved representatives of PM&C, the AFP, ASIO, the Attorney-General's Department, the Department of Foreign Affairs and Trade, DIAC, the Australian Customs Service and other agencies. The stated aim of the meeting was 'to determine a collective approach when/if determination was made by the Brisbane Magistrate this afternoon and how the process would be managed from there'. The AFP noted at the meeting that ASIO continued to support analysis of products provided by the AFP, and there remained a

considerable amount of audio product to translate. The AFP said the focus of the UK investigations was the people of interest from the Glasgow incident. According to the AFP report, the UK investigation was concentrating on the same areas as the Australian investigators, and there were 'no issues at present that would implicate Dr Haneef or any other Australian persons of interest'. The AFP confirmed it was collaborating closely with UK authorities, who were 'very supportive of the methods and processes used by the Australian authorities'.

DIAC reported that in the event that the application for extended dead time was unsuccessful and no adverse security assessment was provided, it had prepared a brief for Minister Andrews to use s. 501(3) of Migration Act to take action to cancel Dr Haneef's visa and have him removed from the country. Information was also provided in relation to public information, including whole-of-government talking points and APEC. The record of this meeting shows that 'wider implications' were also considered: among other things, there was reference to 'the continuing issues of whether Haneef has been wrongly detained'.

The information provided at the meeting continued to highlight the UK authorities' diminishing interest in Dr Haneef. The records of the meeting also clearly demonstrate that DIAC had been developing contingency plans in order to progress a submission to the Minister for Immigration to consider whether to cancel Dr Haneef's visa and the consequences of that decision if it was taken.

4.4.7 12 July 2007

At 12.30 pm on 12 July the fourth meeting solely of Australian government representatives began. Representatives of PM&C, the AFP, ASIO, the Attorney-General's Department, the Department of Foreign Affairs and Trade, DIAC, Customs and other government departments attended. Public information—in particular, the timely distribution of talking points—was discussed. The AFP reported that Dr Haneef remained in custody under dead-time provisions and that a further extension of detention was to be sought. It said considerable progress had been made in examining recovered data, and cooperation with the UK authorities continued. It still had a large amount of material to process, but items of interest had nevertheless been identified. The AFP is reported to have said that there was as yet no 'smoking gun'. It confirmed that the outcomes of further meetings in Brisbane that day, including with the Commonwealth Director of Public Prosecutions, would guide its decisions about future strategy. Significantly, the AFP was reported to have informed the meeting that of the three contingencies planned for—charges being laid, Dr Haneef being released, and the provision of extra time—the first option was 'seen as least likely'.

ASIO reported to the meeting that it had not yet found anything to suggest that an adverse assessment against Dr Haneef was justified. It said the concern that existed related to Dr Haneef's links with the UK suspects and Dr Haneef's actions after the UK incidents had occurred. DIAC reported that it was continuing to look at Dr Haneef's visa status, was examining the case for any potential visa

violations, and was looking at the character provisions of s. 501 of the Migration Act. DIAC is noted to have said that the outcomes of the AFP and ASIO investigations, particularly any adverse security assessment, would assist it in making decisions.

The AFP's advice at this meeting on 12 July that charges against Dr Haneef were seen as 'least likely' and that 'no smoking gun' had been identified in the analysed material to date is noteworthy. Less than two days later the AFP preferred charges against Dr Haneef, which was surprising considering the consistent non-adverse assessment of Dr Haneef provided by ASIO.

4.4.8 13 and 14 July 2007

Two 'operational update' teleconferences were held on Friday 13 July, at 8.30 am and 1.00 pm. The AFP charged Dr Haneef very early on the morning of Saturday 14 July 2007, and a further teleconference was held at 10.00 am on that day. Representatives of PM&C, ASIO, the AFP and DIAC participated in these teleconferences. Apart from random telephone discussions between individuals from various departments, the Saturday teleconference appears to have been the only 'formal' recorded communication of government representatives during the weekend immediately following Dr Haneef's charging.

4.4.9 16 July 2007

An operational update teleconference was held on 16 July, beginning at 3.30 pm; it involved representatives from PM&C, ASIO, the AFP, DIAC, the Department of Foreign Affairs and Trade and the Attorney-General's Department. According to a DFAT record, this teleconference was called 'to discuss the latest developments on the case', which primarily included the granting of bail to Dr Haneef, the factors found to constitute 'exceptional circumstances' and the conditions of bail. The AFP is recorded as having consulted with the Commonwealth Director of Public Prosecutions about a review of the bail decision and saying it was preparing a Criminal Justice Stay Certificate for Dr Haneef, which 'would be issued shortly'.

DIAC is reported to have informed teleconference participants that the visas for Dr Haneef and his wife were cancelled (at 1.00 pm), although it was open to Dr Haneef's wife to apply for a visitor visa should she wish to visit her husband. DIAC had also prepared orders to have Dr Haneef placed in immigration detention, noting that until the bail surety was provided he would remain in criminal detention in Brisbane. DIAC was in contact with Queensland government authorities to determine whether Dr Haneef could remain in Queensland correctional facilities. If not, it would need to move Dr Haneef to Villawood (in Sydney), although this would necessitate the continued assistance of the Queensland authorities so that Dr Haneef could return to Brisbane for court hearings. If Dr Haneef was placed in immigration detention, the AFP would make an application to vary his bail conditions and so remove the requirement

that he report three times a week to the Southport police station. DIAC confirmed it had provided information in writing to Dr Haneef about his visa cancellation and immigration detention and was looking at whether an oral briefing to him was also needed or appropriate to ensure that he understood the information.

During the teleconference PM&C is reported to have emphasised the need to keep the AFP and criminal justice processes separate from the DIAC processes. Dr Asif Ali, the searches conducted in Perth and the charges in the UK against Sabeel Ahmed were discussed. The Department of Foreign Affairs and Trade also reportedly noted that the Indian Government had many questions about Australian processes and that the Haneef case was expected to generate negative media commentary in that country.

The records of the teleconference do not say why the Minister for Immigration proceeded to cancel Dr Haneef's visa.

4.4.10 17 to 24 July 2007

Between 17 and 24 July 2007 there were no meetings of the NCTC or select Australian government representatives. Operational update teleconferences were, however, held in the afternoon each day. With one exception, all these teleconferences involved representatives of PM&C, ASIO, the AFP, DIAC, the Department of Foreign Affairs and Trade and the Attorney-General's Department; DIAC was not involved in the teleconference on 19 July.

4.4.11 26 July 2007

Two operational update teleconferences were held on 26 July, at 10.30 am and 4.00 pm; they involved representatives of PM&C, ASIO, the AFP, DIAC, the Department of Foreign Affairs and Trade and the Attorney-General's Department. A DFAT email reporting on discussions at the morning teleconference revealed that options concerning Dr Haneef were being considered in the light of the Commonwealth Director of Public Prosecutions' review of the charges brought against him. It was also noted that DIAC was working carefully through updated AFP information that represented current knowledge, as opposed to that which had been available at the time the Minister for Immigration made his decision to cancel Dr Haneef's visa. DIAC also provided information about options 'in the event that charges were withdrawn'.

A subsequent DFAT email reporting on the afternoon teleconference revealed that the AFP had no further insight into the timing of the review by the Commonwealth Director of Public Prosecutions. DIAC had also completed a review of the AFP material and found it 'contained nothing that represented a material change and nothing that needed to be considered afresh by the Minister'. On this basis, it was noted that the Minister's cancellation decision would stand and the Federal Court challenge to it would proceed. It was also recorded that

DIAC had further considered possible scenarios should the charges be withdrawn.

4.5 Was there government interference or influence?

The stated aim of the various meetings and communications between government departments and agencies was to coordinate the actions of the departments and agencies and to keep ministers (and the Government collectively) informed about what was occurring in the Haneef matter. Developments in the case progressed rapidly and continued to attract saturation coverage in the media. For these reasons, and also because of the perceived connection with the terrorist attacks in the United Kingdom, the matter had broad relevance to the national interest and commanded the attention of government ministers and officials. The government was entitled to be involved in a process designed to keep it informed of facts and developments in the case. This enabled it to prepare for various contingencies that might emerge, to communicate consistent information to the general public, to maintain awareness across government, and to engage in the necessary planning and preparation for an appropriate response. Importantly, the information provision and planning processes were essentially the province of senior officials in the relevant government departments and agencies. Yet there is a tension between the extent to which government is entitled and expected to organise itself in such a way and when it might be perceived to go too far. 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.

I saw no evidence that political influence was brought to bear in relation to the decisions to arrest, detain and charge Dr Haneef. Those decisions were made essentially by the operational agencies that had statutory responsibility for performing those functions—namely, the Australian Federal Police and the Commonwealth Director of Public Prosecutions. The circumstances in which the decisions were made are examined in Chapter 3.

The decisions to cancel Dr Haneef's visa and to issue a Criminal Justice Stay Certificate were made by members of the Government—the Minister for Immigration and Citizenship (the Hon. Kevin Andrews MP) and the Attorney-General (the Hon. Philip Ruddock MP) respectively. From that limited perspective, there existed an element of 'government' involvement in the decisions, but I found no evidence to suggest that either decision was made in order to achieve some actual or perceived political advantage or in the interest of expediency.

I accept that Mr Andrews probably consulted his ministerial colleagues when considering whether he would proceed to cancel Dr Haneef's visa on the basis of the material the AFP had provided to him. In fact, Mr Andrews told the Inquiry

this occurred at a meeting with the Prime Minister and the Attorney-General held on the morning of Monday 16 July 2007.

Mr Howard provided to the Inquiry correspondence in which he stated:

> Dr Haneef's visa was cancelled on character grounds by the then Minister for Immigration, in exercise of his powers and discretions under the Migration Act. My position and that of my senior colleagues at that time was that the cancellation or otherwise of Dr Haneef's visa was solely within the discretion of the Minister for Immigration.
>
> The legality of the Minister's actions was attested to by the Solicitor General. His opinion was made public by the then Minister.
>
> It was my belief then, and it remains the case now, that the then Minister for Immigration, the Hon. Kevin Andrews MP, not only acted appropriately but also in the public interest. That being the case and given, also, that the original decision of the AFP to charge Dr Haneef was taken independently of the Government, I do not have anything further to add.

Mr Andrews attended the NSC meeting held later that day.

Mr Lewis (from PM&C) rejected suggestions that during the Haneef matter his department was engaged in any form of communication with the Prime Minister or his office that suggested influence was being exerted. Similarly, ASIO Officer C gave evidence that his agency's advice was accepted and that 'at no time' when communicating ASIO's non-adverse assessment of Dr Haneef was there any pressure to change that assessment.

Notwithstanding discrepancies in the evidence about the nature of the discussions that occurred at the NSC meeting on 16 July, and allegedly between Mr Andrews and Commissioner Keelty following that meeting, I found no evidence of political influence or motivation in connection with the decisions to cancel Dr Haneef's visa and issue a Criminal Justice Stay Certificate.

4.6 Were the government meetings effective?

In explaining the role of the National Counter-Terrorism Committee and the particular coordinating role of the Department of the Prime Minister and Cabinet, Mr Lewis (from PM&C) said the key words were to 'coordinate and advise'. He said that historically the states and territories had at various times expressed anxiety about the lack of information sharing by the Commonwealth when a terrorist incident (including international incidents) occurred. He was mindful that the states and territories lacked access to the benefits afforded by the Australian Intelligence Community and federal conduits of information. Mr Lewis said one of the challenges had been to ensure that the states and territories received information in a timely manner so that they could prepare

responses for their respective governments; the information also needed to be acceptable in terms of its security classification.

In Mr Lewis's view, the NCTC achieved these objectives in the Haneef matter. He also considered it 'unremarkable' that the NCTC process was used as 'the vehicle by which we monitored and shared information and provided advice to our respective governments' and described the NCTC as an effective forum and 'one of the most successful examples of Federal/State cooperation'. He considered that the departments and agencies of government involved in responding to terrorism appeared to be comfortable with the way the NCTC operated, the frequency of meetings, and the way the forum delivered the sort of information and coordination that was required. Mr Lewis maintained this assessment in the context of the Haneef matter. He believed that the actions of Department of the Prime Minister and Cabinet were 'extraordinarily unremarkable in what was a remarkable incident' and that the relevant 'mechanisms and apparatus worked very well': the problems seem to have arisen elsewhere.

In my opinion, the meetings of the NCTC and other Australian government representatives served two important functions. The first was the exchange of information among the various organisations of government at the Commonwealth and state and territory levels and keeping ministers aware of details and developments. The meetings achieved this purpose to some extent. It is fundamentally important to ensure effective communication across all levels of government, particularly between the Commonwealth and the states and territories. This is especially the case with counter-terrorism.

The second function of the government meetings (which is necessarily linked to the first) was to achieve coordination of action between the departments and agencies concerned. Such coordination related to policy, not operational matters. This distinction was apparent from the consistent reinforcement at meetings of government of the independent statutory obligations of operational departments and agencies. The meetings did serve to focus government organisations' attention on what was occurring in relation to Dr Haneef, as well as the potential for their involvement, but in my view the organisations' respective roles and actions were not effectively coordinated.

For example, the decision early on 14 July 2007 to charge Dr Haneef came as a surprise to many government representatives and ran counter to the indications and information provided at the various government meetings leading up to that decision. Further, none of the government meetings included a representative of the Commonwealth Director of Public Prosecutions, which meant that agency was not privy to the information being exchanged. It might not always be appropriate for a CDPP representative to attend a meeting of government representatives, but if they had in this case they would have at least appreciated the different assessments being conveyed by the AFP and ASIO. This has added significance in view of the fact that the CDPP was not on the distribution lists for ASIO's reports.

In addition, the sensitive nature of the material concerning Dr Haneef and the UK attacks necessarily constrained the discussions that could take place at these meetings. This could have contributed to assumptions being made or clouded the reality of what was discussed. In my view, in the investigation concerning Dr Haneef there did not exist a forum that enabled robust and open discussion with respect to the available evidence, the differences that existed, and the precise roles and functions of the relevant departments and agencies. What occurred instead was affected by misconceptions and miscommunication.

There was a collective misconception about ASIO's position, the relative importance of its material, and the differences between the respective assessments of Dr Haneef by ASIO and the AFP. The Department of Immigration and Citizenship appears to have paid little or no attention to ASIO's information. It is crucial that the divisions of government and their officers understand ASIO's role and its involvement in analysing material and supplying intelligence. I recommend in Section 3.4 that a committee of senior representatives from the Department of the Prime Minister and Cabinet, the Attorney-General's Department, the Australian Federal Police, ASIO, the Commonwealth Director of Public Prosecutions and the Department of Immigration and Citizenship be formed to carry out a thorough review of existing procedures, arrangements and guidelines in order to remove any misapprehensions about these organisations' roles and responsibilities and the significance of the information they produce. These are the major departments and agencies concerned with counter-terrorism planning and operations, and it is imperative that there be among them clarity and a common understanding.

5 Deficiencies in the legislation

This chapter deals with the fourth part of my terms of reference, which requires me to examine and report on any deficiencies in the laws relevant to the first three parts of the terms of reference. These laws are to be found mainly in the Commonwealth *Crimes Act 1914,* particularly the provisions introduced by amendment in 2004, and in the Commonwealth *Criminal Code Act 1995*.

The approach I took to this aspect of the terms of reference is to identify deficiencies that have sufficient connection to Dr Haneef's case. I did not perform a general examination of the Commonwealth's counter-terrorism legislation: I analysed those provisions that are relevant to an exposure of what I perceive to be deficiencies, or at least problem areas.

I was conscious of the need to strike a balance between civil liberties and the threat to public safety arising from terrorism. Sir Gerard Brennan, the keynote speaker at the Inquiry's public forum in Sydney on 22 September 2008, noted that such a balance must be considered. In *Alister v The Queen* (1984) 154 CLR 404, 456, Sir Gerard, then Chief Justice, said:

> It is of the essence of a free society that a balance is struck between the security that is desirable to protect society as a whole and the safeguards that are necessary to ensure individual liberty. But in the long run the safety of a democracy rests upon the common commitment of its citizens to the safeguarding of each man's liberty, and the balance must tilt that way.

Before moving on to the discussion, I acknowledge the invaluable assistance I received from the written submissions lodged with the Inquiry and the papers delivered at the public forum.

5.1 The perceived inconsistency between ss. 3W(2)(b)(i) and 23CA(2)(b) of the Crimes Act

Dr Haneef was arrested on 2 July 2007 under s. 3W(1) of the Crimes Act. Section 3W(1) provides that a 'constable', which includes an Australian Federal Police officer or a state or territory police officer, may arrest a person without a warrant for an offence under Commonwealth law, provided the requirements of the section are satisfied.

A central requirement of s. 3W(1)(a) is that at the time of arrest the constable must have a reasonable belief that the arrested person has committed or is committing an offence.[1] Among the offences for which a person may be arrested under

[1] The remaining requirements in s. 3W(1)(b) are not relevant in this instance.

s. 3W(1) are the terrorism offences in Part 5.3 of the Criminal Code. Dr Haneef was arrested for one of the offences in s. 102.7 of the Criminal Code—'Providing support to a terrorist organisation'.

Section 3W(2)(b)(i) of the Crimes Act provides that, if, before a person is charged with the offence for which the person was arrested, the investigating officer ceases to believe on reasonable grounds that the person committed the offence, the person must be released. Once again, the threshold under s. 3W(2)(b)(i) is reasonable belief.

The Inquiry received submissions raising the question of the relationship between the s. 3W arrest provisions and Part 1C of the Crimes Act.

Section 3W(2) is in Part 1AA of the Crimes Act. That part deals with search, information gathering, arrest and related powers. Section 23CA, which deals with the period of detention if a person is arrested for a terrorism offence, is in Part 1C of the Act, 'Investigation of Commonwealth offences'. Section 23CA(2) provides as follows:

> (2) The person [arrested for a terrorism offence] may be detained for the purpose of investigating either or both of the following:
>
> (a) whether the person committed the offence;
>
> (b) whether the person committed another terrorism offence that an investigating official reasonably suspects the person to have committed;
>
> but must not be detained for that purpose, or for purposes that include that purpose, after the end of the investigation period prescribed by this section.

