

**2011**

**LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**TERRORISM (EXTRAORDINARY TEMPORARY POWERS)  
AMENDMENT BILL 2011**

**EXPLANATORY STATEMENT**

Circulated by authority of  
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Attorney General

# **Terrorism (Extraordinary Temporary Powers) Amendment Bill 2011**

## **Outline**

The Terrorism (Extraordinary Temporary Powers) Amendment Bill 2011 amends the *Terrorism (Extraordinary Temporary Powers) Act 2006* (the Terrorism Act).

The Bill will extend the operation of the Terrorism Act to 2016 and provides for a second statutory review of the Terrorism Act.

The Bill makes a number of important amendments identified in the '*Review of the Terrorism (Extraordinary Temporary) Powers Act 2006*' (tabled in the Legislative Assembly on 16 November 2010) to:

- Section 11 (no preventative detention orders for children) to extend a police officer's considerations when a child is released from preventative detention;
- Section 31 (setting aside or amending preventative detention orders) to include a note to say that where an order is set aside, it ceases to have effect;
- Section 78 (exercising authorised special powers) to clarify the information that a police officer is required to provide when exercising a power under section 83 (power to enter and search premises under special powers); and
- Section 78 (exercising authorised special powers) to specify that where a request has been made for a written statement from police, the statement, or the reasons why the statement cannot be provided, be provided within a reasonable time.

The ACT Government proposes to continue the Terrorism Act for a further 5 years to 2016 as it is a necessary and proportionate response to the on-going terrorism threat faced by Australians and the ACT community. The continuation to 2016 will ensure that the Terrorism Act's expiry is generally consistent with the expiry clauses of the complementary counter-terrorism legislative schemes across Australia.

This conclusion, as discussed in the *Review of the Terrorism (Extraordinary Temporary) Powers Act 2006* is based on recent security assessments conducted by the Australian Security Intelligence Organisation (ASIO), the Commonwealth Government's '*Counter Terrorism White Paper 2010*', the reviews conducted by State and Territory Governments and with consideration to the complementary role of the Commonwealth, State and Territory counter-terrorism legislative measures.

In addition to the review, the recent announcement of the death of Osama bin Laden, leader of the Terrorist group al Qaeda, reinforces the on-going terrorist threat, and the relevance of legislation to facilitate counter-terrorism measures.

While the National Terrorism Public alert system threat level has not increased from 'medium' following the announcement of the death of Osama bin Laden, the possibility of revenge attacks is real. This possibility has been acknowledged by the Prime Minister of Australia, the Hon. Julie Gillard MP in media interviews following the announcement of the death.

## Human Rights Considerations

Following the September 2005 determination of the Council of Australian Governments (COAG) to enact clear laws to combat terrorism, the ACT Government committed to robustly and transparently address the interaction of any counter-terrorism legislative response with the ACT's *Human Rights Act 2004* (HR Act).

In addition to the recognition by COAG that any laws would be necessary, contain appropriate safeguards against abuse, be based on evidence, and proportionate, the ACT Government determined that the paramount considerations were our human rights obligations and the fundamental principles of justice (the rule of law, proportionality, respect for legal process and the separation of powers).

This position is recorded in the preamble to the *Terrorism (Extraordinary Temporary Powers Act 2006* (the Terrorism Act). It recognises the commitment of the ACT Government to the dual goals of protecting the ACT community against terrorist activity and respecting and promoting our human rights obligations pursuant to the HR Act and the International Covenant on Civil and Political rights.

This explanatory statement will consider whether the Terrorism (Extraordinary Temporary Powers) Amendment Bill 2011, and specifically the proposal to continue the Terrorism Act to 2016, is a reasonable limit on human rights considering the current terrorism threat faced by Australians and the ACT community.

The question of whether the specific counter-terrorism measures contained in the Terrorism Act are a proportionate limitation on the human rights they engage (the preventative detention and the special police preventative and investigative powers) was extensively canvassed, and answered in the affirmative, during the development and debate on the Terrorism (Extraordinary Temporary Powers) Bill 2005.

The nature and extent of the limitations of the Terrorism Act on the human rights in the HR Act has not changed. The Kate Eastman advice (discussed below) considered the interaction of the Terrorism (Extraordinary Temporary Powers) Bill 2005 with the HR Act rights of fair trial, privacy, arbitrary detention and freedom of movement and assembly.

