

# Universal Periodic Review of Australia – Joint NGO Coalition

## Fact Sheet 14

### Counter-terrorism

#### Compatibility with international human rights standards

##### Suggested Question

*How does Australia ensure that its counter-terrorism measures remain necessary and proportionate to combat the threat faced by Australia, and consistent with Australia's international human rights obligations, such as those under ICCPR and the CERD?*

##### Background

Since 2001, Australia has introduced more than 50 new counter-terrorism laws, often without assessing their potential impact on human rights.<sup>1</sup> As a result, some aspects of these laws have been found by UN human rights bodies<sup>2</sup> and independent domestic review bodies<sup>3</sup> to unduly infringe upon fundamental rights and freedoms, including the right to a fair trial, freedom from arbitrary detention, freedom from torture, freedom of association and the right to non-discrimination.

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<sup>1</sup> A comprehensive list of the relevant legislation is available at <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf>.

<sup>2</sup> See, Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia* (March 2009), Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism* (14 December 2006), *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia* (27 August 2010).

<sup>3</sup> The Hon. John Clarke QC, Report of the Inquiry into the Case of Dr Mohamed Haneef, Volume One, November 2008; Report of the Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter-Terrorism Legislation* (December 2006) Report by the Australian Law Reform Commission, *Fighting words: A Review of Seditious Laws in Australia* (July 2006) Report of the Security Legislation Review Committee (June 2006).

Despite some recent positive developments, including laws to establish an Independent National Security Legislation Monitor, and proposed amendments to sedition laws to ensure they do not infringe on the right to freedom of expression, a number of aspects of Australia's counter-terrorism laws continue to raise serious human rights concern. These include provisions which:

- contain broadly defined terrorist offences (Part 5.3 of the Criminal Code 1995). These offences: rely on an overly broad definition of 'terrorist act'; capture a wide range of conduct unconnected with any specific, planned terrorist act; and give police wide powers to determine who should be charged with or prosecuted for these offences. These provisions infringe the freedom from arbitrary arrest and detention in Article 9(a) ICCPR, and fail to comply with the criteria outlined by the UN High Commissioner for Human Rights for counter terrorism laws.
- allow the police to detain persons or restrict their movement even if they have not been charged with or convicted of any offence (Divisions 104 and 105 of the Criminal Code). The police can obtain control orders or preventative detention orders which allow for a person's liberty to be restricted without having to charge or prosecute a person for a terrorist offence. Once these orders have been made they are difficult to challenge or remove. These provisions infringe upon the freedom from arbitrary detention in Article 9 ICCPR, and freedom of movement in Article 10.
- authorise the Australian Security Intelligence Organisation (ASIO) to require a person to answer questions or to detain a person for up to seven days for the purposes of questioning (Part III Division 3 of the ASIO Act 1979). Under these powers, ASIO can question or detain anyone who is able to substantially assist in the investigation of a terrorism offence, even if they are not suspected of being involved in a terrorist offence. People detained are required to keep certain

information secret, and have limited opportunities to contact family or lawyers, or to challenge their detention. These provisions infringe Article 9 ICCPR, and the right to a fair trial in Article 14.

- prevent a person charged with a terrorist offence from being released on bail, unless 'exceptional circumstances' are shown to exist (s15AA of the Crimes Act 1914). These provisions, which reverse the usual presumption in favour of bail, infringe upon the right to be presumed innocent and the right not to be detained while awaiting trial, in Article 9 ICCPR.
- empower the Attorney-General, with Parliament's approval, to ban certain organizations and criminalise any interaction with that organisation (Division 102 of the Criminal Code). Under these provisions, an organisation can be declared a 'terrorist organisation' if, for example, it is involved in preparing or planning a terrorist act, or praises the doing of a terrorist act by another organisation. Once an organisation has been declared to be a 'terrorist organisation', serious criminal penalties apply to anyone who is a member of or connected with the organisation. These provisions infringe the freedom of association, in Article 22 ICCPR and freedom of expression, in Article 19.
- provide police with expanded powers to stop, question and search persons for the purposes of investigating and preventing terrorism, (ss3UA-3UK of the Crimes Act). Once an area has been declared a 'prescribed security zone' by the Attorney General, the police can use their stop, search, questioning and seizure powers on anyone in this zone, even if they are not suspected of committing or planning to commit a terrorist act. These provisions potentially interfere with the right to liberty and security in Article 9 ICCPR and the right to undertake lawful demonstrations, in Article 19.

Many of Australia's counter-terrorism measures impact particularly harshly on Australia's Muslim and Arab population, and have intensified experiences of fear, alienation and distrust of authority experienced by these communities since 11 September 2001. For example, often members of the Muslim and Arab community are the subject of the police's expansive investigative powers, and almost all organisations that have been listed as 'terrorist organisations' have self-identified as Islamic organisations. The UN CERD Committee has recommended that Australia ensure that its counter-terrorism measures do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin.

### **Proposed Recommendation**

That Australia immediately review and amend its counter-terrorism laws and practices to ensure that they are consistent with Australia's international human rights obligations. This should include: (1) enacting a federal Human Rights Act to assess counter terrorism laws against human rights standards; (2) immediately appointing a National Security Legislation Monitor, to review and report on the operation, effectiveness and implications of Australia's counter-terrorism law, including their continued necessity and their compliance human rights; and (3) amending counter terrorism laws and practices to respond to past recommendations of UN treaty bodies and Special Rapporteurs, and to ensure full conformity with the ICCPR, CAT, and CERD.