It is immediately obvious that there is a tension between this section and s. 3W(2)(b)(i):

- As noted, s. 3W(2)(b)(i) provides that, if, before a person is charged with the offence for which the person was arrested, the investigating officer ceases to believe on reasonable grounds that the person committed the offence, the person must be released.
- Section 23CA(2)(b) provides that an arrested person may be detained for the purpose of investigating, among other things, whether the person committed a terrorism offence that an investigating police officer reasonably suspects the person to have committed but that is not the terrorism offence for which the person was arrested.

A question arises: does s. 3W(2)(b)(i) prevail over s. 23CA(2)(b) or does s. 23CA(2)(b) operate independently of s. 3W(2)(b)(i)? For example, the sequence of events might be as follows:

- A police officer reasonably believes that a person has committed terrorism offence *X* and arrests the person under s. 3W(1).

- After an investigation period the police officer in charge of the investigation no longer reasonably believes that the person committed terrorism offence *X* but reasonably suspects that the person committed terrorism offence *Y*.

Must the person be released under s. 3W(2)(b)(i)? Or can the person be detained under s. 23CA(2)(b)? There is no clear answer.

The statutory note to s. 23CB(1) states, '… The person may be detained under subsection 23CA(2) for the purpose of investigating whether the person committed a terrorism offence, whether the person was arrested for that terrorism offence or a different terrorism offence'. This note is not part of Part 1C and does not determine the perceived inconsistency between ss. 3W(2)(b)(i) and 23CA(2)(b).

Section 23A(1) of the Crimes Act provides that any law of the Commonwealth—including Part 1AA of that Act—in force immediately before the commencement of Part 1C has no effect insofar as it is inconsistent with Part 1C.

Section 3W was inserted in 1994[2], although it had earlier iterations going back to 1926. Part 1C was inserted in 1991[3], although s. 23CA was not inserted until 2004.[4] This might provide the answer, but it is far from clear.

5.2 The reasonable suspicion or belief thresholds

One element of the apparent inconsistency between ss. 3W(2)(b)(i) and 23CA(2)(b) is the different thresholds. The 'reasonable belief' threshold in s. 3W(1)(a) contrasts with the lower threshold of 'reasonable suspicion' in s. 23CA(2)(b).

The High Court has acknowledged that in the context of a criminal procedure suspicion, belief and knowledge are different states of mind[5]:

- Suspicion is a state of conjecture or surmise where proof is lacking—'I suspect but I cannot prove'[6]—although it is more than idle wondering. The facts that can reasonably ground a suspicion might be insufficient to ground a reasonable belief, but some factual basis for the suspicion must be shown.

- The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subjective matter of the belief, although that

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2 Act No. 65, 1994.
3 Act No. 59, 1991.
4 Act No. 104, 2004.
5 *George v Rockett* (1990) 170 CLR 104.
6 *Hussien v Chong Fook Kam* (1970) AC 942, 948.

is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists.

- It is a condition of the state of mind of knowledge that the subjective belief in relation to something matches the objective reality.[7] In contrast, it is immaterial to the state of mind of suspicion whether the thing that is suspected is real or not.

Thus, in a hierarchy of the different states of mind that sets the parameters for a reasonable belief in s. 3W of the Crimes Act, a reasonable belief is a meaningfully higher threshold than a reasonable suspicion, although reasonable belief is not necessarily based on the civil standard of proof on the balance of probabilities.[8]

It is clear that s. 23CA applies only to detention when (as a prior proposition) a person is arrested for a terrorism offence. Accordingly, the question of the validity of the arrest arises before the question of valid detention. This proposition led to a submission that a requirement to release a person under s. 3W(2) overrides the power of continued detention in s. 23CA(2). In a situation where there was 'reasonable suspicion' under s. 23CA(2) but no belief on reasonable grounds to justify continuation of a state of arrest under s. 3W(2), a person must be released, the submission argued, in accordance with that section. If there is a valid state of arrest, s. 23CA(2) simply creates an additional threshold to be met for the detention to be valid; if, however, the reasonable belief in the guilt of the arrested person in respect of the offence for which he or she was charged ceases, the person must be released.

If that is correct it becomes arguable that the power to detain under s. 23CA(2)(b) has no purpose. That is because in the event that the reasonable belief under s. 23CA(2)(a) was still held there would be no work for s. 23CA(2)(b) to perform, yet if the investigating officer ceased to hold the belief under ss. 23CA(2)(a) and 3W(2)(b)(i) he or she would, on the premise that s. 3W is dominant, be required to release the person. In essence, section 23CA(2)(b) would serve no purpose.

5.3 Resolving the perceived inconsistency

Of course, the threshold in either section could be changed so that the difference was removed. This would not, however, be a complete solution because (using the belief test):

- Section 3W(2)(b)(i) requires the release of an arrested person if the police no longer have a reasonable belief that the arrested person committed the offence for which the person was arrested.

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7 *Ruddock v Taylor* (2005) 221 ALR 32, [2005] HCA 48, par. 92.

8 In s. 140(1) of the *Evidence Act 1995* (Cth).

- The new section 23CA(2)(b) would permit an arrested person to be detained if the police reasonably believe that the person committed another terrorism offence.

The conflict between the two sections essentially remains.

5.3.1 A suitable threshold

The differences do, however, highlight the question of whether the arrest test should be based on suspicion or belief. The Inquiry received submissions putting both points of view.

In this regard it is of note that the threshold of a reasonable suspicion for arrest without a warrant is reflected in the legislation of most states and territories. For example, in New South Wales[9] a police officer may, without a warrant, arrest a person whom the officer suspects on reasonable grounds has committed an offence under New South Wales law.[10] There is thus a dichotomy between:

- s. 3W(1)(a) of the Crimes Act, where an Australian Federal Police officer or a New South Wales police officer must have a reasonable belief before arresting a person for a terrorism offence under Commonwealth law

  and

- the law in New South Wales, where a state police officer need only have a reasonable suspicion before arresting a person for a terrorism offence.

Finally, s. 3W of the Crimes Act contrasts with the law in the United Kingdom. Generally, s. 25 of the UK *Police and Criminal Evidence Act 1984* provides that a police officer may arrest without a warrant if two circumstances apply:

- The officer has reasonable grounds for suspecting that an offence has been committed or is being committed.

- The officer has reasonable grounds for believing that the other arrest conditions—such as safety considerations—are satisfied.

The differing laws relating to police powers of arrest[11] without a warrant for terrorism and non-terrorism offences are as follows:

- reasonable suspicion

  – United Kingdom—s. 25(1), *Police and Criminal Evidence Act 1984*

  – Australian Capital Territory—s. 212(1), *Crimes Act 1900*

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9 Section 99(2), *Law Enforcement (Powers and Responsibilities) Act 2002* (formerly s. 352 (2) of the *Crimes Act 1900*).

10 For example, the terrorism offence in s. 310J, *Crimes Act 1900*.

11 As opposed to a citizen's arrest, which is dealt with in UK legislation and in some Australian legislation.

- New South Wales—s. 99(2), *Law Enforcement (Powers and Responsibilities) Act 2002*
- Queensland—s. 365(1), *Police Powers and Responsibilities Act 2000*
- Western Australia—s. 128(2), *Criminal Investigation Act 2006*
- South Australia—s. 75, *Summary Offences Act 1953*

- reasonable belief
  - Commonwealth (but not under the *Migration Act 1958*)—s. 3W(1), *Crimes Act 1914*
  - Victoria—s. 459(a), *Crimes Act 1958*
  - Tasmania—s. 27(2), *Criminal Code Act 1924*
  - Northern Territory—s. 123(1) *Police Administration Act 1982*.

As is evident, a preponderance of jurisdictions favour a reasonable suspicion threshold.

5.3.2 The Gibbs Report

The reasonable belief threshold as a precondition for a lawful police arrest has been in the Crimes Act since 1926. More recently, it was examined by the Review Committee of Commonwealth Criminal Law, chaired by Sir Harry Gibbs. An interim report of the committee published in 1991[12] noted the following:

- There should be a police power of arrest without warrant for Commonwealth offences.[13]
- The common law power of police arrest without warrant has been superseded by the police power of arrest without warrant in the Crimes Act.[14]
- Suspicion and belief are different states of mind.[15]
- There was no practical need to lower the reasonable belief threshold in the Crimes Act to reasonable suspicion because of '… the gravity of the interference with the liberty of the subject that occurs when an arrest is made,

[12] Fifth interim report, Parliamentary Paper 194/1991, Commonwealth of Australia—the Gibbs Report.
[13] Page 16, par. 3.8.
[14] Page 12, par. 3.1. At the time of the Gibbs Report, the police power of arrest without warrant was in s. 8A of the Crimes Act, which has since become s. 3W(1) of the Act.
[15] Page 20, par. 3.15.

and [because] … the existing provisions … have operated without apparent difficulty …'[16]

But the Gibbs Report was published 10 years before the terrorist attacks in New York on 11 September 2001. It could be argued that the current threshold in s. 3W(1)(a) of the Crimes Act, insofar as it applies to terrorism offences, is too high in view of the extraordinary risk to public safety posed by a terrorist act. This risk might outweigh the obvious gravity of depriving a person of their liberty and good reputation when arrested and detained in relation to a terrorism offence.[17]

Further, just as the Gibbs Report said that the belief test in the Crimes Act had operated without apparent difficulty, the same might be said of the adoption of the common law reasonable suspicion test by the majority of the states and territories. Retention of two differing tests within the Commonwealth seems inconsistent with the move toward national standards, particularly since terrorism knows no boundaries.

5.3.3 Harmonious operation of arrest and detention powers

There is much sense in seeking national consistency, especially since there are state offences relating to terrorism where the arrest test adopted is the same as the common law. Obviously, adoption of a national test would require the agreement of all states and territories. The alternative is, of course, to retain the belief test and to amend s. 23CA(2)(b) of the Crimes Act.

Whether or not this approach was adopted, however, there would remain the need to ensure that ss. 3W(2) and 23CA(2)(b) operated harmoniously and that the apparent conflict between the two is removed. As a matter of statutory construction, the requirement under s. 3W(2) appears to be definitive, and compliance with it requires that the person be released if the investigating officer ceases to believe on reasonable grounds that the person committed the offence. But, as noted, if this view is correct s. 23CA(2)(b) has nothing to do.

Having regard to the words 'either or both' in s. 23CA(2), it is apparent that, even when the police cease to believe the person committed the offence for which he or she was arrested, there would still be a power to detain (absent s. 3W(2)) under s. 23CA(2)(b)). On the face of it, the draftsperson should be taken to have intended that, once a person was validly arrested, then, whether or not a requisite belief was maintained, the person could be detained in the circumstances set out in s. 23A(2)(b).

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16 Page 21, par. 3.18.

17 The obvious impact on civil liberties of lowering the threshold could be offset somewhat by requiring a judicial officer, when deciding whether an arrested person should be detained under Part 1C of the Crimes Act beyond the statutory minimum period for an investigation, to have a reasonable belief that further detention is necessary in accordance with the statutory criteria. I discuss this later in this chapter.

Strictly speaking, whatever view I take of the proper construction of the two sections is irrelevant. There is, however, undoubtedly a need to ensure that they work harmoniously. The least intrusive way of dealing with the situation would be to make the requirement of release in s. 3W(2) unequivocally subject to s. 23CA(2). In that way the latter section is given the effect it was probably intended to have.

Another way of achieving the purpose would be to have arrest and detention provisions specifically relating to terrorism offences in the Crimes Act. In that scenario, a power of arrest could arise when the arresting officer has a reasonable suspicion or belief (as the case may be) that the person has committed a terrorism offence[18], coupled with a provision requiring release if the officer ceases reasonably to suspect or believe that the person has committed a terrorism offence. In this way there would be no need for a suspicion or belief that the person has committed a specific terrorism offence, which could be difficult to sustain in many circumstances. Rather, the officer would be required to have a suspicion or belief that the person has committed one or more terrorism offences that were not necessarily identified at the time of arrest.

Then, if the arresting officer continued to suspect or believe that the person committed a terrorism offence—which could be different from a terrorism offence the arrested person was originally suspected or believed to have committed—there would be no requirement to release the person. The need for a release provision would arise only if the officer ceased to suspect or believe that the person committed any terrorism offence. If this approach were adopted there would be no need for an equivalent to s. 23CA(2).

A more radical alternative would be to remove the provisions relating to terrorism offences from the both Crimes Act and the Criminal Code and to legislate for a code covering the field relating to terrorism offences and criminal procedure for such offences. Although I describe this as radical, it is the approach taken in the United Kingdom, where arrest and detention and similar provisions are grouped together in s. 41 of and Schedule 8 to the *Terrorism Act 2000*.

I return to this towards the end of this chapter.

5.4 Detention under the Crimes Act

Dr Haneef was detained under Part 1C of the Crimes Act for the period 2 to 13 July 2007 before he was charged with a terrorism offence on 14 July 2007.[19] As

[18] Or is a 'terrorist'—the UK model.

[19] On being charged he was remanded in custody. He was granted bail conditionally on 16 July but did not meet his bail conditions. He was released from police custody and taken into immigration detention on 27 July.

noted, Part 1C provides for the pre-charge detention for investigation purposes of people arrested for Commonwealth offences under s. 3W(1) of the Act.[20]

Part 1C was added to the Crimes Act on 9 May 1991[21] in response to the recommendations of the Gibbs Report[22], which also recommended that there be an 'investigation period':

- during which an arrested person could be questioned in relation to the offence for which they were arrested or another Commonwealth offence they were suspected of having committed
- during which the police could carry out other investigations—for example, gathering or securing evidence
- that did not include periods when questioning or other investigation was suspended or delayed.

As soon as practicable after the end of the investigation period the arrested person was to be released or brought before a magistrate or a justice of the peace.[23] The investigation period was to exclude specified periods—which later became known as 'dead time' or 'down time'; these are the periods referred in the third point of the foregoing list.

The purpose of the Gibbs Report's recommended investigation period was to override the common law. Since 1825 the common law had been as follows:

- A person must be brought before a magistrate following arrest as soon as the arresting officer can reasonably do so.
- An arresting officer has no authority to detain the arrested person beyond that time in order to investigate the suspected offence.[24]

In *Williams v The Queen* (1986) 161 CLR 278 the High Court restated the principle that the police have no common law power to detain an arrested person for investigation, notwithstanding any detrimental effects this might have on the proper investigation of allegations of criminal conduct. Any statutory abrogation of this fundamental principle of personal liberty must be clear and must contain safeguards to compensate for the loss of liberty.

The recommended investigation period was designed to abrogate the common law in the interests of efficient law enforcement. The proposed dead-time

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20 Part 1C does not confer any power to arrest a person, and only a person arrested for a Commonwealth office may be detained under Part 1C—s. 23.

21 *Crimes (Investigation of Commonwealth Offences) Amendment Act 1991*, No. 59, 1991.

22 Second interim report, *Detention before Charge*, Parliamentary Paper 112/1989, Commonwealth of Australia. The final report was published in 1991—Parliamentary Paper 371/1991.

23 The Gibbs Report defined a 'magistrate' to include a justice of the peace.

24 *Wright v Court* (1825) 107 ER 1182.

provisions were meant to be true 'non–investigation period' times, when the questioning 'or investigation of' the arrested person was suspended or delayed.

Further, under the proposed law the arrested person could be detained during the investigation period for the purpose of investigating whether the person had committed:

- the serious offence for which they had been arrested—in accordance with the reasonable belief threshold

  or

- another serious Commonwealth offence they were suspected of having committed—a lower threshold.

The Gibbs Report annexed for consideration a Bill that included a definition of 'investigation period'. The recommendation was that for all Commonwealth offences there be an initial investigation period of four hours, during which time the arrested person could be questioned or other investigative action could take place. A 'justice' (a magistrate or a justice of the peace) could grant an extension of up to eight hours in relation to 'serious offences'[25], allowing for a maximum investigation period of 12 hours.

The recommendations in the Gibbs Report were largely adopted in the form of Part 1C of the Crimes Act, mainly as s. 23C, dealing with the period of arrest and the dead-time provisions, and s. 23D, dealing with extension of the investigation period.

The report's definition of 'investigation period' was, however, not adopted. When the dead-time provisions in s. 23C(7) were enacted, parliament adopted different wording, the effect of which was to provide that specific times were to be disregarded for the purposes of ascertaining the length of investigation periods under ss. 23C(4) and 23C(6).

Part 1C in 1991 did not distinguish between terrorism offences and other Commonwealth offences: the former did not become the subject of federal legislation until more than a decade later.

5.4.1 The 2004 Bill

The Anti-Terrorism Bill 2004 was designed to amend Part 1C by, among other things:

- removing terrorism offences from ss. 23C and 23D and providing for them in new ss. 23CA and 23DA

[25] Offences punishable by imprisonment for 12 months or more.

- allowing the total investigation period for investigations into terrorism offences to be extended under s. 23DA to 24 hours in the normal course[26], excluding dead time

- suspending or delaying questioning of a person arrested for a terrorism offence while the police make inquiries in overseas locations that are in different time zones in order to obtain information relevant to the investigation.

Paragraph 23CA(8)(m) of the Bill provided that in ascertaining the length of any period for the purpose of determining the length of the investigation period, the following time is to be disregarded:

> … any reasonable period during which the questioning of the person is reasonably suspended or delayed in order to allow the investigating official to obtain information relevant to the investigation from a place outside Australia that is in a different time zone, being a period that does not exceed the amount of the time zone difference.

If this paragraph had become law it would have imposed an absolute limit. During this category of dead time, the police could make inquiries in such overseas locations in order to obtain information relevant to:

- the terrorism offence for which the person had been arrested

  or

- another terrorism offence that the police reasonably suspect the person had committed.

For example, Brisbane is 10 hours ahead of London.[27] If a detainee is being questioned in Brisbane and the investigating police want to make inquiries in London, the maximum dead time under the original paragraph 23CA(8)(m) would have been 10 hours, without any review by a judicial officer.

