

Chapter 1

New and continuing matters

1.1 The committee comments on the following bills and draws these concerns to the attention of the the relevant minister and the Parliament.

Bills

Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Bill 2022¹

Purpose	This bill seeks to extend for 12 months the following Australian Federal Police counter-terrorism powers that are scheduled to sunset on 7 December 2022: <ul style="list-style-type: none"> • the control order regime in Division 104 of the <i>Criminal Code Act 1995</i>; • the preventative detention order regime in Division 105 of the <i>Criminal Code Act 1995</i>; and • the stop, search and seizure powers in Division 3A of Part IAA of the <i>Crimes Act 1914</i>.
Portfolio	Attorney-General
Introduced	House of Representatives, 8 September 2022
Rights	Liberty; freedom of movement; fair trial and fair hearing; privacy; freedom of expression; freedom of association; equality and non-discrimination; right to be treated with humanity and dignity; protection of the family; work; social security; an adequate standard of living; and rights of the child

Extension of counter-terrorism powers

1.2 This bill seeks to extend by a further 12 months the operation of a number of counter-terrorism related provisions which are due to sunset on 7 December 2022, in particular the operation of:

¹ This entry can be cited as: Parliamentary Joint Committee on Human Rights, Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Bill 2022, *Report 4 of 2022*; [2022] AUPJCHR 33.

- the control order regime in Division 104 of the *Criminal Code Act 1995* (Criminal Code), which allows a court to impose on a person a number of obligations, prohibitions and restrictions;
- the preventative detention order regime in Division 105 of the Criminal Code, which allows a person to be taken into custody and detained if it is suspected, on reasonable grounds, that they are preparing to engage in a terrorist act; and
- the stop, search and seizure powers in Division 3A of Part IAA of the *Crimes Act 1914*, which provide a range of powers for the Australian Federal Police and state and territory police officers to exercise in a Commonwealth place (such as an airport) relating to counter-terrorism.

International human rights legal advice

Multiple rights

1.3 The powers extended by this measure are intended to protect Australia's national security interests and protect against the possibility of terrorist acts in Australia.² As such, if these powers were capable of assisting in achieving these objectives, it would appear that extending these powers would promote the rights to life and security of the person. The right to life³ includes an obligation on the state to protect people from being killed by others or identified risks.⁴ The right to security of the person requires the state to take steps to protect people against interference with personal integrity by others.⁵

1.4 However, the extended powers also engage and limit numerous human rights, including the:

- right to liberty;
- right to freedom of movement;
- right to a fair trial and fair hearing;
- right to privacy;
- right to freedom of expression;

2 See statement of compatibility, pp. 6, 9, 16 and 20.

3 International Covenant on Civil and Political Rights, article 6(1) and Second Optional Protocol to the International Covenant on Civil and Political Rights, article 1.

4 UN Human Rights Committee, *General Comment No. 36: article 6 (right to life)* (2019) [3]: the right should not be interpreted narrowly and it 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity'.

5 International Covenant on Civil and Political Rights, article 9.

- right to freedom of association;
- right to equality and non-discrimination;
- right to be treated with humanity and dignity;
- right to the protection of the family;
- right to work;
- rights to social security and an adequate standard of living; and
- rights of children.⁶

1.5 The committee has previously considered the human rights compatibility of all of the provisions that are extended by this measure. After detailed consideration of these provisions, the committee has previously found that while all of the measures likely sought to achieve a legitimate objective (namely, that of seeking to prevent terrorist acts), there were questions whether the measures would be effective to achieve this and were necessary, and, in particular, the measures did not appear to be proportionate. As a result, the committee previously found the measures were likely to be incompatible with a range of human rights.⁷

1.6 The same human rights concerns as were previously raised apply in relation to the further extension of these coercive powers. In addition, there are questions as to whether all of these powers remain necessary.

1.7 It is noted that all of these powers were due to sunset on 7 September 2021, but legislation to extend their operation for a further 15 months passed both Houses of Parliament on 23 August 2021.⁸ When that legislation was introduced it was stated that the extension was necessary to provide time for the government to consider any recommendations of the Parliamentary Joint Committee on Intelligence and Security's (PJCIS) review into these powers.⁹ It is noted that the PJCIS was required, under the *Intelligence Services Act 2001*, to review the operation, effectiveness and implications of these powers and report by 7 January 2021. However, the PJCIS did not report on

6 See International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and the Convention of the Rights of the Child.

7 See most recently Parliamentary Joint Committee on Human Rights, *Report 10 of 2018* (18 September 2018) pp. 25-53. Note in relation to the stop, search and seizure powers the committee concluded that in circumstances where a police officer believes on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act, these powers might be a proportionate limit on human rights, however, the scope of the other powers are likely to be incompatible with human rights, see *Report 10 of 2018* (18 September 2018) pp. 45-53.

8 *Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Act 2021*.

9 See *Intelligence Services Act 2001*, paragraph 29(1)(bb).

these powers until October 2021.¹⁰ The stated aim of the current bill is to ensure there 'is sufficient time to consult on, and then implement, the government's response' to the PJCIS's recommendations,¹¹ which were made almost one year ago. As such these coercive powers appear to be proposed to be extended by over two years in order to consider the PJCIS's report.