### **Advice on human rights issues prepared previously for the ACT Government**

The initial legislative response following the September 2005 COAG meeting was proposed by the Commonwealth Government. The Anti-Terrorism Bill 2005 proposed, amongst other things, to enact control orders to allow for restrictions to be placed on a person for up to 12 months for participation in a range of activities, for a preventative detention order scheme and for new offences of treason and sedition.

Subsequently, the ACT Government sought specialist human rights advice on the Anti-Terrorism Bill 2005 and the effect on compatibility with obligations under the HR Act, should the Commonwealth legislation be adopted by the ACT. This advice, completed by Mr Lex Lasry QC (now Justice Lasry) and Ms Kate Eastman (the Lasry/Eastman advice) was made publically available and can be located at: <http://acthra.anu.edu.au/terrorism/index.html>

The Lasry/ Eastman advice concluded that there were many aspects of the proposed Anti-Terrorism Bill 2005 that if enacted as ACT legislation, would be inconsistent with the human rights contained in the HR Act. These rights are defined as the civil and political rights located at Part 3 of the HR Act (Lasry/Eastman advice, paragraph 12).

As a consequence of the assessment of the Anti-Terrorism Bill 2005, the ACT Government proposed the Terrorism (Extraordinary Temporary) Powers Bill 2005. The Bill departed significantly from the Commonwealth legislation. The Standing Committee Report on Terrorism<sup>1</sup> noted that there were many features of the ACT legislation that distinguished it from other jurisdictions. These features included:

- the preconditions that must be satisfied before a preventative detention order can be approved;
- the central role of the ACT Supreme Court;
- the information that must be given to detainees;
- the availability of compensation; and
- the general compliance with international human rights standards.

The HR Act requires the preparation of a written compatibility statement to accompany government bills presented in the Legislative Assembly. In order to assess whether the Terrorism (Extraordinary Temporary) Powers Bill 2005 was compatible, the ACT Government obtained further specialist legal advice on the interaction between the HR Act and the proposed Terrorism (Extraordinary Temporary) Powers Bill 2005.

This advice was prepared by Ms Kate Eastman (the Eastman advice) and determined that the Bill was compatible with the HR Act and satisfied the requirements of section 28 of the HR Act. The Eastman advice is also publically available. It was tabled in the ACT Legislative Assembly on 3 May 2006 and is also available at: <http://acthra.anu.edu.au/terrorism/index.html>

### **Limitations on human rights- HR Act section 28 (2)**

The preamble to the HR Act notes that few rights are absolute. The preamble states that ‘human rights may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society’. Section 28 of the HR Act sets out the reasonable limits that may be placed on the human rights enshrined by the HR Act.

The analysis required by section 28 was undertaken in the initial Lasry/Eastman advice and the further Eastman advice. Paragraph 17 of the Lasry/ Eastman advice notes that when considering limiting the human rights located at Part 3 that limitations may be necessary in order to accommodate the competing rights between individuals and the need to ensure that the broader community is protected.

In the terrorism context, the Lasry/ Eastman advice noted, at paragraph 27, ‘the United Nations and recent developments in international law impose a clear duty on States to protect their citizens against terrorism and counter-terrorism measures.’ It

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<sup>1</sup> Standing Committee Report on Legal Affairs, Report on Terrorism (Extraordinary Temporary Powers) Bill 2005- Exposure Draft, February 2006, p.16.

was further noted that the terrorism measures must conform with international human rights, humanitarian and refugee law.

### **Application of section 28 (2)**

In order to consider a limitation, paragraph 20 of the Lasry/ Eastman advice notes firstly, where a right is to be limited, ‘the Parliament must ensure that the language imposing the restriction is clear, unmistakable and unambiguous’. This position has been confirmed by recent international case law. In the Canadian matter of *R v Ahmad*<sup>2</sup> it was held that ‘a law that imperils a person’s right to life, liberty or security of the person may... be declared invalid if it is found to be vague or overbroad’.

Secondly, at paragraph 21, the Lasry/ Eastman advice notes that any limitation should be for a particular purpose and be proportionate.