The Second Reading Speech for the Bill acknowledged this feature of the original paragraph: 'Any decision to suspend or delay questioning to make overseas inquiries must be reasonable in the circumstances and must only last for a reasonable period that does not exceed the amount of the time zone difference'. It was also acknowledged in the explanatory memorandum for the Bill:

> Seeking and obtaining relevant information from overseas is complicated given that overseas authorities operate (or do not operate, as the case may be) in different time zones. It is proposed that this process should constitute 'dead time', but with two important provisos: (i) the decision to halt questioning and utilise the 'dead time' mechanism must be reasonable and

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[26] That is, where the arrested person is an adult and is not an Aboriginal person or a Torres Strait Islander.

[27] Eleven hours during daylight saving months.

> (ii) the period for which questioning is suspended or delayed must be reasonable, with the maximum allowable 'dead time' capped by the amount of the time zone difference between the place of investigation and the relevant overseas location.[28]

As with the other provisions of s. 23CA(8) in the Bill[29], there was no allowance for review by a judicial officer or an independent senior police officer. The dead-time periods were apparently understood by the legislature to be times when questioning was suspended or delayed, and for this reason it was considered there was no need for any judicial supervision or supervision by an independent senior police officer.

The idea was to identify an 'investigation period' by disregarding the dead-time periods. Further, s. 23B provided that a reference to questioning a person included questioning and the carrying out of an investigation in which the person participates. It did not include the carrying out of a forensic procedure on the person under Part 1D.

In broad terms, therefore, the provisions of ss. 23CA(8)(a) to 23CA(8)(l) all referred to times when the questioning of the person (in the wider sense) could not, practically, be carried out. If this view is correct, the right of the investigating officials to investigate generally did not cease during the dead times. The proposed s. 23CA(8)(m) in the Bill was broadly consistent with this.

5.4.2 The Senate Committee

On 31 March 2004 the Senate referred the Bill to the Legal and Constitutional Legislation Committee. The committee's consequent report, dated 11 May 2004, made the following recommendation (relevantly extracted): 'The Committee recommends that the Bill be amended such that the use of the "dead time" provision contained in proposed paragraph 23CA(8)(m) only be available upon successful application to a judicial officer as defined under the *Crimes Act 1914* …'[30]

The Committee dealt with the removal of the cap in the original paragraph 23CA(8)(m) as follows:

> The Committee believes that to balance the extended investigation period available in the Bill, the use of the 'dead time' provisions of proposed paragraph 23CA(8)(m), should require application to a judicial officer as defined under the Crimes Act …

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28 Explanatory memorandum, p. 3.

29 Section 23C(7) for non-terrorism offences is the equivalent to s. 23CA(8) for terrorism offences.

30 Recommendation 1, par. 3.47, *Inquiry into the Provisions of the Anti-Terrorism Bill 2004*, http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/anti_terrorism04/index.htm.

> The Committee notes that the Attorney-General's Department considered that such a requirement would not be unworkable. The Committee believes that if such a condition was added to the Bill, then the need for an absolute limit on the period of questioning as proposed by some submitters and witnesses would not be necessary, as each extension and use of 'dead time' would have been deemed necessary by a judicial officer.[31]

The result of these recommendations was the removal of an absolute limit corresponding to the time-zone difference in the original paragraph 23CA(8)(m) in the Bill. Dead time under that section became uncapped. The trade-off for removing the cap was to be 'judicial oversight', as it was referred to in the committee's report. The dead-time provisions in ss. 23CA(8)(a) to 23CA(8)(l) remained unaffected. Only s. 23CA(8)(m) required judicial oversight.

In the light of the terms of s. 23CA(8)(m) as enacted and of subsequent events, it could in my opinion reasonably be said that the changes proposed by the committee not only removed the capping that had been proposed consistent with the other provisions of s. 23CA(8): they also introduced into this section a dead-time provision that allowed additional time for what was essentially investigation time.

This created a situation in which an extension of investigation time under s. 23CA could, subject to judicial supervision, be allowed for 20 hours and in which s. 23CA(8)(m) also allowed additional investigation time that, subject to judicial supervision, was uncapped. The situation was obviously anomalous.

5.4.3 Section 23CB

On 1 July 2004 the Anti-Terrorism Bill 2004 became law[32], amending Part 1C of the Crimes Act. Sections 23CA, 23CB and 23DA were inserted into Part 1C in relation to terrorism offences and those offences were excluded from ss. 23C and 23D. Section 23CA(8)(m) as enacted read as follows:

> (m) any reasonable time that:
>
> (i) is a time during which the questioning of the person is reasonably suspended or delayed; and
>
> (ii) is within a period specified under section 23CB.

As a result, it was necessary to insert s. 23CB into the Crimes Act in order to provide for the making of applications under the dead-time provision in s. 23CA(8)(m). Section 23CB sets out the process for applying for a period to be specified as dead time, the decision-making process and other such matters.

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31 Pars 3.44 and 3.45.

32 No. 104, 2004.

Section 23CB is similar to s. 23DA, which governs application for an extension of the investigation period for terrorism offences, although there are some differences that are discussed later in this chapter. Section 23CB had not been in the Bill the Senate Committee considered.[33]

Part 1C now provides for the detention of people arrested for Commonwealth offences, including terrorism offences. An 'investigation period' is prescribed for all such offences. The investigation period begins when the person is arrested and ends at a time thereafter that is reasonable, having regard to all the circumstances. Subject to any extension, the investigation period does not extend beyond:

- if the person is or appears to be aged less than 18 years or is an Aboriginal person or a Torres Strait Islander—two hours after arrest
- in any other case—four hours after arrest.[34]

For serious non-terrorism offences, the investigation period can be extended for up to eight hours. In the 'normal case'[35], therefore, the maximum total investigation period is 12 hours for such offences.[36]

For terrorism offences the investigation period may be extended any number of times, but the total length of the periods of extension cannot be more than 20 hours.[37] In the normal case, therefore, the maximum total investigation period is 24 hours.

The person must not be detained for investigation purposes under s. 23CA(2) after the end of the investigation period prescribed by s. 23CA(4). The latter section provides that the investigation period for terrorism offences does not include any period specified under ss. 23CA(8)(a) to 23CA(8)(m) and is subject to any extension under s. 23DA, to a maximum of 24 hours.

5.4.4 Dead time under s. 23CA(8)

For the purpose of the time limits on the investigation period, the clock stops for the activities specified in s. 23CA(8) of the Crimes Act. As noted, this is known as 'specified time', 'down time' or 'dead time'. Normally, no questioning of a person arrested for a terrorism offence can occur during dead time. For example, the investigation period, including any extension thereof, does not include:

- the time when the arrested person is conferring with their lawyer or the time during which questioning is suspended or delayed to allow the lawyer to arrive

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33 Section 23DA had been in the Bill the Senate Committee considered.
34 Section 23C(4) for non-terrorism offences and s. 23CA(4) for terrorism offences.
35 That is, in the case of a person who appears to be an adult and who does not appear to be an Aboriginal person or a Torres Strait Islander.
36 Section 23D(5), Crimes Act.
37 Section 23DA(7), Crimes Act, added by the *Anti-Terrorism Act 2004* on 1 July 2004.

- a reasonable time when the arrested person is sleeping or recuperating in between periods of questioning.

Significantly, all the activities specified in ss. 23CA(8)(a) to 23CA(8)(l) are relatively finite in time, but those in s. 23CA(8)(m) are not. That is, the activities in ss. 23CA(8)(a) to 23CA(8)(l)—such as a reasonable period of rest in between periods of questioning—are naturally capped, whereas there is no absolute limit for s. 23CA(8)(m).[38]

A police investigation may proceed during the dead time specified under s. 23CB, but questioning of the arrested person must be suspended or delayed. An application under s. 23CB must state why an investigating police officer considers the period should be specified. Section 23CB(5)(c) provides the reasons that may be put forward in the application in support of the granting of the additional time:

- the need to gather evidence by collating and analysing information relevant to the investigation from sources other than the questioning of the person—including information obtained from within Australia or elsewhere

- the need to allow authorities in Australia or elsewhere—other than authorities in an organisation of which the investigating police officer is part—time to collect information relevant to the investigation on the request of the investigating police officer

- the fact that the investigating police officer has requested the collection of information relevant to the investigation from a place outside Australia that is in a time zone different from the time zone of the investigating police officer

- the fact that translation is necessary to allow the investigating police officer to seek information from a place outside Australia and/or to receive such information in a language that the officer can readily understand.

These provisions are to be contrasted with s. 23DA(7), which, although also dealing with an investigating period, did not require the reasons supporting the application to be set out in detail on the application form.

In summary, ss. 23CA(8)(a) to 23CA(8)(l) provide for dead-time periods that are not to be counted in the investigation period under s. 23CA(4)—including any extension under s. 23DA—for the simple reason that in practical terms the arrested person is not available for questioning during these times. Section 23CA(8)(m), in contrast, makes allowance for further investigative activity during dead time, beyond questioning the arrested person. In substance, s. 23CA(8)(m) provides for an additional period for activities associated with the investigation and labels it dead time. The only justification for this seems to be that it is

[38] Indeed, in ascertaining any amount of time for the purposes of s. 23CA, regard must be had to the number and complexity of terrorism offences or related matters being investigated—s. 23CA(5), Crimes Act.

reasonable to suspend or delay questioning until another activity associated with the investigation is concluded.

It is thus immediately apparent that dead time under s. 23CA(8)(m) is completely different in character from the other periods of dead time allowed in s. 23CA(8). It is not accurate to describe the s. 23CA(8)(m) dead time as dead time. Rather, it is additional investigation time, and the only reason questioning is suspended during that time is because the section so permits.

It follows, in my opinion, that there is a strong argument that ss. 23CA(8)(m) and 23CB should be removed from the Crimes Act: in lieu thereof all applications for extended time would be made under s. 23DA, with a reconsideration of the time limit. A consequence of this change would be the reinstatement of a cap on any extension of the investigation time.

An alternative solution would be to amend s. 23CA(8)(m) by returning it to the form it had in the Bill, so that it would be limited to time-zone differences. In this event, s. 23CA(8) would consist of dead-time provisions that are, in a sense, self-capping.

A more radical approach would be to remove all the dead-time provisions from Part 1C. I discuss this later.

5.4.5 Applications under ss. 23CB and 23DA

I now turn to the procedures set out in ss. 23CB and 23DA in order to examine their effectiveness. They create a complicated and not entirely satisfactory process for seeking an extension of the investigation period. Some of the associated problems were, in my view, exposed during Dr Haneef's detention.

Sections 23CB and 23DA require that an application to specify dead time or an application to extend the investigation period be made:

- to a magistrate
- if it cannot be made at a time when a magistrate is available, to a justice of the peace employed in a court of a state or territory or a bail justice
- if it cannot be made when any of the foregoing are available, to any justice of the peace.[39]

(For the purpose of this chapter, I refer to applications under ss. 23CB and 23DA being made to a 'judicial officer'.)

Both sections require that the judicial officer be satisfied that the arrested person or their legal representative has been given the opportunity to make

[39] Sections 23CB(4) and 23DA(2). These adjudicating officers are collectively defined in s. 23DA as a 'judicial officer'. They are not collectively defined for the purposes of s. 23CB.

representations about the application. Nothing is said, however, or necessarily implied, about an obligation on the part of the police to advise the person of their entitlement to legal representation or to provide a brief of facts on which the police will rely to the arrested person or to their legal representative to enable effective representations to be made by or on behalf of the arrested person.

Curiously, there is no express requirement in ss. 23CB and 23DA that the police inform the person under arrest that they or their lawyer may make representations to the judicial officer about the application in the event that the application is made in person before a judicial officer or in writing to a judicial officer. Instead, there is only an express requirement for the police to inform the person of those rights in the event that an application to specify dead time or to extend the investigation time is to be made by telephone, telex, fax 'or other electronic means'.[40]

It is difficult to understand why there is this distinction, although in practice it might not matter since the judicial officer would need to be satisfied that the arrested person or their legal representative had been informed of their rights before the officer could be satisfied that the person or their representative had been given the opportunity to make representations about the application. It is possible that there was a perception of a need to be more specific in the case of applications lodged by electronic means.

5.4.6 Dr Haneef's case

At this point it is germane to refer briefly to the applications made in Dr Haneef's case.

On 3 July 2007 a magistrate made two orders extending the investigation period under s. 23DA by 20 hours, which was the maximum allowable extension. Thereafter a number of applications to specify time were made under s. 23CB:

- The first application, granted on 3 July at 11.20 pm, was for 48 hours' specified time.
- The second, granted on 5 July at 7.05 pm, was for 96 hours.
- The third application, made on 9 July, sought 120 hours' specified time. The judicial officer granted 48 hours.
- The fourth application, made on 11 July, sought 72 hours. On this occasion Mr Stephen Keim SC, representing Dr Haneef, applied for the magistrate to disqualify himself. At the end of the hearing the magistrate adjourned the application hearing for 48 hours. It would appear that both parties accepted this period was dead time under s. 23CA(8)(h). Insofar as questioning and investigation were possible during this time, however, arguably that was not correct. Nevertheless, for present purposes, I treat it as dead time.

[40] Sections 23CB(4) and 23E(2).

By that stage, 240 hours of dead time had been allowed or had elapsed, which meant that the total detention period, including extended investigation time but excluding other possible dead time (when, for instance, Dr Haneef was sleeping) was 264 hours, or 11 days. Dr Haneef was, however, in custody for a slightly longer period, which is probably accounted for by the other sets of dead time to which I refer.

In my opinion, it is of the essence that legislation setting down procedures for dealing with such matters as extension of investigation periods or the specification of dead time be clear and that it detail a comprehensive set of procedures to ensure that applications can be made simply and expeditiously. When the legislation is drafted it should be borne in mind that a judicial officer might be required to consider sensitive or classified information in the absence of the person under arrest and/or their lawyer. Provision should be made to ensure that, where necessary, that type of material may be put before the judicial officer without there being an undue risk of questions of procedural fairness or natural justice arising.

In Dr Haneef's case, although Mr Keim relied primarily on an argument that the magistrate should disqualify himself on the grounds of bias, he also was proposing to raise arguments in support of the proposition that Dr Haneef had been denied procedural fairness. The statute makes no provision dealing with hearings when the arrested person is excluded and so leaves the way open for lengthy argument and possible adjournments, which would not only disrupt the process but could lead to the person under arrest having to remain in detention when they should not be in detention.

The requirement for insertion into the statute of provisions dealing with the reception of what I might call secret evidence is manifest if the process is to work in the summary way intended. I return to this after dealing with the question of a cap on dead time.

The relevant provisions as they applied to Dr Haneef—in particular, the lack of a cap on dead time—were severely criticised in numerous submissions to the Inquiry. Many of these criticisms have considerable substance.

5.4.7 A cap on dead time

Perhaps the most obvious deficiency in Part 1C of the Crimes Act is the absence of a cap on, or limit to, the amount of dead time that may be specified as a consequence of the introduction of s. 23CA(8)(m) and therefore the amount of time a person arrested for a terrorism offence can be detained in police custody.

I acknowledge that investigation of terrorism offences might generally be more difficult and complex than investigation of the crimes for which Part 1C provided before the introduction of terrorism offences in Part 5.3 of the Criminal Code in 2002, but the absence of a cap in relation to terrorism offences serves only to highlight the deficiency. In saying this, I am aware that there can be

investigations—as in Dr Haneef's case—where the event in question occurred in another country and it is difficult to secure relatively promptly important and accurate information from abroad.

Indeed, in Dr Haneef's case the investigation was greatly complicated by the need to secure information from overseas countries and by the broadening of the inquiries to cover a number of other individuals in various parts of Australia. Nevertheless, the absence of a cap and the complexity of the procedures led, in my opinion, to a greater extension of the investigation than perhaps should have been the case. It must be said, though, that attacks of this nature are difficult to anticipate; the risk to the community is great and often associated with public fear and panic such that inquiries might need to extend as widely as occurred in this case.

Despite this, I believe the concept of uncapped detention time is unacceptable to the majority of the community and involves far too great an intrusion on the liberty of citizens and non-citizens alike. In the United Kingdom, which has experienced a number of terrorist acts, there is a cap, albeit after a fairly lengthy period. There is a powerful argument in favour of remedying the situation in Australia—not only to limit the length of detention but also to ensure that an investigation is carried out expeditiously and with a sense of the need to act with urgency.

Varying time limits were suggested in submissions. Some argued for 48 hours; others argued for longer—up to 13 days. I do not have expertise to determine the most appropriate time, nor do I hold a strong view about it. Many people told the Inquiry the period of Dr Haneef's detention (11 or 12 days) was far too long. Others, including police forces, would argue that 48 hours is manifestly inadequate. In the United Kingdom the period is 28 days (subject to judicial oversight), but different considerations apply in Australia.

It was thought that judicial oversight was a sufficient substitute for a cap but—and I say this intending no disrespect to the magistrate in Dr Haneef's case, who was confronted by a novel and complex process—I do not share that view. I believe both a cap and judicial oversight are necessary. That said, I do not understand my task as requiring me to put forward a specific recommendation as to the allowable time.

If pressed—and having regard to Dr Haneef's detention in circumstances where the overseas involvement created time problems generally for the investigation—I would tend to say the cap should be no more than seven days.

5.4.8 Related problems with s. 23CA(8)

I do, however, hold the view that more is needed than the simple introduction of a cap applying to s. 23CA(8)(m) of the Crimes Act. As noted, the section is quite out of place in the dead-time provisions and is better positioned for consideration as investigation time in s. 23DA or reinstated as originally proposed in the Bill.

Related problems with s. 23CA(8)(m) were exposed to some extent in Dr Haneef's case. In the first place, the police understood they were unable to question Dr Haneef at all during dead time but were uncertain about whether they were entitled to resume questioning for an hour or two by suspending dead time—there being a number of hours of investigation time under s. 23DA remaining—and, at the end of that questioning, resume dead time. In essence, were they able to break dead time in order to question further and then resume it?

As a matter of construction, that would not seem to me to be prohibited, but there appears to have been considerable doubt in the minds of the police officers involved. I would accept that the degree of uncertainty is understandable and that the provisional view I express might be incorrect.

