

Counter-terrorism and national security laws



Australian
Human Rights
Commission

Australia's third UPR | 2021

Background

Over the last few decades, Australia has enacted a range of laws aimed at combatting the threat of terrorism. It is critically important that security agencies have appropriate powers to ensure national security, even where this impinges on individual rights and freedoms. However, international human rights law dictates that such limitations must be clearly expressed, unambiguous in their terms and legitimate and proportionate responses to potential harms.

Key Issue – Counter-terrorism legislation

The Commission is concerned that some of Australia's counter-terrorism laws limit rights under the ICCPR where this is not reasonable, necessary and proportionate to a legitimate objective.

The Commission is particularly concerned about laws relating to:

- 'declared areas' offences under the *Foreign Fighters Act 2014* (Cth) which criminalise entry into a specified area without having committed any other offence, or intending to perform any wrongful conduct
- presumptions against bail and parole
- control orders which may place significant prohibitions and restrictions on a person's freedom of movement, expression, association and right to privacy
- preventive detention orders allowing the detention of persons without criminal conviction or charge
- continuing detention orders
- broad 'stop, search and seize' powers
- revocation of citizenship
- measures which limit children's rights such as the prosecution and sentencing of children for terrorism offences.

The [Independent National Security Legislation Monitor](#) (INSLM) has a statutory mandate to review the operation, effectiveness and implications of Australia's counter-terrorism and national security laws on an ongoing basis. There have been three INSLMs since the inception of the role in 2010. The INSLMs have played a valuable role in recommending amendments to aspects of counter-terrorism laws to better safeguard rights and freedoms.



Key Issue – Citizenship loss provisions

Since Australia's second cycle of the UPR in 2015, the Australian Government has extended the circumstances in which an Australian can be deprived of citizenship. The Commission is concerned that these laws are inconsistent with Australia's human rights obligations.

In 2015, the Government enacted provisions to automatically strip citizenship from dual nationals who engage in terrorism-related conduct and permit the Minister to make a determination to remove someone's citizenship as a result of certain criminal convictions. The Commission expressed concern about the provisions at the time of their introduction and at all opportunities since.

In June 2019, the [Commission made a submission to the INSLM](#) expressing serious concern about: the automatic nature of citizenship loss, the impacts on children as young as 10 years old, the lack of procedural safeguards, the lack of merits review, the ambiguity of criminal conduct captured and the retrospective application of the regime. The [INSLM Report](#) recommended that the provisions be urgently repealed with retrospective effect and replaced with a Ministerial decision-making model to remove Australian citizenship based on a person's conduct.

In response to the INSLM report, the government has introduced the [Australian Citizenship Amendment \(Citizenship Cessation\) Bill 2019](#) (Cth). That Bill implements some (but not all) of the INSLM's recommendations and has been referred for [parliamentary inquiry](#) but not yet passed.

Recommendation

Government amend existing counter-terrorism laws that unduly limit human rights



Key Issue – Freedom of Expression and the Right to Privacy

The Commission is also concerned that some national security laws and law enforcement powers limit the rights to freedom of expression and privacy under the ICCPR in a manner that is not reasonable, necessary and proportionate to achieving a legitimate objective.

For example, secrecy provisions in Division 122 of the *Criminal Code* (Cth); espionage offences in Division 91 of the *Criminal Code*; non-disclosure provisions linked to ‘special intelligence operations’ under the

Australian Security Intelligence Organisation Act 1979 (Cth); the mandatory metadata retention regime requiring service providers to retain communications data for two years; and intrusive and covert powers introduced by the *Telecommunications and Other Legislation (Assistance and Access) Act 2018* (Cth) such as enabling agencies to access encrypted communications and devices.

The Commission has expressed concern that these regimes unjustifiably limit individual rights to privacy and freedom of expression. The Commission considers the application of these laws on journalists and whistleblowers to be overly broad.

Recommendation

Government amend national security laws so that they do not unduly limit human rights, particularly freedom of expression and the right to privacy