The Lasry/ Eastman advice posed a number of important questions and issues to be weighed to critically assess the proposed limitations. These questions, and the insights they offer, assist in the analysis of whether a limitation is reasonable, and how the limitation should be imposed.

The questions:

- (1) What is the extent of the restriction or limitation on the right in question?
- (2) What is the purpose for restricting or limiting the right and does it serve an important and significant objective?
- (3) Is it strictly necessary to restrict or limit the right?
- (4) Is there any alternative means of achieving the purpose which is less restrictive?
- (5) Are there safeguards in place to ensure that any limitation on the right will operate only to serve its purpose and not otherwise impair a person’s enjoyment of their human rights?

Paragraph 25, Lasry/ Eastman Advice

The issues to be weighed:

- (1) The significance in the particular case, of the objects and values protected by the HR Act;
- (2) The importance in the public interest of the intrusion on the particular right;
- (3) The limits sought to be placed on the application of the particular right in the particular case;
- (4) Whether alternative less intrusive measures may achieve the same desired results; and
- (5) The effectiveness of the intrusion in protecting the interests put forward to justify those limits.

Paragraph 26, Lasry/Eastman Advice

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<sup>2</sup> 2009 CanLII 84774 (ON S.C.)- 2009-03-31

The following sections of this explanatory memorandum will consider the Terrorism (Extraordinary Temporary) Powers Amendment Bill 2011 and section 28 (2) of the HR Act with reference to the questions and issues as set out above.

### **Section 28 (2) (a)-The nature of the right affected**

This Bill does not propose any substantive amendment to the provisions of the *Terrorism (Extraordinary Temporary) Powers Act 2006*. The amendments, in particular clauses 4, 7 and 8, support the Terrorism Act's compatibility with the HR Act, as the amendments will provide greater clarity and certainty; and will recognise the rights of families and children.

Clause 4 will provide greater protection for children and families by ensuring that if a child has been detained under preventative detention, in addition to the police officer releasing the child, the police officer must arrange for the child to be escorted to their home or arrange for a person with parental responsibility to collect the child. If the child is released (without being escorted home or collected) then the police officer must notify the Director-General for the *Children and Young People Act 2008*.

The clause 4 amendment recognises section 11 of the HR Act by providing greater protection for families and children by ensuring that children are returned safely to their home or families, and by ensuring that any care and protection issues for children are addressed by the Director-General responsible for the *Children and Young People Act 2008*.

The clause 4 amendment will engage the section 12 of the HR Act right of the child to privacy and reputation. In *Toonen v Australia*<sup>3</sup> the Human Rights Committee determined that any interference with the right to privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

The interference with a child's right to privacy is a reasonable limitation given the competing rights of families and children and the responsibility of the ACT Government to address any issues with the child's care and wellbeing in the context of a child allegedly being involved in a terrorist activity.

Clause 6 proposes to include a note to state that where the Supreme Court has set aside an order for preventative detention, then it ceases to have effect. This amendment will ensure that a person is immediately released from preventative detention where no lawful basis exists for on-going detention. This amendment will recognise section 18 of the HR Act, which provides for the right to liberty and security of the person.

Clause 7 proposes to correct the uncertainty with section 78 (exercising authorised special powers) regarding the information that a police officer is required to provide when exercising a power pursuant to section 83 (power to enter and search premises under special powers).

Clause 8 proposes to amend section 78 (exercising authorised special powers), which states that a written statement, or the reasons why the police cannot provide the

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<sup>3</sup> Communication No.488/1992, UN Doc CCPR/C/50/D/488/1992(1994), para 8.3

statement, be amended to require the statement or reasons be provided ‘within a reasonable time’.

With reference to the nature and extent of the limitations of the Terrorism Act (HR Act section 28 (2) (c)), this question was analysed in the Eastman advice. Please refer to paragraphs 55-68 of the advice for the discussion and conclusions to these questions with respect to the Terrorism (Extraordinary Temporary) Powers Bill 2005 (the Terrorism Act).

Recent judicial interpretation on the interaction of human rights legislation and counter- terrorism legislation has not significantly changed. International jurisdictions, including the European, United Kingdom and Canadian courts, have not significantly changed their position to counter-terrorism legislative schemes. The respective legislative schemes continue to be deemed compliant with international human rights obligations.