Another problem arose when the magistrate adjourned for 48 hours an application for dead time in order to consider Mr Keim's submission that the magistrate should disqualify himself. The period of the adjournment appears to have been treated as dead time under s. 23CA(8)(h). That might be incorrect but, if it was treated as such, would the police have been entitled to resume questioning, as well as continue investigations, during the period of the adjournment? It would seem extraordinary if they were not so entitled, yet the reason for dead time under s. 23CA(8)(m) is that questioning has been suspended or delayed and valuable time might be lost.

Another possible deficiency arising out of s. 23CA(8)(m) concerns the other parts of s. 23CA(8). If an order is made under s. 23CA(8)(m) does that cover the field? For example, if an order is made for 48 hours, does that mean the provision for dead time to allow a person to rest or recuperate under s. 23CA(8)(j) is suspended during those 48 hours, or is the time for rest and recuperation added to the dead time ordered by the judicial officer? There is much to be said for the former view, but it is by no means clear to me that that view is right.

5.4.9 Remove s. 23CA(8)?

Leaving aside other possible timing problems under s. 23CA(8), is there not a case for removing the complexity that is introduced into a police investigation by the presence of s. 23CA(8) and removing all the dead-time provisions completely? If so, a judicial officer would be required only to consider applications for an extension of the investigation period and an investigating officer would be entitled to seek extra time for reasons including the matters contained in s. 23CA(8)—with, perhaps, a longer time allowed before the cap applied.

I am not aware of any use of the dead-time provisions in s. 23C(7) for non-terrorism offences, and I understand that Dr Haneef's case was the first time the dead-time provisions in s. 23CA(8) were relied on. To say that the provisions caused the investigating officers difficulty is to put it mildly. Provisions allowing for further investigation time beyond the statutory four hours should be made as simple as possible in order to limit the risk of police being distracted from the investigative process. But not only should the provisions be as simple as possible:

they should be comprehensive and should spell out the procedures so as to minimise the risk of denying detainees procedural fairness.

5.5 Procedural fairness

The process required by ss. 23CA, 23CB and 23DA is not particularly prescriptive. That is, while the broad requirements are laid down there is, for example, no procedure set out for dealing with the situation that occurred in the Haneef case, when the police sought to rely on sensitive classified material and to be able to present that material only for the magistrate's eyes—and so prevent Dr Haneef or his lawyers seeing it.

In the fourth application for dead time the AFP appears to have sought to adapt the procedure laid down in the United Kingdom. There, however, the process is set out in the Schedule to the relevant statute; here, there is simply no provision covering procedural fairness problems and, while it could be argued that the magistrate could mould administrative procedures to deal with the situation, that is not always easy. There is, in my opinion, much to be said for the view that if the magistrate is to be able to rely on secret information there must be a statutory basis entitling him or her to do so. At the least, the summary process intended by the Act becomes very difficult when an application raises questions of procedural fairness not dealt with by the enabling statute.

There are other problems with ss. 23CB and 23DA that need attention. For example, in the Haneef case the officers in direct charge of the investigation were not familiar with the process—one officer had no training in it—and were not in possession of all the material that had come from the United Kingdom. In the very limited time they had to make the applications, they needed to rely on other officers to draft the application forms and then they had to sign them.

This was unsatisfactory, as the Inquiry has revealed. Having regard to the fundamental importance of the extended deprivation of liberty, there is a strong case for requiring the application to be made by more senior officers, trained in the process and familiar with all the facts, including those arising in sensitive material.

Thus far I have discussed Part 1C of the Crimes Act only in relation to the provisions dealing with terrorism offences, for the reasons I gave earlier. No doubt some of my observations relate equally to the non-terrorism provisions, but I am unaware of the existence of cases in which reliance has been placed on those provisions, so I am unable to say whether they have operated satisfactorily to date.

There are, in addition to the problems just noted, a number of other matters requiring attention. It is convenient here to deal with them in a summary way.

- As noted, ss. 23CB and 23DA provide that an application to extend the time of detention should be made to a judicial officer, which includes a magistrate, varying classes of justices of the peace and a bail justice. The idea underlying the nomination of these alternative judicial officers is that it could be difficult to secure the services of a magistrate in urgent circumstances. I accept the force of this reasoning, but the fact is that an application of this nature is too important and, it should be said, potentially too complex and difficult to be dealt with by someone other than an experienced judicial officer, as that expression is commonly understood. The Haneef case satisfies me that, although a magistrate should be acceptable, if there is to be any alternative it should be a judge, probably a district (county) court judge.

- There were in Dr Haneef's case many problems surrounding the making of the various applications. In the first place the officers, or the main ones, entrusted with the duty had not received training in Part 1C of the Crimes Act. Second, the procedures themselves are relatively complex and not sufficiently defined. Third, the officers who made the applications did not know all the facts and certainly were not trained in the drafting of what were, essentially, legal documents. As a consequence, they signed documents that made overly general statements, some of which were incorrect. Indeed, in my opinion, the degree of generality of the reasons expressed provided little justification for, at least, the later applications.

- The task of settling the documents and making the applications is a specialised one and should be entrusted only to a senior officer (at minimum at inspector level) or a senior lawyer in the police force who is conversant with all the facts of the case, the procedures and the drafting requirements.

- There should be express provisions requiring that an application be made in writing, that it specifies the grounds on which it is made, states the time at which it will be heard, and expressly states that the person has a right to be heard, to make representations and to have legal representation. This must be served on the person at least, say, two hours before the application is to be heard.

  Having regard to the fact that the allowable initial period is four hours it is difficult to stipulate a preferred longer period.

- Associated with the foregoing should be a requirement that, in the event that the person does not have legal representation but wishes it, the judicial officer adjourn the application to enable the person to secure that representation. This provision would require an express statement that the period of the adjournment is, in shorthand, effectively 'dead time'.

- The present provisions allow for an application to be made in a number of ways. Again, the underlying philosophy was the perceived potential difficulty of making an application in writing or in person. I am not convinced that any of those alternatives should be retained, particularly since I have a concern that the procedures applied should be, in a sense,

watertight. By that I mean the legislation should seek to avoid the likelihood of problems of procedural fairness arising. I note that in the United Kingdom it is left to the judicial authority to make an order for the manner of the hearing and the making of representations (Schedule 8 to the Terrorism Act, clause 33(4)). That Act also contains express provisions for excluding the person and their legal representatives from part of the hearing and for the judicial officer making an order in his or her discretion that material may be received from the police and not provided to the person or their legal representative if satisfied that for stipulated reasons there are reasonable grounds for believing that the information should be kept secret.

I note what I perceive to be the main problems. Most of these arise from my over-riding concern that procedural fairness should be accorded a person and, if the judicial officer considers there is a need to depart from normal processes for reasons he or she believes outweigh the need for procedural fairness, the making of an order authorising that departure. This, as I point out, is crucial to ensuring that the procedures for securing an extension of time work in a summary way and do not become a vehicle for delay in the determination of an application. In the Haneef case the magistrate was not required to deal with submissions concerning the denial of natural justice because the final application was not pressed. The AFP was, however, anxious to provide to the magistrate material that should have been kept secret from Dr Haneef, and the problems of procedural fairness were about to become relevant.

Having regard to these difficulties I conclude that it would be quite unsatisfactory for changes to be made to the existing procedures unless those changes cover the fundamental matters I raise. It would be far better that there be a review of all of that part of Part 1C that deals with terrorism offences so that a simple process can be spelt out in detail, encompassing procedural fairness provisions. Such a review should extend beyond Part 1C to consideration of the difficulties arising from the relationship between ss. 3W and 23CA.

I have referred to the UK provisions: they are much more explicit and comprehensive than the current procedures under Part 1C of the Crimes Act and in my view provide a sound starting point for consideration of the problems to which I refer.

5.5.1 A counter-terrorism code for offences and procedures

Rather than reviewing the counter-terrorism criminal procedure provisions and then leaving them in Part 1C of the Crimes Act, perhaps there is a case for adopting the wider UK approach of bringing together Commonwealth terrorism offences and the associated criminal procedures in dedicated counter-terrorism legislation, in the manner of the UK *Terrorism Act 2006*.

This is, of course, a large subject, and I do no more than mention the possibility. It might be that experience in recent terrorism trials provides a sound basis for

either retaining the status quo or developing separate terrorism-specific legislation.[41]

If this, more sweeping, reform were adopted, the criminal procedure provisions in the Crimes Act that deal with arrest and pre-charge detention would be restricted to non-terrorism offences. The codification would be in the interest of simplicity, to diminish the risk of confusion and error.

Any development of a counter-terrorism code should take account of the referral of counter-terrorism laws. Following is a brief overview of my understanding of such a referral and its relevance to reforming the current laws.

On 5 April 2002 the Commonwealth and each of the states and territories entered into the Agreement on Terrorism and Transnational Crime 2002, whereby the states would refer their counter-terrorism law-making powers to the Commonwealth. The Commonwealth had not had specific constitutional power to legislate in connection with terrorism and, in the absence of a clear referral of the states' and territories' powers[42], was obliged to rely on an uncertain patchwork of constitutional powers.

The Commonwealth and each of the states enacted referral legislation in accordance with the agreement. The following are examples:

- Queensland enacted the *Terrorism (Commonwealth Powers) Act 2002*, specifically setting out the precise counter-terrorism laws the Commonwealth could insert into the Criminal Code.

- New South Wales enacted the *Terrorism (Commonwealth Powers) Act 2002* in largely the same terms, including a provision to the effect that the referral was not permanent but would endure only while the 'war on terror' was being waged.

- The Commonwealth enacted the *Security Legislation Amendment (Terrorism) Act 2002* to insert a new Part 5.3 (Terrorism) into Chapter 5 of the Criminal Code.

The states' referral of powers did not expressly include criminal procedure provisions associated with terrorism offences—such as arrest, detention and the laying of charges. Nevertheless, the Commonwealth undoubtedly has an incidental power to make laws in relation to the procedures relevant to Commonwealth offences, including terrorism offences.

The power to amend the terrorism offences is less flexible. The referral of powers allowed the Commonwealth a limited power to amend Part 5.3 of the Criminal Code but not to the extent that an amendment would 'have a substantive effect otherwise than as part of the text of the legislation' that was referred to the Commonwealth. As a consequence, for example, if the definition of a 'terrorist

41 In particular, arising from Operation Pendennis.

42 The reference of powers was under s. 51(xxxvii) of the Australian Constitution.

act' in Part 5.3—a definition that is fundamental—was thought to be flawed and in need of substantive amendment, the concurrence of the eight state and territory jurisdictions might be required in order to redress the situation.

Overall, the development of a counter-terrorism code for offences and procedures in dedicated Commonwealth legislation would not appear to be prevented by the states' and territories' referral of counter-terrorism laws or the Commonwealth's powers to enact such a code, provided no substantive changes were made to the offence provisions.

Recommendation 3

The Inquiry recommends that the provisions of Part 1C of the *Crimes Act 1914* in relation to terrorism offences and the association of those provisions with s. 3W of the Act be reviewed in the light of the discussion in Chapter 5 and relevant provisions of the United Kingdom's *Terrorism Act 2000*.

5.5.2 The role of an independent reviewer

There has been debate about establishing in Australia a position of 'Independent Reviewer of Anti-terrorist Laws', similar to the system that currently operates in the United Kingdom. There have been calls to establish this role as an ombudsman or as an extension of the duties of the current Inspector-General of Intelligence and Security or to create a completely new and statutorily independent office to periodically review the terrorism laws to determine their effectiveness, use and relevance.

Although I do not have available to me any costs–benefit analysis to allow me to form a conclusion on whether such a position ought to be established, I do believe that the concept has merit. Considerable energy and resources have been dedicated to the introduction of the counter-terrorism laws and the mechanisms that now exist. I do not criticise such action: it was intended to better prepare the nation to respond to threats and incidents of terrorism should they arise. I do, however, support the notion of ensuring that the system is balanced between the need to endeavour to prevent terrorism and the need to protect an individual's rights and liberties. An independent reviewer could play an important part in striking this necessary balance.

Generally speaking, I consider it would be more appropriate to establish such a role as a new position, as opposed to extending the current 'intelligence' focus and specialisation of the Inspector-General of Intelligence and Security. I am mindful, though, that the volume of counter-terrorism investigations in Australia might be insufficient to support a wholly dedicated independent reviewer role and that it might be deemed necessary for the appointment to be combined with an existing independent statutory role. Such rationalisation, were it to occur, should not, however, unduly inhibit the capacity of the incumbent to act in a proactive and efficient manner.

I envisage the role to be statutorily independent, to ensure complete impartiality. The position holder could be a senior judicial officer and should be qualified to have unfettered access to all classified information. The incumbent should have unrestricted access to all agencies that have counter-terrorism remits and should have power to rigorously scrutinise all aspects of counter-terrorism legislation to ensure that the use of anti-terrorism powers is proportionate and justified. Exceptional and intrusive powers have been granted counter-terrorism agencies, but they are necessary to protect the community from those who wish to engage in acts of terrorism. It is obvious that investigating terrorism offences is increasingly complex and early intervention is crucial. I believe, though, that the scrutiny afforded by an independent reviewer would not compromise these important considerations. Rather, it is likely to increase the professionalism of both police and intelligence agencies and would provide reassurance to the Australian public. The reviewer ought to be required to present to parliament an annual report on the laws and how the agencies have used those laws.

Lord Alex Carlile of Berriew QC is the current Independent Reviewer of counter-terrorism laws in the United Kingdom. He is appointed under s. 36 of the UK *Terrorism Act 2006*, which provides that the Secretary of State must appoint a person to review the operation of the provisions of the Terrorism Act and related counter-terrorism legislation. This includes terrorism offences and the associated criminal procedure provisions. Lord Carlile's annual reviews are publicly available, as are the government's responses. His primary term of reference is to conduct reviews to ensure that 'the nation's counter-terrorism laws … delicately balance the government's need to investigate and prevent terrorism with the public's right to civil liberties'.

Recommendation 4

The Inquiry recommends that consideration be given to the appointment of an independent reviewer of Commonwealth counter-terrorism laws.

5.6 The counter-terrorism criminal offences

During the Inquiry a question arose concerning the meaning of s. 102.7 of the Criminal Code and precisely what the prosecution must establish in order to make out the offence of providing support to a terrorist organisation.[43] Section 102.7(2) reads:

> (2) A person commits an offence if:
>
> (a) the person intentionally provides to an organisation support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of ***terrorist organisation*** of this Division; and

[43] On 14 July 2007 Dr Haneef was charged under s. 102.7(2) of the Criminal Code.

(b) the organisation is a terrorist organisation; and

(c) the person is reckless as to whether the organisation is a terrorist organisation.

Penalty: Imprisonment for 15 years.

If one had regard simply to the words of s. 102.7(2) one would encounter some difficulties in the interpretation of s. 102.7(2)(a). But the position is far more complex than that, as becomes clear when one has regard to Chapter 2.2, Division 5, 'Fault elements', of the Criminal Code. Because of the complexity this division introduces into the interpretation of the section I set it out in full:

5.1 **Fault Elements**

(1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

(2) Subsection (1) does not prevent a law that creates a particular offence from specifying other elements for a physical element of that offence.

5.2 **Intention**

(1) A person has intention with respect to conduct if he or she means to engage in that conduct.

(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.

(3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

5.3 **Knowledge**

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

5.4 **Recklessness**

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

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

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

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

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

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

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

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

5.5 **Negligence**

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

(b) such a high risk that the physical element exists or will exist;

that the conduct merits criminal punishment for the offence.

5.6 **Offences that do not specify fault elements**

(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

It was submitted to the Inquiry that s. 102.7(2)(a) has two physical elements. The first is qualified by the word 'intentionally'; the second is a physical element that consists of a result and so recklessness is the fault element for that physical element.

On that basis, the elements of the charge of providing support to a terrorist organisation that the prosecution would be required to establish are as follows:

- The defendant intentionally provided resources—for example, a can of petrol—to an organisation.
- The can of petrol would help the organisation engage in preparing, planning, assisting in or fostering the doing of a terrorist act.

- The defendant was reckless as to whether the resources would help the organisation engage in preparing, planning, assisting in or fostering the doing of a terrorist act.
- The organisation was a terrorist organisation.
- The defendant was reckless as to whether the organisation was a terrorist organisation.

That is one view. There are, however, a number of difficulties with it.

The first is whether there are, in fact, two physical elements in s. 102.7(2)(a). The alternative is that the later words of s. 102.7(2)(a) simply qualify the 'support or resources' and are not a separate physical element. Understood in this way, s. 102.7(2)(a) consists of one physical element—'intentionally provides to an organisation support that would help', and so on.

If this is correct, the consequence might be that the word 'intentionally' qualifies both the giving of the support and the fact that such support would help the organisation engage in the purpose stated. In the example of the can of petrol, the two parts could be spelt out: the defendant intentionally gave to the organisation a can of petrol, intending that the can of petrol would help the organisation engage in preparing, planning, assisting in or fostering the doing of a terrorist act.

But there is an alternative argument: the essence of the physical element is the intentional giving of support that has a particular quality—that is, it 'would help the organisation in preparing …' On this view, the word 'intentionally' would qualify only the giving of the support, which, viewed objectively, would 'help the organisation engage in …'

Assuming, however, that there *are* two physical elements, is it correct to describe the later words of s. 102.7(2)(a) as a result? To so describe it is, in my mind, a distortion of English.

As s. 5.6 of the Criminal Code is drafted, however, it would seem that a physical element that does not specify a fault element must be either a result or a circumstance. If that is the correct view, recklessness would be the relevant fault element. Again, I am not convinced that, as a matter of normal English, the later words do constitute either a circumstance or a result.

If those words can be understood as either a result or a circumstance and, taken together, they constitute a physical element, then recklessness is the fault element.

Accordingly, it appears there are the following alternatives:

- Section 102.7(2)(a) consists of one physical element, and either 'intentionally' qualifies both the giving and the 'would help' parts of it or it is necessary to prove only that the giving was intentional, provided that, objectively viewed, the resource 'would help …'

- The word 'intentionally' qualifies only the provision, and it is necessary to prove that the defendant was reckless as to whether the resources would help.