1.8 The PJCIS's October 2021 report recommended a number of changes to the stop, search and seizure powers and the control order regime, to provide some safeguards over the use of these powers, but otherwise recommended their further continuation. The statement of compatibility states that the current terrorism threat level remains 'probable', which means 'there is credible intelligence assessed by Australia's security agencies indicating that individuals and groups have the intent and capability to conduct a terrorist act in Australia'. It states that all the powers being extended by the bill 'are critical to support Australia's counter-terrorism framework, ensuring there are appropriate tools to protect the community from terrorism risk'.¹² However, the Attorney-General in his second reading speech for this bill stated that the stop, search and seizure powers, and the preventative detention order powers, have never been used since their introduction. In relation to control orders, as of 25 August 2022, 23 control orders have been made since September 2014 (including one control order against a child).¹³ No specific information has been provided to demonstrate the continuing need for all of these powers, particularly those that have never been used, including in light of the additional legislative powers that have been enacted since these powers originally commenced.

1.9 As such, noting the committee's previous conclusion that these provisions do not contain sufficient safeguards to constitute a proportionate limit on rights, and noting the government has not demonstrated the continued necessity of all these powers, it has not been demonstrated that the extension of the control order, preventative detention order and stop, search and seizure provisions for a further 12 months is compatible with human rights.

Committee view

1.10 The committee notes it has previously found that while all of the measures sought to be extended by this bill likely sought to achieve a legitimate objective (namely, that of seeking to prevent terrorist acts), there were questions whether the

10 Parliamentary Joint Committee on Intelligence and Security, [Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime](#), October 2021.

11 See the Hon Mark Dreyfus MP, Attorney General, Second Reading Speech, *House of Representatives Hansard*, 8 September 2022, p. 3.

12 Statement of compatibility, p. 3.

13 See the Hon Mark Dreyfus MP, Attorney General, Second Reading speech, *House of Representatives Hansard*, 8 September 2022, p. 3.

measures would be effective to achieve this and were necessary, and, in particular, the measures did not appear to be proportionate, and therefore were likely to be incompatible with a range of human rights.

1.11 The committee notes that the PJCIS conducted a statutory review of the provisions being extended by this bill and presented its report in October 2021. The committee notes the Attorney-General's statement in his second reading speech that due to the complexity of the PJCIS's proposed amendments, and the need to consult with states and territories in relation to these amendments, there is insufficient time before the end of the year to finalise the government's response to the PJCIS report; draft legislation to implement the government's response; consult with, and obtain the agreement of, state and territory governments; and introduce and secure passage of legislation through the Parliament. The committee notes that the Attorney-General stated that extending the relevant sunset dates of the provisions by 12 months will provide sufficient time to consult on, and then implement, the government's response to the PJCIS report.

1.12 The committee notes its previous conclusion that these provisions do not contain sufficient safeguards to constitute a proportionate limit on rights, and that the legislation to be extended has not been relevantly amended since the committee previously examined it. Whilst the committee remains concerned as to the compatibility of extending these provisions for a further 12 months with a range of human rights, it supports the Attorney-General in using this extension to consider the recommendations of the PJCIS and undertake appropriate consultations with stakeholders.

1.13 The committee draws these human rights concerns to the attention of the Attorney-General and the Parliament.

Treasury Laws Amendment (2022 Measures No. 3) Bill 2022¹

Purpose	<p>This bill seeks to amend various Acts in relation to foreign investment and acquisitions, taxation, the coronavirus and superannuation</p> <p>Schedule 1 seeks to double financial penalties relating to foreign ownership of residential property in Australia</p> <p>Schedule 2 seeks to amend the taxation secrecy provisions to enable the Australian Taxation Office to share taxation information with an Australian government agency, including state and territory governments, for the purposes of administering major disaster support programs</p> <p>Schedule 3 seeks to extend the operation of a temporary mechanism operating during the COVID pandemic that allows arrangements for complying with information and documentary requirements under Commonwealth legislation to be altered</p> <p>Schedule 4 seeks to set out tax arrangements for foreign resident workers participating in the Pacific Australia Labour Mobility scheme</p> <p>Schedule 5 seeks to require the Australian Prudential Regulation Authority to take account of religious obligations when conducting the performance test on superannuation products</p>
Portfolio	Treasury
Introduced	House of Representatives, 8 September 2022
Rights	Criminal process rights; equality and non-discrimination; housing

Doubling financial penalties relating to foreign ownership of property

1.14 Schedule 1 of the bill seeks to amend the *Foreign Acquisitions and Takeovers Act 1975* (the Act) to double the maximum civil penalties available for contraventions of provisions relating to the acquisition of residential land by foreign persons. For example, a foreign person is currently liable for a civil penalty of 250 penalty units (currently \$55,500)² if they fail to give notice to the Treasurer when they acquire or dispose of an interest in residential land in particular circumstances.³ This bill proposes

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Treasury Laws Amendment (2022 Measures No. 3) Bill 2022, *Report 4 of 2022*; [2022] AUPJCHR 34.