With regard to preventative detention, Canada has recently confirmed that detention pursuant to a certificate is justified on the basis of a continuing threat to national security or to the safety of any person. This was discussed in the 2007 case of *Charkaoui v Canada (Citizenship and Immigration)*<sup>4</sup>.

### **Section 28 (2) (b)- the importance and purpose of the limitation**

An important consideration for this explanatory statement is whether the purposes of the Terrorism Act (and therefore the limitations on human rights) remain current. The key question, as expressed by the Lasry/ Eastman advice is ‘what is the purpose of restricting or limiting the rights and does it serve an important and significant objective?’ This analysis will also include the HR Act section 28 (2) (d) consideration of the relationship between the limitation and its purpose.

The objects and purposes of the Terrorism (Extraordinary Temporary Powers) Bill 2005 are described in the preamble. The preamble to the Terrorism Act notes that the legislation was enacted in response to the clear need for laws to combat terrorism. As is described in the *Review of the Terrorism (Extraordinary Temporary Powers) Amendment Bill 2010*, the Terrorism Act was enacted in response to the changing nature of terrorism following the attacks in London in 2005, which resulted in a critique of Australia’s capacity to respond to a similar attack.

It is recognised in the Eastman advice, at paragraph 60, that Australia has an obligation ‘to respond to a real or perceived threat of terrorism and this has been accepted as a legitimate basis for legislative action.’ This obligation is expressed in the preamble to the Terrorism Act (at point 5) which states that:

‘the community needs to be protected from acts of terrorism. If law enforcement agencies have evidence that a terrorist act is imminent or has happened, they need to be able to respond appropriately to prevent it or investigate and reduce it’s impact.’

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<sup>4</sup> 2007 SCC 9, (2007) 1 S.C.R. 350.

The Eastman advice concluded that the ‘Bill serves an important and significant objective’.

### **The current threat of terrorism**

The purpose of the Terrorism Act, to protect the community from acts of terrorism in circumstances where law enforcement agencies have evidence that a terrorist act is imminent or has happened, and in circumstances where the available evidence is insufficient to enable suspected terrorists to be detained under existing criminal law powers, continues to be necessary.

This conclusion is discussed in the *Review of the Terrorism (Extraordinary Temporary Powers) Amendment Bill 2010* which discussed the current terrorism threat with reference to the ASIO 2008-2009 report to Parliament, the Commonwealth Government’s ‘*Counter-Terrorism White Paper 2010*’ and the reviews of counter-terrorism legislation conducted by State and Territory Governments.

The ASIO report identified a range of terrorism related activity and identified new extremist groups. The most serious activity identified by ASIO was the alleged planning by a Melbourne based group of extremists of an armed suicide assault on an Australian military facility. ASIO also reported in 2008-2009 that Australia was identified as a terrorist target by Islamic extremists. It was reported that new extremists were identified in Australia, with their intent being to participate in terrorism activities in Australia and overseas.

The Commonwealth Government’s ‘*Counter-Terrorism White Paper 2010*’ states that terrorism ‘is a persistent and permanent feature of Australia’s security environment, with intelligence agencies assessing that further terrorist attacks could occur at any time’. Further, the paper states that ‘thirty-eight people have been prosecuted or are being prosecuted as a result of counter-terrorism operations, with thirty-five of these prosecutions for offences against the Commonwealth *Criminal Code Act 1995*’.

The announcement by the President of the United States of America on 2 May 2011 of the death of Osama bin Laden, leader of the terrorist group *al Qaeda*, reinforces the prominence of the international threat of terrorist activity, and the relevance of legislation to facilitate counter-terrorism activities, both in the ACT, in Australia and abroad.

While Australia’s National Security Committee has not increased the National Terrorism Public alert system threat level from ‘medium’, the possibility of revenge attacks is real. A ‘medium’ assessment indicates that a terrorist attack is feasible and could occur. This possibility has been acknowledged by the Prime Minister of Australia, the Hon. Julie Gillard MP, in media interviews following the announcement of the death of the leader of *al Qaeda*.