It might be useful to contemplate the summing up a judge would give on the assumption that s. 102.7(2)(a) consists of two physical elements and that recklessness is the fault element of the second one and, in doing so, to incorporate the meaning of recklessness.

In such a situation the judge would need to instruct the jury that it must be satisfied on the following counts:

- The defendant intentionally provided the resource—in this example, the can of petrol—to an organisation.
- The defendant was reckless as to whether the can of petrol would help the organisation in preparing, planning, assisting in or fostering the commission of a terrorist act.
- To be satisfied as to recklessness, the jury must further be satisfied that the defendant was aware of a substantial risk that the can of petrol would help the organisation engage in, for example, fostering the commission of a terrorist act and that, having regard to circumstances known to the defendant, it was unjustifiable for the defendant to take that risk.
- The organisation was a terrorist organisation.
- The defendant was aware that there was a substantial risk that the organisation was a terrorist organisation or was to become one, and it was unjustifiable for the defendant to take that risk.

My reaction to this summing up is that it is confusing and tautologous. I say tautologous because the evidence necessary to prove the recklessness in regard to the second physical element in s. 102.7(2)(a) could, having regard to the definition of a terrorist organisation in s. 102.7(2)(a), be seen to encompass not only the defendant being reckless in knowing that the resource would help but also that the resource would help a terrorist organisation.

In the circumstances, and particularly because of the risk of judicial error, I recommend a reconsideration of the wording of the offence. This would not appear to be inhibited by the states' and territories' referral of counter-terrorism laws to the Commonwealth.

Recommendation 5

The Inquiry recommends that consideration be given to amending s. 102.7 of the *Criminal Code Act 1995* to remove the uncertainties discussed in Chapter 5.

6 Cooperation, coordination and interoperability

The effectiveness of the operational counter-terrorism framework in Australia is affected by the degree to which the relevant Commonwealth, state and territory organisations can achieve proper cooperation and coordination. This chapter discusses a number of interoperability matters that arose during the Haneef case when Australian government agencies and departments interacted, as well as in the collaborative relationship between the Australian Federal Police and the Queensland Police Service. The facts are detailed in Chapter 3 and in the report's supplementary material (Volume Two). Accordingly, they are repeated here only to the extent necessary to introduce the discussion.

This chapter is in three main sections: laying charges for terrorism offences, which looks in particular at the relationship between the Australian Federal Police and the Commonwealth Director of Public Prosecutions; visa cancellation, which looks at the interplay between the Department of Immigration and Citizenship, the AFP and ASIO; and the AFP, which focuses on the dynamics between the AFP and the Queensland Police Service.

The chapter also proposes a number of recommendations to improve the coordination of and interaction between government agencies involved in the counter-terrorism environment. As part of this discussion, a number of recommendations suggested by the various government agencies in response to an invitation by the Inquiry are considered.

6.1 Laying charges for terrorism offences

There is no test in Australia that sets out when an individual who has been arrested for an offence should be charged with that (or another) offence. Generally speaking the 'arrest test' in s. 3W of the Crimes Act suffices. If a police officer has formed a belief on reasonable grounds that a person has committed an offence and proceeding by way of summons will not be appropriate, the officer is empowered to arrest the person. Subject to any legislative power to detain the person before charging them (for example, Part 1C), the person must be charged and bailed or taken before a court for the question of bail to be determined. Usually the reasonable grounds relied on to justify the arrest will also justify the subsequent charging of the person. However, there may be real difficulties in applying such a standard after a lengthy period of detention. Although a police officer might genuinely and perhaps reasonably believe the suspect has committed the offence, after a number of days of investigation they may nonetheless have obtained in evidence or the realistic prospect that sufficient evidence will be collected, to justify charging the person.

Here Dr Haneef had been in custody for almost 12 days before the decision to charge him was made. Police sought advice from the CDPP on whether there was 'enough to charge' and were advised that there was—although this advice was flawed and a misunderstanding arose as to what it actually meant. The AFP has said that absent this advice it would not have charged Dr Haneef. The CDPP for its part says that the advice provided should not have been given and, because insufficient material was available to make an assessment under the 'reasonable prospects' test, the police should have been so advised and told the question of charging was purely a matter for them to decide.

The AFP in its submission has suggested that this would not be a particularly helpful response and that consideration should be given to introducing a lower 'threshold' type test into Australia, as exists in the United Kingdom. This allows the Crown Prosecution Service to apply a much lower test than 'reasonable prospects of obtaining a conviction' in considering whether a suspect in custody should be charged with a terrorism offence. For reasons set out below I do not consider there is either a need or a place for such a lower 'threshold' test in Australia.

Having said that, the circumstances of the Dr Haneef case do raise a number of matters that need considering. First, how did the confusion and miscommunication both within the CDPP and between it and the AFP arise? Second, have adequate steps have been taken to ensure it does not occur again in any future case. Third, what type of advice might the CDPP properly be able to provide to the AFP in circumstances where there is insufficient material to apply the 'reasonable prospects' test, whilst still providing some guidance to the AFP on how it should address the question of whether or not to charge a suspect. In order to address these matters it is necessary to briefly set out the basis on which the CDPP currently provides advice to the AFP.

6.1.1 The CDPP advisory role and the 'reasonable prospects' test

The CDPP has the statutory power to provide legal advice to the AFP on law enforcement or any matter relating to law enforcement, whether or not the advice is for the purpose of a particular investigation. The Prosecution Policy of the Commonwealth makes it clear that, although the decision to lay charges is an operational decision for the AFP, the CDPP may be consulted for advice. Pursuant to the Prosecution Policy, the CDPP will only advise that there is sufficient evidence to commence a prosecution if satisfied there are reasonable prospects of obtaining a conviction and a prosecution is in the public interest. To make this assessment, which involves a close evaluation of the admissible evidence, the CDPP usually requires a full brief of evidence to be provided. When all the evidence is not available or significant material is still outstanding it will not be possible for the CDPP to make this determination.

In the context of an ongoing investigation of a person who has been detained following arrest, it will almost invariably be the case that the CDPP is not in a position to provide considered advice as to whether the reasonable prospects test

is satisfied. The question whether to charge the person will then fall to be determined by the arresting police. The AFP submits that this leaves them in a difficult position and consideration should be given to allowing the CDPP to give advice on the sufficiency of evidence in terrorism cases by applying a lower 'threshold' test.

6.1.2 The UK position

The UK equivalent of the CDPP Prosecution Policy sets out a similar test to that applied in Australia. In most situations, before a prosecution can be instituted or continued the 'Full Code Test' must be satisfied. This requires that:

> Crown Prosecutors must be satisfied that there is enough evidence to provide a 'realistic prospect of conviction' against each defendant on each charge. They must consider what the defence case may be, and how that is likely to affect the prosecution case.

A much lower 'threshold test' applies in relation to a person who has been arrested but insufficient evidence is available to meet the full code test. In determining whether there is sufficient evidence to charge the person, a prosecutor need only be satisfied that:

> there is at least a reasonable suspicion that the suspect has committed an offence, and if there is, that it is in the public interest to charge that suspect.

As I understand the AFP submission, what is sought is the introduction of a threshold test for the prosecution of terrorism offences. Then, when faced with a situation like the Dr Haneef case, where sufficient material is not yet available to make an assessment under the reasonable prospects test, the CDPP could provide advice on the sufficiency of evidence to charge on this much lower test. However, it should immediately be noted that the threshold test is a charge test for Crown prosecutors in the UK, who are 'embedded' in the police force in a normal counter-terrorism operation. It is not a 'police charge test' and it still requires consideration of the public interest. In Australia, any decision to charge remains solely one for police to make and it is not appropriate for such an operational decision to be imposed on a prosecutor. In my view, the UK threshold test is not appropriate to the Australian situation for the following reasons:

- The UK system of Crown prosecutors working on a regular basis within a section of the police force does not apply in Australia especially where the CDPP has statutorily independent role and function to the police.
- It is not an appropriate charge test for police—reasonable suspicion is not a sufficient basis upon which to charge a person with an offence even if in some jurisdictions it can be a sufficient basis to arrest a person.
- Australian police have worked successfully without a charge test for many years.

6.1.3 Advice by the CDPP to police on charging

In my experience, police officers generally know when sufficient evidence exists to charge a person with an offence. They should not be burdened with a complex legal test.

During the course of the Inquiry the police officers with whom I spoke all indicated that they generally look for something more than mere 'reasonable belief' before proceeding to charge a person. They expressed it in terms of 'prima facie evidence', 'enough to succeed' or a similar test. In the Haneef matter I am of the view that had Mr Porritt not told police there was enough to charge they would have not proceeded to do so.

Nevertheless, I am mindful of the concerns raised by the AFP. They need something more than 'it is an operational decision for you' response in circumstances where the CDPP is approached for advice but there is not enough material available to apply the reasonable prospects test. I note that the CDPP has not suggested that this is the extent of any advice it would provide in such circumstances. As discussed in greater detail in Chapter 3, in my opinion the CDPP could assist the police with respect to complicated terrorism offences where a suspect has been held in extended detention by providing the following assistance and advice:

- Any decision to charge is an operational decision for the police to make.
- It would identify the elements of the offence being investigated:
  - whether any evidence obtained so far might satisfy any of the elements
  - what type of evidence might be obtained to remedy any insufficiency.
- If a charge is laid and subsequently the evidence provided does not satisfy the CDPP that there is a reasonable prospect of obtaining a conviction, the charge will be discontinued.
- In making the decision police should take into account anything they consider relevant in the circumstances—including their own assessment of the available evidence and any evidence they reasonably expect to obtain.
- If police do not hold a reasonable belief that the suspect has committed an offence it would not be appropriate to proceed to charge.
- Reasonable belief alone is unlikely to be sufficient—police should also consider the whether there is a realistic prospect that further evidence will be obtained to address any insufficiency.

6.1.4 What went wrong and will it happen again?

It is a matter of history that Mr Porritt told the AFP that in his opinion on the information he had been provided, there was 'enough to charge'. He did apply the reasonable prospects test. Indeed he actually formed the view that the evidence then available did not provide reasonable prospects of obtaining a conviction. The advice proffered was based on an assessment of what Mr Porritt called the 'arrest test', which he described as whether there was enough evidence for a police officer to reasonably believe that Dr Haneef had committed an offence[1].

Confusion arose because the police understood that statement 'you have enough to charge', in the absence of any further explanation, to mean precisely that - considered advice from a Commonwealth prosecutor as to the sufficiency of the evidence. Unfortunately it was not advice provided in accordance with the Prosecution Policy of the Commonwealth.

Since the Dr Haneef case a number of steps have been implemented to ensure a similar situation does not arise again. Firstly the CDPP has amended its internal 'Guidelines & direction manual' in a number of important ways as a consequence of the Dr Haneef case. A new guideline entitled 'Head Office supervision in counter-terrorism cases' now provides instruction to prosecutors on a range of matters relevant to such matters. In particular before any action is taken in a counter-terrorism case, from the provision of advice concerning appropriate charges, to settling the counsel who will appear or advise, Head Office must be consulted.

The internal guidelines have now been amended to make it clear that no advice on the sufficiency of evidence can be provided by a Commonwealth prosecutor other than in accordance with the Prosecution Policy—that is, on the reasonable prospects test.

The CDPP, the AFP and ASIO have recently signed joint Counter Terrorism Guidelines designed to operate in addition to existing MOUs. These guidelines cover such issues as the provision of advice to the AFP, early and ongoing liaison and consultation between the agencies and specific provisions dealing with disclosure of material to the CDPP before it provides advice.

Having reviewed this material I am confident that the unusual (if not unique) sequence of events that led to the CDPP to provide advice of the type that was provided here without complete material and in the absence of appropriate oversight from Head Office will not be repeated.

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[1] Strictly speaking, the 'arrest test' involves a police officer holding a reasonable belief that the suspect has committed an offence *and* that proceeding by way of summons would not be appropriate. Therefore, whilst Mr Porritt has consistently described what he was doing as applying the 'arrest test' in reality he was applying a 'reasonable belief' test.

In light of these unusual circumstances and the actions taken by the agencies to identify what went wrong and to implement safeguards to stop it happening again I do not think it necessary to make any recommendations on this topic.

6.1.5 Consent to prosecute in terrorism offences

Pursuant to s 16.1 of the Criminal Code Act, the consent of the Attorney-General is required before proceedings can be commenced for some criminal offences. Under to s. 16.1(2), a person may be arrested, charged, remanded in custody or released on bail in connection with an offence before the consent of the Attorney-General is given. The offence with which Dr Haneef was charged was such an offence because the conduct constituting the alleged offence occurred wholly in a foreign country (the United Kingdom) and he was not an Australian citizen. The charge against Dr Haneef was discontinued by the CDPP before the question of the Attorney-General's consent arose for determination.

I have considered whether it might be appropriate for there to be some additional 'consent to prosecute' requirement in counter-terrorism offences for example, the consent of the Director-General of ASIO being a condition precedent to the laying of charges in relation to any of the offences in Part 5.3 of the Criminal Code Act. Such a provision would reduce the possibility that a person would be prosecuted for a terrorism offence unless the CDPP, ASIO and the AFP where in agreement that it was appropriate to do so.

However in my view this small benefit is significantly outweighed by the problems such a proposal would create. Such a provision would effectively give ASIO, an intelligence agency, a role in the prosecution process and undermine the independence of the CDPP. One of the problems that arose in the Dr Haneef case was the absence of communication between ASIO and the CDPP. Rather than taking the extreme step of providing ASIO with a 'right of veto' in any terrorism prosecution, it is far simpler and appropriate that the relevant agencies adopt procedures to ensure that appropriate arrangements for effective communication exist and are observed before proceedings for terrorism offences are commenced. I note that in October 2008 ASIO, the CDPP and the AFP entered into joint guidelines for counter-terrorism investigations which require such communication to occur.

6.2 Visa cancellation

On the same day that Dr Haneef was granted bail, 16 July 2007, the Minister for Immigration and Citizenship, the Hon. Kevin Andrews MP, cancelled Dr Haneef's subclass 457 visa. The visa was cancelled under s. 501(3) of the *Migration Act 1958*, which provides that the Minister may cancel a visa if the Minister:

- reasonably suspects that the person does not pass the character test—s. 501(3)(b)

- is satisfied that the cancellation is in the national interest—s. 501(3)(c).

A number of grounds are then listed in s. 501(6) which specify when a person will not pass the character test, including the 'association test' in s. 501(6)(b). The association test provides that a person does not pass the character test if the person:

> … has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct.

As s. 501(3) is expressed with the word 'may' the Minister retains a discretion to cancel even if the requirements of ss. 501(3)(b) and (c) are satisfied.

In relation to Dr Haneef, and applying this legislative regime, the Minister:

- reasonably suspected that Dr Haneef did not pass the 'character test' because he was 'a person who has or has had an association with Dr Sabeel Ahmed and Dr Kafeel Ahmed'—whom he suspected 'are or have been involved in criminal conduct' namely, involvement in the London incident and the Glasgow bombings on 29 and 30 June 2007

- was satisfied that the cancellation was in the national interest having regard to the serious offence for which Dr Haneef was charged and the serious nature of the criminal conduct in which his alleged associates were suspected of having engaged.

The Minister reasonably suspected Dr Haneef did not pass the character test on the basis of the information before him which included protected information supplied by the AFP under s. 503A of the Migration Act. Having formed the necessary suspicion and also decided that cancellation would be in the national interest, the Minister then proceeded to consider a range of factors to determine whether or not to exercise his discretion to cancel the visa. Mr Andrews ultimately concluded that the seriousness of Dr Haneef's suspected conduct and, to a lesser extent, the expectations of the Australian community outweighed all other considerations and he exercised his discretion to cancel. As the Minister made his decision to cancel under s. 501(3), the rules of natural justice did not apply: s. 501(5) of the Migration Act.[2]

Significantly, in a security intelligence report dated 11 July 2007 ASIO provided an assessment that Dr Haneef did not represent a threat to security and that there were no grounds to issue an adverse security assessment. The report went on to

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[2] The privative clause in s. 474(1) of the Migration Act has application only to a decision that does not involve jurisdictional error. There is still jurisdiction for judicial review under section 75(v) of the Constitution: *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at [5].

provide quite detailed information as to why ASIO also considered Dr Haneef did not have any involvement in or foreknowledge of the incidents in the United Kingdom. ASIO's report was distributed widely in government, including to the Department of Immigration and Citizenship.

At least two important issues arise for consideration from this sequence of events:

- What information should be supplied to DIAC to put before the Minister for Immigration for the purposes of considering visa cancellation on character grounds test and applying the association test?

- What value does ASIO's security intelligence report have in connection with the visa cancellation process on character grounds and should DIAC have placed some or greater significance on the report of 11 July 2007?

6.2.1 The information to be supplied to DIAC for character purposes

In the narrative dealing with the visa cancellation there are references to the information supplied by the AFP to DIAC for the purpose of considering cancellation of Dr Haneef's visa.

What transpired was that Mr White of DIAC sought information from Federal Agent Anderson in order to put it before the Minister so that he could properly consider whether Dr Haneef's visa should be cancelled. It appears that Anderson asked White what he needed and a discussion ensued in which protected information under s. 503A of the Migration Act was discussed.

It is unnecessary to revisit the terms of the discussion but as a result Anderson prepared two documents – one public labelled 'Part A' and one protected labelled 'Part B' – and provided them to the AFP. These documents together provided detailed material which could be described as the evidentiary basis for the consideration for the visa cancellation.

While this material was capable of raising suspicions about Dr Haneef's association it was not focused, nor was it complete, entirely accurate or presented in an organised manner. In saying that I do not mean to criticise either White or Anderson for the 'association test' which was the subject of interest had been rarely used, and White (who was not a lawyer) was not familiar with the specific nature of the material required to be submitted to the Minister under this test. For his part, Anderson also was not experienced in the production of material necessary to meet the association test in the Migration Act.

The volume and nature of the evidence in the documents caused me to reflect on the kind of information which should be furnished to DIAC by the AFP, ASIO or any other relevant agency when a similar request is made in the future.

