

2015

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**TERRORISM (EXTRAORDINARY TEMPORARY POWERS)
AMENDMENT BILL 2015**

EXPLANATORY STATEMENT

**Presented by
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Introduction

This explanatory statement relates to Terrorism (Extraordinary Temporary Powers) Amendment Bill 2015 (the Bill) as presented to the ACT Legislative Assembly. It has been prepared in order to assist the reader of the bill and to help inform debate on it. It does not form part of the bill and has not been endorsed by the Assembly.

The Statement must to be read in conjunction with the bill. It is not, and is not meant to be, a comprehensive description of the bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Overview

The *Terrorism (Extraordinary Temporary Powers) Act 2006* (the TETP Act) is due to expire on 19 November 2016. The Bill extends the operation of the TETP Act for a further five years (to 19 November 2021) and also requires a further review after 13 years of operation.

The TETP Act allows the court to make a preventative detention order if it is satisfied that a terrorist act is happening or will happen sometime within the next 14 days, and that the order will substantially assist in preventing the terrorist act or reducing its impact or both.

The 2013 Council of Australian Governments (COAG) review of counter-terrorism legislation in Australia evaluated the operation, effectiveness and implications of key Commonwealth, state and territory counter-terrorism laws. Recommendation 39 of that Review called for preventative detention legislation to be repealed nationally because the overall effectiveness of the legislation is limited.

The ACT's response to the review aligned with the national position that the repeal of preventative detention orders would create a gap in the capability of Australia's counter-terrorism laws to take action to prevent a terrorist threat from eventuating, for instance where admissible evidence is not available to support arrest and charge, but where a person presents an immediate threat to public safety. National and local terrorist threats are enduring, and a national position is important for consistency, support and the overall integrity of counter-terrorism legislation.

The utility of preventative detention orders is finely balanced with the need for such measures and the human rights implications of detaining a person without charge.

Human rights

Section 37 of the *Human Rights Act 2004* (HRA) requires the Attorney-General to prepare a written compatibility statement for presentation of each government bill to the Legislative Assembly. The compatibility statement must state whether, in the Attorney-General's opinion, the Bill as presented to the Assembly is compatible with the human rights set out in the HRA. If the Attorney-General forms the view that the bill is not compatible the statement must explain how it is not compatible with those rights.

In particular, by extending the operation of the Act, the Bill engages and limits the following HRA rights:

- freedom of movement (s 13);
- freedom of thought, conscience, religion and belief (s 14);
- freedom of assembly and association (s 15);
- right to liberty (s 18)
- humane treatment when deprived of liberty (s 19);
- right to a fair trial (s 21);
- rights in criminal proceedings (s 22);
- rights of minorities (s 27); and
- right to privacy (s 12).

Preventative detention orders legislation forms part of a national scheme. In the context of this scheme:

- the restrictions on rights are reasonable and necessary for the purpose of achieving consistency; and
- the extent of the safeguards against arbitrary detention in the Act represent the least restrictive options available.

The limitations are therefore reasonable and proportionate in the context of responding to the threat of terrorism and the importance of achieving consistency within the national counter terrorism framework.

Key rights engaged and limited

Section 13 of the HRA provides that everyone has the right to move freely within the ACT, to enter and leave it, and the freedom to choose his or her residence.

The right to freedom of movement is linked to the right to liberty – a person’s movement across borders should not be unreasonably limited by the state. It also encompasses freedom from procedural impediments, such as unreasonable restrictions on accessing public places.

The right to freedom of movement is not an absolute right. The right has inherent limitations, which are acknowledged at subsection (3) of article 12 of the International Covenant on Civil and Political Rights (the equivalent right to s 13 of the HRA):

the rights to liberty and freedom of movement shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights or freedoms of others and are consistent with the other rights recognised in the Covenant.

Section 18 of the HRA provides that:

(1) Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.

(2) No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

The prohibition against arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law and that the law, and the enforcement of it, must not be arbitrary under human rights law.

Arbitrary detention can include elements of inappropriateness, injustice and lack of predictability. Therefore, in addition to being lawful, any detention must also be reasonable, necessary and proportionate in all the circumstances. This is addressed through the authorisation processes prescribed in the Act:

- Part 2 of the TETP Act provides powers to allow police officers to bring an application to the ACT Supreme Court for a preventative detention order. A preventative detention order allows a person to be taken into custody and detained for up to 14 days.
- Part 2 also provides procedural and representational rights for people who are subject to an application for a preventative detention or prohibitive contact order. Section 48 of the TETP Act requires that a person who is taken into custody, or detained, is treated with humanity and respect for human dignity and is not subjected to cruel, inhuman or degrading treatment.
- The authorisations must be made by either the Magistrates Court or the Supreme Court.

Terrorism (Extraordinary Temporary Powers) Amendment Bill 2015

Detail

Part 1 – Preliminary

Clause 1 — Name of Act

This is a technical clause that names the Act, which will be the *Terrorism (Extraordinary Temporary Powers) Amendment Act 2015*.

Clause 2 — Commencement

This clause provides that the Act will commence on the day after notification on the ACT Legislation Register.

Clause 3 — Legislation amended

This clause identifies the legislation amended by the Act.

Clause 4 – Review of Act after 13 years of operation

This clause amends section 100 of the Act to require that it be reviewed after 13 years of operation (which will be 19 November 2019), and that a report of the review be presented to the Legislative Assembly by 19 November 2020.

Clause 5 – Expiry of Act etc

This clause amends section 101 of the Act to extend the operation of the Act for a further 5 years. This means that the Act will expire 15 years after it commenced (19 November 2021) unless its operation is extended before that time.