The ACT’s unique position within Australia, as the seat of Australian Government and the host of international diplomatic missions, heightens the potential threat faced by the ACT community. This fact has not changed since the introduction of the Bill in 2005. This unique position of the ACT was discussed by the Commissioner for the



Australian Federal Police, Mr Mick Keelty, for the February 2006 report of the Standing Committee Report on Legal Affairs 'Report on Terrorism (Extraordinary Temporary Powers) Bill 2005- Exposure Draft'. Mr Keelty noted the importance of anti-terrorism measures in the ACT given the fact that the ACT houses the seat of government and approximately 90 diplomatic missions. This importance is reinforced by the fact that in 2000 the Israeli Embassy in the ACT was the target of a planned, but aborted, terrorist attack.

A further consideration for the continuation of the Terrorism Act is the complementary role of the Commonwealth and State/ Territory legislative schemes. The Commonwealth Government's '*Counter-Terrorism White Paper 2010*' recognises the cross-jurisdictional challenges that terrorism presents. It notes that Australia's domestic response relies in the complementary roles between the Commonwealth and the States and Territories.

Eastman, at paragraph 66, noted that when considering the necessity for the legislation, the question should be considered not only in the context of the need for the Terrorism's Acts proposed measures, but by also considering the inter-relationship between State and Territory legislative schemes.

All Australian States and Territories enacted counter-terrorism legislation to allow for preventative detention and to provide police with special powers. The States and Territories were required to enact these terrorism laws because the Australian Constitution prevents the Executive from imposing punitive sanctions without a person firstly being tried or convicted by a court.

The continuation of the Terrorism Act to 2016 will ensure that the Terrorism Act is consistent with other Australian jurisdictions. Victoria's *Terrorism (Community Protection) Act 2003* will expire in 2016; Queensland's *Terrorism (Preventative Detention) Act 2005* on 16 December 2015 and Western Australia's *Terrorism (Extraordinary Powers) Act 2005* will expire on 19 December 2015.

The remaining jurisdictions (New South Wales, Northern Territory, South Australia and Tasmania) do not have sunset or expiry dates for their counter-terrorism schemes. Alternatively, their schemes specify that following 10 years of operation, preventative detention orders and preventative contact orders cannot be applied for under the schemes. The tenth year of operation for these jurisdictions arises between 2012-2016.

It is the conclusion of the ACT Government that:

- the continuation of the Terrorism Act is necessary to ensure that the ACT does not become an attractive base for terrorist related activity due to the absence of a counter-terrorism legislative regime; and
- the purpose for the Terrorism Act remains current as terrorism activity poses a real and significant threat to residents of Australia and the ACT.

**Section 28 (2) (e)- any less restrictive means reasonably available to achieve the purpose the limitations seeks to achieve**

The Eastman advice noted, at paragraph 67 'given the federal context in which the ACT will enact this Bill, there are limited alternatives which are available.' Further at

paragraph 68, Eastman conclude that as important safeguards have been included in the legislation, it is unlikely that any less restrictive options could be developed in the circumstances.

Given the conclusions of Eastman, and the fact that the Terrorism Act was enacted as a component of a national counter-terrorism legislative response, the ACT Government considers that the Terrorism Bill is an appropriate and proportionate response to the continuing threat of terrorism faced by resident of the ACT.

# **Terrorism (Extraordinary Temporary Powers) Amendment Bill 2011**

## **Detail**

### **Clause 1— Name of Act**

This is a technical clause that names the short title of the Act. The name of the Act is the *Terrorism (Extraordinary Temporary Powers) Amendment Act 2011*.

### **Clause 2— Commencement**

This clause states that the Act will commence on the day after its notification day.

### **Clause 3— Legislation amended**

This is a technical clause stating that the Act being amended is the *Terrorism (Extraordinary Temporary Powers) Act 2006* (the Act).

### **Clause 4— No preventative detention orders for children- substitute section 11 (2) (b)**

This clause substitutes a new section 11 (2) (b). The substitution will require that where a child has been detained under preventative detention, the police officer must immediately release the child from preventative detention and either arrange for the child to be escorted by a police officer to the child's home; or arrange for a person with parental responsibility for the child to collect the child; or release the child.

In the circumstance where the child is not escorted to their home or collected by a person with parental responsibility, this amendment requires the police officer to advise the Director-General of the administrative unit responsible for the *Children and Young People Act 2008* of the release as soon as practicable after the release.