It will be recalled that the Minister exercised his power under s. 501(3) of the Migration Act which, relevantly, reads 'the Minister reasonably suspects that the person does not pass the character test'. The limb of the character test which was

used was s. 501(6)(b) – 'the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct'.

Although there is an awkwardness in the term 'reasonably suspects' which appears in both sub-sections, the test involves essentially two elements:

- Did the Minister subjectively suspect that Dr Haneef was associated, and implicated with, persons involved in criminal activity?
- Were there reasonable grounds for the suspicion?

It is the second limb which usually attracts attention. However, the test imposed by that limb has a low threshold. 'Suspicion' has been described as a state of conjecture and is not to be confused with knowledge. It may be based solely on hearsay evidence, and it matters not that the evidence turns out to be mistaken. If the information is furnished by a source known to be reliable, or a source perceived to be reliable, then it will be clearly capable of engendering a reasonable suspicion.

To take the facts of Dr Haneef's case as an example. There was information held by the AFP to the effect that:

- Dr Haneef was wanted by the UK Metropolitan Police Service for possible involvement in the bomb incidents.
- His cousin Kafeel Ahmed was alleged to have driven the car into Glasgow Airport and had been seriously injured.
- His cousin (and Kafeel's brother) Sabeel Ahmed was under arrest as a suspected terrorist implicated in the attack.
- Dr Haneef had contact with the Ahmed brothers since leaving the United Kingdom.
- Dr Haneef gave his SIM card to Sabeel before leaving London.
- Dr Haneef learned on 2 June 2007 that the SIM card was in some way implicated in the events in the UK and immediately arranged through his father-in-law to obtain a one-way air ticket to India for a flight departing at midnight on 2 June.
- Dr Haneef had been arrested for suspected involvement in the incidents and had been charged with providing a resource to a terrorist organisation.

That information transmitted to someone in the position of the Minister of Immigration was capable of giving rise to a suspicion that Dr Haneef had the requisite association and was himself implicated in some way in the suspected crimes in the United Kingdom. In considering those events it would, in my opinion, be clearly arguable that there were reasonable grounds for that suspicion

(and, I emphasise in this context the circumstances of Dr Haneef's attempted departure).

This analysis demonstrates that a statement from an AFP officer setting out those circumstances would have been sufficient to enable the Minister to act. In short, there was no need to refer to the actual evidence. Opinions expressed by AFP officers could themselves be relevant in giving rise to a reasonable suspicion. This reinforces the heavy responsibility that the AFP carries in providing an opinion and for that reason it will invariably be preferable for an opinion to be accompanied by a short statement of reasons forming the basis for it.

An appreciation of the legal requirements of the test posed in the legislation may have resulted in the Minister being furnished with focused, and relatively concise, material.

The purpose of this discussion is not to give advice but to give background to a suggestion that DIAC seek advice from an experienced lawyer as to the nature of the material which would be required when the association ground was being considered, so that its request for information would itself be focused. Such advice would need to take into account DIAC may be seeking information from authorities other than the AFP. Nevertheless, such advice should significantly simplify the process from DIAC's point of view.

In conclusion, I point out that I have deliberately refrained from formulating a formal recommendation because I am conscious of the relatively few occasions when the association test arises for consideration.

6.2.2 The significance of ASIO material for character purposes

ASIO has its genesis in the 1974 Hope Royal Commission into Intelligence and Security.[3] In the report of the Royal Commission the Commissioner wrote:

> ASIO's first requirement is that it should operate within the confines of the ASIO Act. It should not seek to enter or stray into other fields of activity. It is part of that basic requirement that the organisation should recognise that its principal function is the collection, collation and dissemination of intelligence … [4]

ASIO's functions are now specified in the *Australian Security Intelligence Organisation Act 1979.* It is generally acknowledged that since the legislative reforms to counter-terrorism at the federal level, there has been 'substantial overlap between the roles and responsibilities of ASIO and the AFP in relation to people who are suspected of involvement in terrorism.'

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3 See http://www.naa.gov.au/whats-on/records-releases/rcis.aspx.

4 *Royal Commission into Intelligence and Security,* 4th report, vol. 1, p. 210. This founding principle was acknowledged by the High Court in *Church of Scientology v Woodward* (1982) 154 CLR 25, 56.

Since ASIO was established on 1 June 1980, s. 17(1)(c) of the ASIO Act has provided that one of ASIO's functions is 'to advise Ministers and authorities of the Commonwealth in respect of matters relating to security, in so far as those matters are relevant to their functions and responsibilities.' Section 37(1) of the Act confers on ASIO the power to furnish Commonwealth agencies with 'security assessments' relevant to their functions and responsibilities. The Commonwealth Attorney-General has issued public guidelines for ASIO to observe in the performance of its functions.[5]

'Security' is a core concept to ASIO's functions, and is defined in s. 4 of the ASIO Act to mean the protection of the Commonwealth, the states and territories, and its people, from a number of specified harms, including 'politically motivated violence'. The reference to 'politically motivated violence' in the definition of security provides ASIO with a remit to operate with respect to terrorism offences. The ASIO Act was amended in 2003 by the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* No. 77, 2003. A 'terrorism offence' in this context is an offence against Part 5.3 of the Criminal Code Act. Terrorism offences in Part 5.3 depend on the notion of a 'terrorist act' which is defined in s. 101.1(1) of the Criminal Code Act to include action that is done with the intention of advancing a political, religious or ideological cause, and also the threat of such action. This amended meaning of security can be reflected in:

- intelligence reports provided under s. 17(1) of the ASIO Act
- security assessments provided under s. 37(1) of the ASIO Act.

Section 35(1) of the ASIO Act defines a 'security assessment' for the purposes of s. 37(1) to mean:

> … a statement in writing furnished by the Organisation to a Commonwealth agency expressing any recommendation, opinion or advice on, or otherwise referring to, the question whether it would be consistent with the requirements of security for prescribed administrative action to be taken in respect of a person or the question whether the requirements of security make it necessary or desirable for prescribed administrative action to be taken in respect of a person, and includes any qualification or comment expressed in connection with any such recommendation, opinion or advice, being a qualification or comment that relates or that could relate to that question.

The 'prescribed administrative action' referred to in this definition is also defined by s. 35(1) of the Act to include 'the exercise of any power, or the performance of any function, in relation to a person under the *Migration Act 1958* or the regulations under that Act.'

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[5] see http://www.asio.gov.au/About/content/AttorneyAccountability.aspx.

This analysis demonstrates to me that at all material times, ASIO had the power to provide to DIAC, and in turn the Minister for Immigration and Citizenship, a s. 37(1) security assessment for the purposes of the character test.

Section 37(2) provides that if ASIO produces an adverse security assessment of a visa holder under s. 37(1), then it must provide DIAC with a statement of the grounds for ASIO's opinion containing all information that ASIO relied on in making the adverse assessment. If the security assessment is a non-adverse assessment, ASIO may simply provide the assessment itself. However, it retains discretion to supplement that assessment with a statement of the grounds for ASIO's opinion containing all information that ASIO relied on in making the non-adverse assessment.

ASIO's non-adverse assessment of Dr Haneef

On 11 July 2007, ASIO issued its second security intelligence report on Dr Haneef. The report was issued under s. 17(1) of the ASIO Act and provided a non-adverse assessment of Dr Haneef together with a statement of the grounds and the information relied on in making that assessment. The report was fundamentally at odds with the conclusion drawn by the Minister when he cancelled Dr Haneef's visa on 16 July 2007. Included in ASIO's report was a statement that there was no information that Dr Haneef had foreknowledge of, or any involvement in, the activities of the United Kingdom attacks.

ASIO passed its report to the (then Acting) Secretary of DIAC (Mr Bob Correll) on 11 July 2007 who, after noting it was not an adverse security assessment, effectively disregarded it. Mr Correll did not forward the security intelligence report to the Minister for Immigration and Citizenship as part of the issues paper used for the purposes of considering visa cancellation under the character test. The Minister was informed that he should only take into account what was in the issues paper. While the Minister was aware of the general nature of ASIO's views he did not know of the specific detail of the security intelligence report.

Both the Acting Secretary and the Minister told the Inquiry that ASIO's report would probably not have made a difference to the cancellation of Dr Haneef's visa on 16 July 2007 if the report had been considered, because the report was not of great significance.

Further, ASIO's 11 July report was widely distributed across government and had been seen by many officials and representatives on the National Counter-Terrorism Committee. Those members appeared to adopt a similar view of the report as the then Acting Secretary of DIAC and the Minister with respect to the character test. The view was founded on the belief that 'the AFP and ASIO had different roles and remits'.

It is my view that:

- The security intelligence report of 11 July 2007 from Australia's premier intelligence agency was directly relevant to the character test and very

important for the Minister to consider, particularly in the light of the disorganised information provided by the AFP.

- The Minister and Acting Secretary
  - effectively disregarded the report because of a misconception of the roles of the AFP and ASIO
  - did not appear to understand that the AFP and ASIO, while having overlapping roles, shared and analysed the same or largely the same information (indeed, ASIO had provided intelligence analysis to the AFP).

Having regard to the reasoning employed by the Minister in applying the character test, ASIO's report completely undermined the notion of Dr Haneef's requisite association with the attacks in the United Kingdom. Although ASIO's opinion in the security intelligence report was expressed to be 'at this stage', this alone provided no reason to disregard the report or to severely devalue its significance.

Having regard to the approach taken by DIAC and the NCTC members to ASIO's report, it is necessary to examine the position and suggest steps to ensure all relevant agencies understand the effect of ASIO's intelligence reports and ASIO's capacity to issue security assessments under s. 37(1) of the ASIO Act. This is particularly important given that in a submission to the Inquiry DIAC maintained its apparent misconception of ASIO's powers.

The use of ASIO's opinion

As noted, for the purpose of security assessments issued under s. 37(1) of the ASIO Act, 'prescribed administrative action' is defined in s. 35(1), and one limb of that definition directs attention to the Migration Act. Where the prescribed administrative action recommended by ASIO in an adverse security assessment is 'visa cancellation', s. 116 of the Migration Act relevantly provides that if the Minister is satisfied of specified conditions he or she may cancel the visa unless 'prescribed circumstances' exist. Migration Regulation 2.43 provides that where ASIO has assessed that a visa holder is 'directly or indirectly a risk to security', then the visa must be cancelled. The Minister's discretion that would otherwise arise under s. 116(1) of the Migration Act is converted into a duty by s. 116(3).

ASIO's security intelligence report of 11 July was patently not an adverse assessment of Dr Haneef's relevance to security. Accordingly, his visa could not be cancelled on a mandatory basis under s. 116(3) of the Migration Act. Once that avenue of possible visa cancellation was closed, the focus of DIAC's attention shifted to possible visa cancellation under the character test in s. 501(3) of the Migration Act.

ASIO informed the Inquiry that the 11 July security intelligence report was compiled in accordance with ss. 17 and 18 of the ASIO Act, not s. 37(1) of the ASIO Act for the character test under the Migration Act. Having expressed its

assessment of Dr Haneef's relevance to security in the 11 July report, even if ASIO had repeated its opinion in the form of a s. 37(1) security assessment it would have contained a similar message.

ASIO advised the Inquiry that its security intelligence report of 11 July could have been used by DIAC for the purpose of the character test in s. 501(3) of the Migration Act. It seems to me that there was no relevant distinction between ASIO expressing its non-adverse opinion of Dr Haneef in a s. 17(1) security intelligence report or in a s. 37(1) assessment report. ASIO stated that non-adverse security assessments under s. 37(1) can be supplied to DIAC for the purpose of the character test without any prior s. 17(1) intelligence report having been issued. Accordingly, ASIO could initiate a non-adverse s. 37(1) security assessment and supply it to DIAC. ASIO's advice would only be concerned with whether it would be consistent with the requirements of security for prescribed administrative action to be taken. The advice would not concern any other issues that might be relevant to DIAC as to whether the prescribed administrative action should be taken.

Alternatively, DIAC could seek ASIO's opinion on whether it would be consistent with the requirements of security for prescribed administrative action to be taken (such as visa cancellation under the character test). There is no legislative impediment to ASIO providing its opinion in the form of a s. 37(1) security assessment, which may be a non-adverse opinion, or an adverse or qualified assessment.

ASIO clarified its position to the Inquiry on this issue. It specified that if it was of the opinion that a visa-holder was not a risk to security (such that it could not issue an adverse security assessment for the purposes of s. 116 of the Migration Act), ASIO might still have an on-going role and may provide a non-adverse security assessment to assist DIAC with administering the character test. In such a situation, ASIO would not be required to supplement the assessment with the grounds referred to in s. 37(2) of the ASIO Act. However, ASIO would consider on a case-by-case basis supplementing a non-adverse security intelligence assessment made under s. 37(1) with a statement of the grounds, containing all information that had been relied upon by ASIO in making the assessment, other than information specifically excluded under s. 37(2)(a)—which refers to information that in the opinion of the Director-General would be contrary to the requirements of security.

DIAC's view of ASIO's opinion

As noted, ASIO's second security intelligence report concerning Dr Haneef was forwarded to DIAC on 11 July 2007. It is unlikely that a separate non-adverse s. 37(1) security assessment report by ASIO to DIAC would have made any difference to the Minister's decision to cancel Dr Haneef's visa on 16 July 2007. At all material times, DIAC was (and remains) of the view that ASIO's report could not be characterised or used as a security assessment under s. 37(1) of the ASIO Act for the purpose of the character test. That is, once ASIO assessed that a person of interest is not a threat to security, there is no scope for ASIO to express

that opinion for DIAC in a security assessment under s. 37(1). I believe DIAC's view that the report could not be treated as a security assessment under s. 37(1) is erroneously premised on the belief that such an assessment is necessarily a 'qualified' or 'adverse' security assessment in s. 37(2) of the ASIO Act.

ASIO's understanding of a security assessment under s. 37(1) is quite different. ASIO takes the view that there are two types of security assessment that can be issued under s. 37(1):

- an adverse security assessment
- a non-adverse security assessment (which ASIO calls a 'security assessment' to distinguish it from an adverse security assessment).

DIAC's view in this regard may have contributed to DIAC and the Minister severely underestimating the value of ASIO's non-adverse assessment of Dr Haneef for the purposes of the character test in s. 501(3) of the Migration Act. DIAC characterised the report as 'merely an intelligence report', and that a security assessment under s. 37(1) must be 'by definition negative in some way'. The impression conveyed by this view is that if ASIO does not provide an adverse assessment for the purposes of s. 116 of the Migration Act (which would precipitate an automatic cancellation of a visa) then ASIO's assessment of the visa holder has little consequence to DIAC. By adopting such an approach, DIAC is effectively foreclosing an opportunity to acquire valuable information for the purposes of the character test. The opportunity arises when ASIO has conducted an investigation of a person of interest (whether a sole investigation by ASIO or a parallel investigation with the AFP), and ASIO has not provided an adverse assessment for the purposes of s. 116 of the Migration Act.

Where there has been no automatic visa cancellation as a result of ASIO choosing not to issue an adverse security assessment, ASIO may still make a vital contribution. ASIO is Australia's premier intelligence agency and has superior credentials with respect to security intelligence. The AFP's essential function is law enforcement, not intelligence.

In the Haneef matter, I accept that DIAC and the Minister were not to know that ASIO had made the correct assessment of Dr Haneef, but if DIAC had appreciated the importance of the security intelligence report of 11 July 2007 one would expect that DIAC would have asked questions of ASIO and the AFP, and then discovered that their assessments of Dr Haneef were diametrically opposed. The Minister may also have found out that the AFP's information was, in part, inaccurate or that the respective assessments were largely based on substantially the same material. In that situation, the Minister may have deferred

6.2.3 Possible proposals for reform

One proposal for resolving this apparent dichotomy was to amend the *Migration Act 1958* (and possibly also the *Passports Act 2005*) to provide that, before taking 'prescribed administrative action' as defined in s. 35 of the ASIO Act in relation to a person, the Minister for Immigration and Citizenship must, if he or she intends to take into account information relating to a person's suspected involvement in a terrorist act or suspected association with another person who is suspected of involvement in a terrorist act:

> (a) seek advice from ASIO as to the person's relevance to security before taking the prescribed administrative action; and
>
> (b) take ASIO's advice into consideration in deciding whether or not to take the prescribed administrative action.

However, the proposal might impose 'an unnecessary and burdensome requirement' as it necessitates a statutory obligation. This may be difficult administratively for DIAC especially given that visa cancellations on the basis of the 'association test' are relatively uncommon.

Instead of proposing legislative amendments, I recommend that executive representatives from DIAC and ASIO meet to address the following:

- how best to establish a clear and mutual understanding between DIAC and ASIO of the respective legislative requirements relevant to the visa cancellation process.
- achieve consensus on how DIAC can be best assisted by ASIO in the provision of information, assessments, advice, opinions and assistance in relation to visa cancellation particularly on the basis of the character test and the association test.
- review arrangements to ensure that material produced by ASIO is given appropriate significance and the purposes for which it can be appropriately used are understood.

A minor but relevant administrative matter is that the Minister for Immigration and Citizenship ought to be independently included on the distribution list for security intelligence reports produced by ASIO. There is no impediment to the Minister being added to the list.

Recommendation 6

The Inquiry recommends that the Minister for Immigration and Citizenship be added to the distribution list for security intelligence reports produced by ASIO, in addition to senior departmental officers.

6.3 The AFP's further five recommendations

I now turn to consider together the AFP's other submission containing a further five specific recommendations:

1 That the National Counter-Terrorism Committee develop procedures for the National Counter-Terrorism Handbook and the National Counter-Terrorism Plan specifying operational protocols regarding a major incident room structure to be implemented for counter-terrorist investigations.

2 That the NCTC facilitate exercises that specifically address the problems involved in investigating and prosecuting terrorism offenders in Australia.

3 That urgent development of a national case management system for police investigations be undertaken.

4 That a review of Joint Counter-Terrorism Team arrangements be conducted with a view to establishing nationally consistent arrangements under the NCTC governance framework.

5 That the NCTC develop procedures for the National Counter-Terrorism Handbook and the National Counter-Terrorism Plan specifying operational protocols regarding an investigational structure to be implemented for counter-terrorism investigations.