2 *Crimes Act 1914*, section 4AA.

3 *Foreign Acquisitions and Takeovers Act 1975*, subsection 97(1).

to increase that potential penalty to 500 penalty units (currently \$110,000).⁴ It would also increase other potential civil penalties where the penalty payable is a percentage of the consideration paid for, or the market value of, the interest in residential land (from 25 per cent to 50 per cent).⁵

International human rights legal advice

Criminal process rights, rights to equality and non-discrimination and housing

1.15 In certain contexts, civil penalties may be construed as criminal penalties for the purposes of international human rights law, depending on their potential severity. In this regard, the statement of compatibility with human rights accompanying this bill states that these proposed amended civil penalty provisions may be considered criminal for the purposes of human rights law, noting that the penalties are significant.⁶ If this is the case, these civil penalty provisions engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights. This includes the right to be presumed innocent until proven guilty according to law, which includes that the case against the person be demonstrated to the criminal standard of proof (beyond all reasonable doubt).⁷

1.16 Under Australian law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters, with the burden of proof being on the balance of probabilities. As the right to be presumed innocent requires that the case against a person be demonstrated beyond all reasonable doubt, but the standard of proof applicable in civil penalty proceedings requires proof only on the balance of probabilities, there is a risk that increasing the civil penalties, as sought by Schedule 1 of this bill may not be consistent with this criminal process right.

1.17 Further, these provisions would apply only to 'foreign persons', being individuals not ordinarily resident in Australia.⁸ The statement of compatibility states that it is anticipated that most individuals who are directly affected by the amendments will not be Australian citizens.⁹ As such, these provisions would appear to have a disproportionate impact on non-citizens, and so engage the right to equality and non-discrimination. This right provides that everyone is entitled to enjoy their

4 Item 11.

5 See, Item 4.

6 Statement of compatibility, pp. 42–43.

7 International Covenant on Civil and Political Rights, article 14(2). See UN Human Rights Committee, *General Comment 32: Article 14: Right to equality before courts and tribunals and to a fair trial* (2007) [30]: 'The presumption of innocence, which is fundamental to the protection of human rights... guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt'.

8 *Foreign Acquisitions and Takeovers Act 1975*, section 4.

9 Statement of compatibility, pp. 43–44.

rights without discrimination of any kind and that all people are equal before the law and entitled to equal and non-discriminatory protection of the law.¹⁰ Differential treatment will not be unlawful if it is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective (having regard to the effect of the measure).¹¹

1.18 The statement of compatibility states that the purpose of Australia's foreign investment framework is to regulate certain kinds of foreign investment to ensure that the proposed investments are not contrary to Australia's national interest, and notes that all foreign residents are regulated in the same manner.¹² It also states that the proposed civil penalties increase is intended to adequately deter non-compliance with the residential property provisions in the Act to protect Australia's housing stock and the affordability of Australian residential property.¹³ Increasing these penalties so as to address non-compliance with the Act would appear to constitute a legitimate objective. Further, to the extent that this assists in achieving the broader objective of protecting the affordability of residential property, the measure may also promote the right to an adequate standard of living in respect of housing. The right to an adequate standard of living requires that the State party take steps to ensure the availability, adequacy (including affordability) and accessibility of housing for all people in its jurisdiction.¹⁴

1.19 However, whether the measures would constitute a proportionate limit on the right to equality and non-discrimination would depend on whether (and to what extent) there is a current problem with non-compliance with the Act, and whether there are sufficient safeguards in the Act in practice as regards the treatment of non-nationals.

10 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

11 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights* (2009) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

12 Statement of compatibility, p. 44.

13 Statement of compatibility, p. 44.

14 International Covenant on Economic, Social and Cultural Rights, article 11. See also UN Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant)* (1990) [8].

Committee view

1.20 The committee notes the proposed civil penalty increase in Schedule 1 of the bill and the corresponding advice in the statement of compatibility that these penalties may be considered 'criminal' for the purposes of international human rights law. The committee considers that, as the right to be presumed innocent requires that the case against a person be demonstrated beyond all reasonable doubt, if these penalties are considered 'criminal', the application of the civil standard of proof means there is a risk that the proposed increase of civil penalties may not be consistent with this criminal process right.

1.21 The committee also notes that these provisions engage the right to equality and non-discrimination, as they disproportionately apply to non-nationals. The committee considers that these provisions are directed towards the legitimate objective of strengthening the existing regulatory scheme which is intended to protect the affordability of Australian housing. The committee considers that to the extent that this measure could protect Australia's housing stock and the affordability of Australian residential housing this would promote the right to an adequate standard of living in respect of housing. However, the committee notes the advice regarding the proportionality of the measure, noting that much depends on existing safeguards in the Act and how the measure is to operate in practice.

1.22 The committee draws these human rights concerns to the attention of the assistant minister and the Parliament.

Mr Josh Burns MP

Chair