This amendment is consistent with section 151 of the ACT's *Liquor Act 2010*. This amendment will ensure that the best interests and welfare of children is preserved by ensuring that children receive appropriate care if they are released from preventative detention.

While this amendment will engage the section 12 HR Act right to privacy, it is a proportionate limitation. The amendment recognises section 11 of the HR Act by providing greater protection for families and children by ensuring that children are returned safely to their homes and families and by ensuring that any care and protection issues for children are addressed by the Director-General responsible for the *Children and Young People Act 2008*.

### **Clause 5 – New section 11 (4)**

This clause inserts definitions for 'CYP Director-General' and 'person with parental responsibility' as they apply to section 11.

### **Clause 6 – Section 31 (3) – new note**

This clause will insert a new note to state that where an order is set aside, it ceases to have effect. This amendment will ensure that a person must be immediately released when a preventative detention order is set aside by the Supreme Court.

This amendment will recognise section 18 of the HR Act, which provides for the right to liberty and security of the person.

**Clause 7 – Exercising authorised special powers- general provisions- Section 78 (5) (b)**

This clause will omit section 78 (5) (b) from subsection (5). This will clarify the obligations of police officers when exercising a special power under section 83 (power to enter and search premises under special powers).

Previously both section 78 (4) and 78 (6) applied when a power was exercised under section 83. Section 78 (4) provides that before a police officer exercises the search power in relation to a person, the police officer must inform the person of the reason why the power is being exercised. Further, if the police officer is not in uniform, the officer must provide evidence that they are a police officer.

However, section 78 (6) also applied where a police officer exercised a search power under section 83 in relation to a person. Section 78 (6) required a police officer, if asked by the person who is the subject of the search, to tell the person why the power is being exercised. This section also requires the police officer to provide evidence that they are a police officer if the officer is not in uniform.

This amendment will omit the application of section 78 (6) to section 83. Therefore, the ambiguity will be removed and the notification obligations under section 78 (4) will apply to the exercise of a power under section 83.

This amendment addresses the human rights concern that legislation that is vague can be invalid. As discussed at page 3, the Canadian case of *R v Ahmad* held in relation to a law that imperils a person's right to life, liberty or security that it may be declared invalid if it was vague or overbroad.

**Clause 8 – Section 78 (9)**

This clause will include the time period 'within a reasonable time' at section 78 (9). Section 78 (9) applies to the search of a person or premises. Section 78 (8) states that where a person, a person's vehicle or premises are searched, the person may, not later than 1 year after the day of the search, ask the Chief Police Officer in writing for a written statement that the search was conducted in accordance with the Terrorism Act.

This amendment will amend section 78 (9) to require that the statement under section 78 (8) be provided within a reasonable time after the request for the statement.

Presently, a time period is not fixed by the Terrorism Act for the provision of this statement. In these circumstances section 151B of the *Legislation Act 2001* applies. Section 151B states that if under an Act something must or may be done, and no time period is provided for doing that thing, then the thing must be done as soon as possible.

The inclusion of the 'reasonable time' requirement will provide for greater consideration of the particular circumstances for the exercise of powers under the Terrorism Act. This approach will balance the right of the person who is the subject of the search to receive a written statement while recognising that the circumstances where these powers will be exercised (to respond to a recent terrorist act or the planning of such an act) will require police resources to be flexible during the incident.

This amendment supports human rights principles by provide clarity and certainty regarding the obligations of police officers under this section.

**Clause 9 – Section 100**

This clause will provide for a second statutory review of the Terrorism Act to be completed following the Terrorism Act’s eighth year of operation, with a report of the review to be tabled in the Legislative Assembly before the end of the ninth year of operation (9 November 2015).

A further review is appropriate given the effect of the legislation and will allow for a further critique of the operation and effectiveness of the Terrorism Act. It will allow for consideration of the terrorism climate to 2015 and will allow consideration of whether the Terrorism Act should continue past the new expiry date of 2016.

**Clause 10- Expiry of Act etc- Section 101 (1)**

This clause will omit the 5 year expiry date for the Terrorism Act, and will substitute a 10 year expiry for the Terrorism Act.

The Terrorism Act will expire 10 years after the day it commenced.