In dealing with these recommendations I am mindful that I am not an expert in counter-terrorism investigations or intelligence-gathering but regard it as important to respond positively, based on the information gleaned in this Inquiry about problems encountered in the investigation pertaining to Dr Haneef's case.

6.3.1 The five recommendations considered together

Detective Superintendent Gayle Hogan of the Queensland Police Service gave a statement to the Inquiry in which she discussed some interoperability issues that arose. In particular she identified the AFP's major incident room as a source of some difficulties. Hogan said it was originally run specifically for processing information rather than as the central hub of the investigation. According to Superintendent Hogan, this was contrary to QPS procedures and she believed that this impacted negatively on information and task management due to the volume of information. By arrangement with Commander Jabbour she set in place some procedures to improve the workings of the major incident room.

Hogan also identified issues with intelligence processes and structures and arranged for Detective Superintendent Shepherd to attend and discuss these issues with Commander Jabbour. As a result Jabbour approved the establishment of a joint intelligence group and joint analysis group consistent with the National Counter-Terrorism Plan developed by the National Counter Terrorism

Committee. She said that this was a model that Commander Jabbour and the QPS had operated under previously and strongly advocated. However this structure was not, in her view, implemented to the standard required by Commander Jabbour or to the satisfaction of the QPS.

Superintendent Hogan said that under the QPS investigation model their Criminal Investigation Centre performs the role of the major incident room. For the QPS, that role helps in tactical decision-making and strategy—it is the 'engine room' where everything goes in and tasks are then allocated. People do not undertake a task elsewhere; it comes into the MIR, it is prioritised and 'tasked out'. According to Hogan, however, in the Haneef investigation the MIR was originally utilised as an administrative centre where lots of different people could make up taskings, send them out and then they just got dumped back into the MIR. As the evidentiary material revealed, there was a great deal of duplication and I think it could fairly be said that amongst people working in the MIR there was a general lack of direction. During his interview, Commander Jabbour recognised there were problems but said that from about 6 July onwards there was considerable improvement in the MIR and by the end of the investigation it worked quite efficiently.

The Inquiry has found that many documents relied on in the Haneef matter—for instance, in the detention applications, the brief to the Commonwealth Director of Public Prosecutions and the documents furnished to the Department of Immigration and Citizenship—contained factual errors or omitted important relevant information. These errors continued in many instances right up until the charging of Dr Haneef. Some arose from the information which had been sent from the United Kingdom which turned out not to be accurate. One example was whether Haneef had given Sabeel a SIM card or both a handset and SIM card. The AFP were finally advised later on 13 July that it was only a SIM card which had been handed over (I put to one side the statements in the various records of interview). Others however were of a different nature and seemed to flow from the absence of an accurate updated log of information. Some statements that were recorded in the early days were not updated so that the mistaken information in them continued uncorrected until 16 July when earlier analysis of the written material would have shown that the information was wrong. This may have been because of the absence of a proper system for updating material relating to Dr Haneef or the failure to properly analyse material and correct information when it was found to be inaccurate.

Superintendent Hogan also expressed the opinion that the case management system used by QPS was superior to the PROMIS system used by the AFP noting that the two systems were not compatible. The differences in the systems necessitated officers in QPS being trained to use the PROMIS system which was in many senses a 'band-aid solution'. As Superintendent Hogan said, 'The operability between systems nationally is still a nightmare'.

Another problem related to the security classification of the police officers. Many of the AFP officers did not hold security classifications that enabled them to see

some of the material that came into the investigation centre, and probably even fewer of the QPS officers had them. As a consequence, they did not become aware of some of the important documents. Further, and perhaps more importantly, some information sent from the United Kingdom was regarded by Commander Jabbour as highly sensitive and he restricted access to that information to a few people. For instance, Detective Sergeant Simms was required to prepare or check detention period applications that required the provision of accurate and complete information. He was not, however aware of some relevant material, the Kafeel email being a case in point. It is true that the information there contained may not have helped in those applications but it might be that there is a good argument that the actual investigating officer preparing such applications should know all of the information that is available.

Another matter of concern was the failure to properly analyse the records of the interview with Dr Haneef in a timely and organised manner. The first record of interview conducted on 3 July was not transcribed until 6 July, and the transcript was checked much later. There does not seem to have been any analysis of that interview before charging. Dr Haneef answered virtually every question asked and provided detailed answers to some questions, including in relation to where he had resided in the UK. He also categorically stated that he had not left a mobile phone handset with Sabeel Ahmed, only a SIM card. In particular there seemed to be no process of checking what Dr Haneef had said against what Sabeel Ahmed had told the UK police. Such a process would have disclosed that both Dr Haneef and Sabeel denied having resided together and both said Dr Haneef had only left a SIM card behind. No doubt, investigating police officers are entitled to be suspicious of assertions made during an interview but they cannot be dismissed or ignored simply because they are not incriminating. I am not suggesting the police deliberately ignored Dr Haneef's answers but clearly very little analysis occurred in comparing his answers with the other material that had emerged.

I also wish to say something about the role of the senior investigating officer. Commander Jabbour said he performed this role in the following way: 'I drill down into the weeds, into a lot of detail, but that is typically not what an SIO does. They are typically more high level, strategic, looking at the direction of the investigation in that sense'.

By drilling 'down into the weeds', I believe Commander Jabbour became too close to the Haneef case and lost both perspective and a degree of objectivity. Jabbour presented as a committed, professional and competent individual and was held in high esteem by the officers he led, but his failure to maintain a more 'high level and strategic' perspective hampered his effectiveness. The words he used to describe his role possibly explain why, in my opinion, this occurred. I mention this because I hold the view that an important part of the fifth recommendation set out above concerns the role of the senior investigating officer in a counter-terrorism investigation.

Whilst in this section I have not carried out a detailed analysis of the evidence, I believe it is appropriate to make the recommendations that the AFP seek. I am, however, slightly hesitant about doing so because most of these issues have not only been identified by the AFP and the QPS but steps have been taken to address them. It is important that I detail these actions before finally making an observation in relation to the recommendations.

In November 2006, the AFP hosted a conference with state and territory law enforcement counterparts and members of the intelligence community to discuss issues emanating from counter-terrorism operational experiences. The outcomes of the conference were raised at the December 2006 operational management meeting of police deputy commissioners. Agreement was reached that investigations should be included as a capability in the National Counter-Terrorism Committee capability regime as they are fundamental in combating terrorism. In November 2007 the NCTC approved the establishment of the Investigations Support Capability Coordination Sub-Committee to progress the development of capabilities to support counter-terrorism investigations as follows:

- provide national counter-terrorism investigative police coordination on behalf of the NCTC to prepare for, prevent and respond to terrorism in the current and future counter-terrorism operational environment
- identify gaps in investigation support capability and capacity, including impediments into interoperability
- in consultation with other NCTC sub-committees, develop strategies to address gaps and impediments in order to promote sustained investigative capacity
- identify training requirements to enhance counter-terrorism investigations and related capabilities.

On 30 January 2008 the AFP held an internal debrief in relation to the Haneef investigation at which representatives from the QPS and Detective Superintendent John Prunty of the United Kingdom Metropolitan Police Service were present. On 1 February a formal joint debrief of the Haneef investigation by the AFP and QPS was held. Those meetings identified three broad areas that needed addressing, namely:

- management and coordination structures
- investigational structure
- information and task management, including interoperability of systems.

The debrief recommended the establishment of a working group to develop a generic and nationally consistent investigative teams structure, incorporating a major incident room and intelligence cell for use in future counter-terrorism investigations. It seems that the recommendation was accepted and it was noted

that the outcomes identified would be addressed through the working group and the Investigations Support Capability Coordination Sub-Committee.

On 28 and 29 February 2008, the ISCCSC met in Brisbane and considered critical issues that arose during recent counter-terrorism operations. The AFP and QPS highlighted the issues arising from Operation Rain as follows:

- the need for national consistency in the role and function of major incident rooms and investigational structures
- the need for a national case management system
- the absence of interoperability between existing law enforcement information technology systems.

Five working groups were formed to consider the identified gaps and develop strategies to address:

- Investigations and Investigations Support
- Surveillance
- Exhibits, Evidence Gathering and Forensic Support
- Governance
- Case Management.

Superintendent Hogan was appointed as chair of the investigations and investigations support working group. She said the aim of the working group is to ensure a pool of state police senior investigating officers and investigators trained to a national model are available to respond in the event of a national or multi jurisdictional investigation. The intention is that wherever an investigation arises, a team of 40-50 investigators, with an understanding of the national investigation model will be able to respond with the AFP on a national basis.

Superintendent Hogan also referred to the work of the case management working group which is endeavouring to identify an information management system that all police forces can use during a joint operation. It is intended that the system will be capable of being quarantined from other police systems so only those involved in the investigation can gain access, but equally so all those involved actually do get access.

The work of these groups is continuing and I am not aware that any of them have yet made definitive recommendations. The AFP has developed a draft revised investigational structure it intends to submit to the Investigations Support Capability Coordination Sub-Committee to assist in the development of a nationally approved model.

I mention these matters in order to acknowledge that considerable effort at the national level is being directed into developing models, systems and procedures that can be applied in everywhere and understood by the AFP as well as the police forces of the states and territories. They do, however, raise the question whether there is any particular benefit in this Inquiry making the recommendations sought. I have no doubt that this ongoing work is beneficial and indeed necessary to avoid a repetition of many of the problems encountered in the Haneef matter. Possibly the most important areas are the development of a national major incident room model and a national case management system.

Given what I have learnt during the course of this Inquiry, I support the initiatives that have begun and endorse the current process of implementation. Accordingly, I make the recommendations proposed.

Recommendation 7

The Inquiry recommends that the National Counter-Terrorism Committee develop for the *National Counter-Terrorism Handbook* and the National Counter-Terrorism Plan procedures specifying operational protocols for an investigational structure and a Major Incident Room structure to be implemented for counter-terrorism investigations.

Recommendation 8

The Inquiry recommends that a review of Joint Counter Terrorism Team arrangements be conducted with a view to establishing nationally consistent arrangements under the National Counter-Terrorism Committee governance framework.

Recommendation 9

The Inquiry recommends that a national case management system for major police investigations be developed and adopted as a matter of urgency.

Recommendation 10

The Inquiry recommends that the National Counter-Terrorism Committee facilitate exercises that specifically respond to the problems involved in investigating and prosecuting terrorist offenders in Australia.

I turn now to deal with other individual recommendations that were sought.

6.3.2 A Permanent Joint Intelligence Group

The AFP also proposed a recommendation that a centrally located Permanent Joint Intelligence Group be established to support counter-terrorism investigations.

In support of this submission the AFP stated that the Operation Rain debrief noted that, while the combined intelligence cell provided a high level of support to the investigation, the joint intelligence group and joint analysis group structures would have provided more efficient intelligence support arrangements. Furthermore, the submission argues, a centrally located permanent joint intelligence group involving the co-location of representatives from all state, territory and Commonwealth law enforcement services and agencies from the Australian Intelligence community would significantly enhance interoperability and information sharing.

The stated intention of this recommendation was not for the permanent joint intelligence group to replace the national counter-terrorist joint intelligence group and joint analysis group but rather complement the existing regional intelligence structure and enhance information sharing. In major counter-terrorism investigations, a designated liaison officer could deploy to the major incident room in the affected jurisdiction to act as a conduit between the permanent joint intelligence group and the investigation team.

While the idea seems to me to be a good one I believe that, in the absence of a detailed analysis of the costs and benefits and the likelihood of cooperation between the states and the Commonwealth, I am not armed with sufficient information to make the recommendation.

6.3.3 Nationally consistent training

The next recommendation sought that all counter-terrorism investigators receive nationally consistent training in relation to:

- investigation of terrorism offences
- advanced interviewing skills
- investigator program addressing Commonwealth legislation
- Islamic cultural awareness.

In support of this recommendation it was pointed out that during Operation Rain state police officers had a limited understanding of Commonwealth legislation applicable to counter-terrorism investigations. Particular attention was directed to Part 1C of the Crimes Act. I note that Part 1C also presented difficulties for AFP officers and, as I say in Chapter 5, ought to be amended or replaced by a far simpler procedure.

The submission goes on to say:

> A review of the records of interview between police and persons of interest, conducted during the investigation, identified areas for improvement. These included occasions when non-targeted questioning of suspects resulted in unclear responses from which it was impossible to draw conclusions. Furthermore, on occasions members did not appear to listen to answers, thereby failing to appropriately respond and fully explore all avenues to further questions.

The submission then points out that the AFP, in conjunction with Monash University and the UK Metropolitan Police Service Counter-Terrorism Command have developed an Advanced Interview Skills Program, incorporating analytical and cognitive interviewing techniques. As I read the submission it conveys a suggestion that it would be desirable for all officers engaged in counter-terrorism to undertake at least the Monash University training course.

Again, the idea of nationally instituted training standards covering interviews and allied skills and dealing with relevant procedural rules, such as part 1C, would be beneficial. But I am hesitant to make a recommendation in relation to a national scheme of this nature when I have heard no submissions from state jurisdictions and am not aware of the merits or otherwise of the Monash University program as compared to relevant state programs. Nonetheless, I anticipate that consideration of this recommendation should appropriately proceed under the auspices of the Investigations Support Capability Coordination Sub-Committee.

6.3.4 Judicial officers

The AFP submitted that I make a recommendation to the effect that a national group of judicial officers be specifically trained and equipped to hear applications arising under Commonwealth counter-terrorism legislation

While I am familiar with education programs conducted by the New South Wales Judicial Commission and the Australian Institute of Judicial Administration, there are other programs with which I am not familiar, such as the National Judicial Conference of Australia and the Judicial College of Victoria.

Speaking generally, these bodies conduct education courses for judges and magistrates and also produce court manuals and support conferences on a regular basis. I believe that, having regard to the work done by these bodies, a sensible response to the AFP proposal is to recommend that the AFP raise the question with these educational organisations to see whether a segment on Commonwealth counter-terrorism legislation could be included in manuals and, perhaps, also in conferences.

I should add that the subject is relatively narrow in the context of the work carried out by judicial officers and it may be that inclusion in a manual is the more appropriate response.

6.3.5 A prohibition on publishing transcripts of interview

The AFP submitted that I should recommend 'that the *Crimes Act 1914* be amended to restrict the use of transcripts of interview'.

During the Operation Rain investigation, police provided Dr Haneef's legal representatives with transcripts of the interviews conducted with Dr Haneef. On 22 August 2007 Dr Haneef's legal representatives released the transcript of the second police interview to the media.

The AFP states that the consequence of this release was that the public, through the media, were invited to review the transcripts and make their own judgement as to Dr Haneef's involvement in the terrorism incidents. As the transcripts were lengthy, those views were likely to be formed by those portions of the transcripts that were extracted by the media and used in commentary and editorial articles. The AFP regarded this process 'as potentially prejudicial to any possible trial of Dr Haneef, the trial of defendants in the UK and to the broader Operation Rain investigations'.

The AFP wrote to the Queensland Legal Services Commission in respect of the conduct of Senior Counsel for Dr Haneef who had released the transcript. That organisation dismissed the complaints against Senior Counsel stating that although the release of the record of interview contravened rule 60 of the Barrister's Rules which prohibits barristers from publishing information concerning a matter currently before a court except in certain limited circumstances there was, because of the exceptional circumstances in the present case, no reasonable likelihood that a disciplinary body would find that the contravention of the rule amounted to unsatisfactory professional conduct or professional misconduct.

The stated view of the AFP was that the disclosure of the records of interview invited uninformed public comment on the evidence and undermined the proper conduct of the police investigations and court proceedings. It went on to say that 'there is an important public interest in avoiding matters, particularly criminal matters, from being tried in "the court of public opinion"'. It also raised the question of national security:

> A further issue arises in national security investigations where overseas links may apply and the suspect may be questioned in relation to security classified materials. Some of that material may be sourced from domestic and foreign intelligence agencies.

It was noted that some of the material released relating to Dr Haneef may impact on overseas trials.

Generally, there is no doubt that where evidentiary material becomes available to the media before the commencement of a trial either as a result of a leak or the release of the information by someone who is lawfully in possession of the material there is a potential risk that publication of that material may prejudice a fair trial.

Whether such publication does have that potential is a contentious one and has been the subject of a number of celebrated cases. The argument in most of those cases focuses on the clash between the right to a fair trial as against the right to free speech. There is, in New South Wales, a statutory provision (s. 314 of the *Criminal Procedure Act 1986*) which makes provision for media access to court documents. That section does not however deal with the wider problem raised by the AFP.

I acknowledge that the problem exists and that the question raised is an important one, but there are two reasons why I am not prepared to make the recommendation sought.

- In my view, even an expansive reading of my terms of reference, and in particular term (a), upon which the subsequent terms are dependent, does not encompass consideration of this vexed question.

- Even if I were to seriously consider making such a recommendation I would need to have studied detailed argument for and against the proposal from not only the police but others, including representatives from relevant professional law bodies and the media. The subject is a complex and controversial one, and without the benefit of arguments on the conflicting point of view I could not properly entertain the question. I add that a consideration of this question, involving the consideration of arguments from interested parties, would be a considerable diversion from my task.

Appendix A Terms of reference

ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

08/4843

The Hon John Clarke QC
3 Adderstone Avenue
NORTH SYDNEY NSW 2060

13 MAR 2008

Dear Mr Clarke

I would like to express my appreciation to you for agreeing to head the Inquiry into the case of Dr Mohamed Haneef (the Inquiry).

The terms of reference for the Inquiry are **attached**.

The Government regards the Inquiry as one of great importance. The Government is committed to ensuring public confidence in Australia's counter-terrorism laws and in the agencies that are responsible for administering and enforcing those laws. The Inquiry is an important part of that process.

The Inquiry should include opportunities for public input where possible. However, I stress the importance of conducting the Inquiry in a way that does not put at risk national security information, ongoing operations, and pending domestic or overseas trials.

The Government has been assured that all Commonwealth agencies will cooperate fully with the Inquiry. If, however, you indicate that a lack of cooperation by any person is preventing an effective inquiry, the Government will consider any recommendations from you on reconstituting the Inquiry under the *Royal Commissions Act 1902*.

If you encounter any problems in relation to the conduct of the Inquiry please raise them with me or my Department. My Department will provide assistance to the Inquiry, including arranging funding, and will settle the details of that assistance with you. My Department will also send you a separate letter of engagement.

I look forward to receiving your report and assure you that it will be considered very carefully by myself and the Government.

Yours sincerely

Robert McClelland

Parliament House, Canberra ACT 2600 • Telephone (02) 6277 7300 • Fax (02) 6273 4102 www.ag.gov.au

TERMS OF REFERENCE

The Inquiry is to examine and report on:

a) the arrest, detention, charging, prosecution and release of Dr Haneef, the cancellation of his Australian visa and the issuing of a criminal justice stay certificate;

b) the administrative and operational procedures and arrangements of the Commonwealth and its agencies relevant to these matters;

c) the effectiveness of co-operation, co-ordination and interoperability between Commonwealth agencies and with state law enforcement agencies relating to these matters; and

d) 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.

The Inquiry is to report by 30 September 2008.

Appendix B Administration of the Inquiry

The Attorney-General, the Hon. Robert McClelland MP, announced the Inquiry and released the terms of reference on 13 March 2008. The Hon. John Clarke QC was appointed to lead the Inquiry on the same day. The reporting date, initially set at 30 September 2008, was later extended to 14 November 2008 and finally to 21 November 2008.

Personnel

It was a requirement that every person attached to the Inquiry, whether full time or by means of another contractual arrangement, have a security clearance to either Secret or Top Secret level.

The Secretary to the Inquiry, Ms Sheila Butler, was appointed by the Attorney-General's Department on 13 March 2008. The role of the Secretary was to manage all budgetary and administrative matters, including the appointment of barristers and solicitors and the recruitment of other ancillary staff. The Attorney-General's Department was responsible for providing administrative support to the Inquiry, and the Secretary was the point of contact on all such matters.

A small legal team was engaged to assist Mr Clarke. In order that the Inquiry could start as soon as possible, limited selection exercises were conducted. A short list of suitable candidates and firms was developed by the department in consultation with the Inquiry Secretary; Mr Clarke considered this, and the appointments were made. The Australian Government Solicitor was precluded from providing services to the Inquiry because its previous involvement in Dr Haneef's case presented a conflict of interest.

Counsel assisting

On 15 April 2008 Mr Chris Horan, a barrister at the Victorian Bar, was appointed counsel assisting the Inquiry. As the Inquiry progressed, however, it became clear that the workload associated with preparation for and the conduct of interviews was such that additional resources were needed. Mr Steven Whybrow, a barrister at the Australian Capital Territory Bar, was appointed counsel assisting on 8 August 2008.

Terms of engagement for counsel assisting were negotiated in accordance with the approved fee structure for the engagement of counsel by the Commonwealth.

Solicitors assisting

Sparke Helmore Lawyers were appointed solicitors to the Inquiry on 18 April 2008. Mr Rohan White, a partner in the firm, was appointed senior solicitor assisting; Ms Kylie Neville was appointed senior lawyer. An additional solicitor from that firm, Dr Stephen Thompson, special counsel, was appointed on 21 July 2008.

Executive and administrative support

Two officers were seconded from the Attorney-General's Department to provide clerical and administrative support. Ms Michelle Ford acted as the finance and office manager, and Ms Susan Carlyon provided executive assistance to Mr Clarke and the Inquiry team.

Accommodation

The Inquiry was based in Canberra, at 10 National Circuit, Barton, in premises leased by the Attorney-General's Department. The Inquiry occupied these premises from 21 April until the end of November 2008. Because of the nature of the documentary material held by the Inquiry, a high level of security was essential. Alarms and other surveillance systems were installed, and access to the premises was restricted. The office was certified a 'secure area' for the management of national security information up to and including Secret. There were no breaches of or threats to the security of the premises or the documents.

All witnesses were interviewed on site in the Inquiry's conference room. In one instance the nature of the documents being examined made it necessary to hear part of a witness's evidence off site.

Document management

Although the Inquiry used the information technology of the Attorney-General's Department, no officers of the department (apart from technical support staff as required) had access to the Inquiry's electronic records or communications. A secure local area network classified at Secret level was built in the premises; this allowed Inquiry staff to store, access and create classified documents.

All correspondence received was recorded, and documents produced were recorded and coded. Secure storage containers were used for all classified material. Some documents of interest to the Inquiry were held by several of the intelligence agencies; these were viewed at the agencies' premises. To ensure the requisite level of protection for some ASIO documents, these were delivered daily to the Inquiry and removed at the close of business.

At the conclusion of the Inquiry, all records, including witness statements and the transcripts of interview, were passed to the department for storage and archiving. Documents produced to the Inquiry were returned to the originating departments, agencies and individuals.

Communication

A dedicated website—www.haneefcaseinquiry.gov.au—was established in mid-April. It was the Inquiry's main avenue of communication with the public. General information about the Inquiry, all statements and practice notes issued by Mr Clarke, and other announcements were published on the website. To the extent possible, submissions were also published. Dates of interviews and the names of witnesses appearing were released through the website: national security considerations and other sensitivities prevented the Inquiry from publishing the transcripts of interviews, witness statements and associated documents. All proceedings of the public forum held on 30 September 2008 were published. It is expected that if this report is publicly released a copy will be posted on the website, which will be maintained by the Attorney-General's Department after the Inquiry concludes.

There was steady media interest in every aspect of the Inquiry. Apart, however, from the preliminary hearing and the public forum, there was no opportunity for the media to observe the Inquiry's operations. Mr Clarke gave no interviews and issued no media releases: all media inquiries were handled by the Secretary.

Liaison

The Inquiry was in regular contact with the relevant Commonwealth departments and agencies, as well as the Queensland Police Service. Each of these bodies nominated a senior officer as a point of contact and assistance. From the Inquiry's perspective, none of these officers had been directly involved in the matters under review. The Inquiry found this an efficient approach, and the nominated officers were responsive to requests for information and assistance.

Contracted support services

Additional staff were contracted to provide specialist services to the Inquiry, as follows:

- transcription services
  - Merrill Legal Solutions—Judith White, Sally Ann Hicks, Kathryn Robertson and Bairbre Sullivan

- editorial team
  - Chris Pirie Comprehensive Editorial Services
  - DP Plus—Debbie Phillips
  - Mirrabooka Marketing and Design—Julie Hamilton.

Budget

The Inquiry was funded under the budget appropriation of the Attorney-General's Department; $4.19 million was allocated to it. Of that amount, the Inquiry itself administered $3.84 million. The balance of the budget, which was administered by the department, was allocated to provision of financial assistance to members of the public who were asked to provide submissions or statements to the Inquiry. People seeking this assistance applied to the department. The Inquiry had no influence over this process and was not made aware of who had made any such applications or who gained approval.

All other costs directly related to the Inquiry—salary and associated expenses, premises, office services (including information technology), transcription services, advertising, report production and printing, hearings, interviews and the public forum—were met from the Inquiry's budget.

At the end of October 2008 recorded expenditure was $2.25 million. At the time of publication, costs incurred in November and the wind-up costs were yet to be determined.

Appendix C Submissions

Date received	Name/organisation
23 May 2008 24 October 2008 27 October 2008	Maurice Blackburn Lawyers on behalf of Dr Haneef
Government departments and agencies	
16 May 2008 (background submission) 13 June 2008 (redacted submission) 30 June 2008 (full submission) 23 October 2008 (public submission)	Australian Federal Police
16 May 2008	Attorney-General's Department
21 May 2008 14 August 2008 (public submission)	Commonwealth Director of Public Prosecutions
21 May 2008 25 July 2008 (public submission)	Australian Security Intelligence Organisation
26 May 2008	Queensland Police Service
23 July 2008	Department of Immigration and Citizenship
Interested parties	
1 May 2008 20 May 2008	Australian Lawyers Alliance
16 May 2008	Law Council of Australia
16 May 2008	Gilbert & Tobin Centre of Public Law, University of New South Wales
16 May 2008	Civil Rights Defence Committee
16 May 2008	The Law Society of NSW
16 May 2008	NSW Council for Civil Liberties (endorsed by Liberty Victoria)
16 May 2008	The Australia Institute
19 May 2008	Australian Muslim Civil Rights Advocacy Network
21 May 2008	Australians Against Capital Punishment
23 May 2008	Human Rights and Equal Opportunity Commission
23 May 2008	Amnesty International Australia
23 May 2008 13 August 2008	Australian Federal Police Association
18 June 2008 22 September 2008	Sydney Centre for International Law, University of Sydney
22 September 2008	Associate Professor Nick O'Brien, Charles Sturt University
22 September 2008	Associate Professor Russell Hogg, University of New England
Individuals	
28 April 2008	Mr Bill Calcutt
15 May 2008	Mr Kendall Lovett
30 July 2008	Mr Robert Wills
30 August 2008	Mr John Wilson
28 October 2008	Mr Prevail Buttar

Appendix D Witnesses and legal representatives

Witnesses

Date (2008)	Name	Organisation
22 July	Mr Peter White	Department of Immigration and Citizenship (former officer)
30 July	Commander Ramzi Jabbour	Australian Federal Police
31 July		
1 August		
6 August		
16 October		
5 August	Detective Sergeant Adam Simms	Australian Federal Police
7 August	Federal Agent David Craig	Australian Federal Police
12 August	Federal Agent Neil Thompson	Australian Federal Police
13 August	Federal Agent Luke Morrish	Australian Federal Police
14 August	Officer A	Australian Security Intelligence Organisation
15 August	Officer B	Australian Security Intelligence Organisation
	Officer C	Australian Security Intelligence Organisation
19 August	Assistant Commissioner Frank Prendergast	Australian Federal Police
20 August	Mr Bob Correll	Department of Immigration and Citizenship
21 August	Ms Lyn O'Connell	Department of Immigration and Citizenship
22 August	Mr Michael Rendina	Australian Federal Police
26 August	Mr John Prunty QPM	British High Commission—Metropolitan Police Service
27 August	Mr David Adsett	Commonwealth Director of Public Prosecutions
	Mr Graeme Davidson	Commonwealth Director of Public Prosecutions (Queensland)
1 September	The Hon. Philip Ruddock MP	Former Attorney-General
	Ms Zoe Clarke	Department of Immigration and Citizenship
2 September	Ms Robyn Curnow	Commonwealth Director of Public Prosecutions
3 September	Mr Geoff McDonald	Attorney-General's Department
4 September	Detective Superintendent Gayle Hogan	Queensland Police Service
	Assistant Commissioner Ross Barnett	Queensland Police Service
8 September	Commissioner Mick Keelty APM	Australian Federal Police
9 September	Mr Paul O'Sullivan	Australian Security Intelligence Organisation
10 September	Mr Duncan Lewis	Department of Prime Minister and Cabinet
11 September	Federal Agent James Anderson	Australian Federal Police
	Mr Andrew Metcalfe	Department of Immigration and Citizenship
12 September	Mr Clive Porritt	Commonwealth Director of Public Prosecutions
17 September	Mr Chris Craigie SC	Commonwealth Director of Public Prosecutions
15 October	The Hon. Kevin Andrews MP	Former Minister for Immigration and Citizenship

Legal representatives

Lawyer	Witnesses	Organisation
Dr Stephen Donaghue	Officer A Officer B Officer C Mr Paul O'Sullivan	Australian Security Intelligence Organisation
Mr John Purnell SC	Detective Sergeant Adam Simms Federal Agent David Craig Federal Agent Luke Morrish Federal Agent Neil Thompson Federal Agent James Anderson	Australian Federal Police
Mr Mark Dean SC	Ms Robyn Curnow	Commonwealth Director of Public Prosecutions
Mr Peter Hastings QC (Solicitors—Andrew Boe Lawyers)	Mr Clive Porritt	Commonwealth Director of Public Prosecutions
Mr Christopher Behrens—Australian Government Solicitor (for DIAC)	Mr Peter White	Department of Immigration and Citizenship
Mr James Watson, Chief Counsel AFP	Commander Ramzi Jabbour Assistant Commissioner Frank Prendergast Mr Michael Rendina	Australian Federal Police
Mr David Evans, Legal DIAC	Ms Zoe Clarke	Department of Immigration and Citizenship
Ms Kate Bradley, Solicitor QPS	Detective Superintendent Gayle Hogan Assistant Commissioner Ross Barnett	Queensland Police Service

Appendix E Statements

Name	Organisation	Date (2008)
Mr Peter White	Department of Immigration and Citizenship	21 July
Commander Ramzi Jabbour	Australian Federal Police	29 July, 6 August
Federal Agent David Craig	Australian Federal Police	29 July, 4 September
Officer C	Australian Security Intelligence Organisation	30 July
Officer F	Australian Security Intelligence Organisation	30 July
Officer A	Australian Security Intelligence Organisation	30 July, 31 July
Officer B	Australian Security Intelligence Organisation	30 July
Officer E	Australian Security Intelligence Organisation	30 July
Mr Geoff McDonald	Attorney-General's Department	1 August, 22 August
Detective Sergeant Adam Simms	Australian Federal Police	1 August, 5 August
Federal Agent Neil Thompson	Australian Federal Police	31 July
Mr Glen Rice	Commonwealth Director of Public Prosecutions	30 July
Ms Deborah Stokes	Department of Foreign Affairs and Trade	7 August
Mr David Adsett	Commonwealth Director of Public Prosecutions	7 August
Mr Graeme Davidson	Commonwealth Director of Public Prosecutions	7 August
Mr Raymond Frankcom	Australian Customs Service	7 August
Mr Anthony Simson	Australian Customs Service	7 August
Assistant Commissioner Frank Prendergast	Australian Federal Police	8 August
Agent G	Australian Security Intelligence Organisation	11 August
Agent D	Australian Security Intelligence Organisation	11 August
Mr Todd Frew	Department of Immigration and Citizenship	11 August
Mr Bob Correll	Department of Immigration and Citizenship	11 August
Federal Agent Luke Morrish	Australian Federal Police	11 August
Ms Jennifer Rawson	Department of Foreign Affairs and Trade	12 August
Ms Susan Grace	Department of Foreign Affairs and Trade	13 August
Ms Nadia Caswell	Australian Customs Service	15 August
Ms Nicole Pearson	Department of Immigration and Citizenship	15 August
Mr Andrew Parsons	Department of Immigration and Citizenship	15 August
Ms Lynette O'Connell	Department of Immigration and Citizenship	18 August
Mr Michael Rendina	Australian Federal Police	19 August
Mr John Prunty QPM	Metropolitan Police Service	19 August
Mr Steve Dreezer	Department of Immigration and Citizenship	20 August
Dr Mohamed Haneef	Maurice Blackburn Lawyers	12 August
Mr Duncan Lewis	Department of the Prime Minister and Cabinet	20 August
Ms Rebecca Irwin	Department of the Prime Minister and Cabinet	20 August
Detective Superintendent Gayle Hogan	Queensland Police Service	11 August
Detective Chief Superintendent Ross Barnett	Queensland Police Service	11 August
Mr Scott Curtis	Australian Customs Service	22 August
Detective Inspector Robert Weir	Queensland Police Service	25 August
Ms Zoe Clarke	Department of Immigration and Citizenship	26 August

Name	Organisation	Date (2008)
Mr Adrian McCabe	Department of Immigration and Citizenship	27 August
Mr Damian Carmichael	Department of Immigration and Citizenship	26 August
The Hon. John Howard AC	Prime Minister (2007)	28 August
The Hon. Philip Ruddock MP	Attorney-General (2007)	28 August
Mr Hugh Borrowman	Department of the Prime Minister and Cabinet	29 August
Mr John Valastro	Australian Customs Service	29 August
Mr Clive Porritt	Commonwealth Director of Public Prosecutions	27 August, 10 September
Federal Agent Anna Dart	Australian Federal Police	29 August
Federal Agent James Anderson	Australian Federal Police	3 September
Federal Agent Kylie Rendina	Australian Federal Police	29 August
Ms Robyn Curnow	Commonwealth Director of Public Prosecutions	29 August, 1 September, 1 October
Commissioner Mick Keelty APM	Australian Federal Police	4 September
Mr Paul O'Sullivan	Australian Security Intelligence Organisation	4 September
Detective Sergeant David Timms	Australian Federal Police	6 August
Mr Andrew Metcalfe	Department of Immigration and Citizenship	5 September
Ms Lynette O'Connell	Department of Immigration and Citizenship	8 September
Mr Chris Craigie SC	Commonwealth Director of Public Prosecutions	8 September, 8 October
Federal Agent Dr David Craig	Australian Federal Police	9 September
Federal Agent Susan Thomas	Australian Federal Police	9 September
Federal Agent Michelle Gear	Australian Federal Police	2 October
Mr David Ness	Department of Immigration and Citizenship	13 October
The Hon. Kevin Andrews MP	Minister for Immigration and Citizenship (2007)	6 June, 15 October

Shortened forms

AEST	Australian Eastern Standard Time
AFP	Australian Federal Police
AGD	Attorney-General's Department
APEC	Asia–Pacific Economic Cooperation
ASIO	Australian Security Intelligence Organisation
AUSTRAC	Australian Transaction Reports and Analysis Centre
CDPP	Commonwealth Director of Public Prosecutions
COAG	Council of Australian Governments
CTC	Counter Terrorism Command
DFAT	Department of Foreign Affairs and Trade
DIAC	Department of Immigration and Citizenship
DPP	Director of Public Prosecutions
FA	Federal Agent
JCTT	Joint Counter Terrorism Team
MIR	Major Incident Room
MOU	memorandum of understanding
MPS	Metropolitan Police Service
NCTC	National Counter-Terrorism Committee
NCTP	National Counter-Terrorism Plan
NSC	National Security Committee (of Cabinet)
PM&C	Department of the Prime Minister and Cabinet
QPS	Queensland Police Service
SAC-PAV	Standing Advisory Committee on Commonwealth/State Cooperation for Protection Against Violence
SCNS	Secretaries Committee on National Security
SIO	Senior Investigating Officer