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

TERRORISM (EXTRAORDINARY TEMPORARY POWERS) AMENDMENT BILL 2022

GOVERNMENT AMENDMENTS

SUPPLEMENTARY EXPLANATORY STATEMENT

**To be moved by
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Attorney-General**

TERRORISM (EXTRAORDINARY TEMPORARY POWERS) AMENDMENT BILL 2022

GOVERNMENT AMENDMENTS

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Terrorism (Extraordinary Temporary Powers) Amendment Bill 2022

Government Amendments

Outline of Government Amendments

On 5 May 2022, the Terrorism (Extraordinary Temporary Powers) Amendment Bill 2022 (the Bill) was introduced to the Legislative Assembly. The Bill includes provisions to extend the operation of the *Terrorism (Extraordinary Temporary Powers) Act 2006* (the TETP Act) for a further five years to 19 November 2027 and also requires a further statutory review of the TETP Act be submitted to the Legislative Assembly a year before the expiry of the extension. The Bill includes several amendments aimed at strengthening human rights protections for individuals detained under the TETP Act to ensure that the powers in the TETP Act for preventative detention are subject to appropriate human rights safeguards.

The explanatory statement accompanying the Bill provides a detailed account of the provisions contained in the Bill.

The Government amendments make changes to the Bill to address concerns and comments raised by the Standing Committee on Justice and Community Safety (Legislative Scrutiny) and in response to recommendations by stakeholders in submission to the Inquiry into the Bill. These Government amendments are necessary to ensure the Bill achieves its intended objectives and that any limitations on human rights are proportionate and justified.

Consultation on the Proposed Approach

The Government amendments were identified by the Justice and Community Safety Directorate (JACS) to address comments made by the Standing Committee on Justice and Community Safety (Legislative Scrutiny). One of the Government amendments was recommended by a stakeholder in a submission to the Inquiry into the Terrorism (Extraordinary Temporary Powers) Amendment Bill 2022. ACT Policing and the JACS Human Rights Scrutiny team were consulted on the Government amendments.

Consistency with Human Rights

Rights Engaged

The Government amendments engage and may promote the right to equality and humane treatment (section 19 of the *Human Rights Act 2004*), the right to recognition and non-discrimination (section 8 of the HR Act) and protection from cruel, inhuman or degrading treatment (section 11 of the HR Act).

The Government amendments may engage and limit the right to privacy (section 12 of the HR Act), the right to equality and non-discrimination (section 8 of the HR Act), the right to equality and humane treatment (section 19 of the *Human Rights Act 2004*) and the right to recognition and non-discrimination (section 8 of the HR Act).

Rights Promoted

The Government amendments engage and may promote the right to equality and humane treatment (section 19 of the *Human Rights Act 2004*), the right to recognition and non-discrimination (section 8 of the HR Act) and protection from cruel, inhuman or degrading treatment (section 11 of the HR Act) through the safeguards police officers are required to adhere to when taking identification material from a detained person to record an injury or illness.

Rights Limited

Nature of the right and the limitation (ss 28(2)(a) and (c))

The Government amendment to require officers to make a written record of an injury or illness and to take a photograph or video where the injury or illness can be recorded visually limits the right to privacy (section 12 of the HR Act) which protects against arbitrary and unlawful interferences with privacy such as physical and bodily integrity. This may also limit the right to human treatment when deprived of liberty (section 19 of the HR Act) which recognises the vulnerability of people in detention and imposes positive obligations on detaining authorities to ensure that detained persons are held in conditions befitting their inherent dignity as human beings.

This amendment limits these rights as it places a mandatory obligation on police officers to take photographic evidence of an injury or illness. A person may need to remove pieces of clothing or uncover parts of their body in order for an illness or injury to be recorded.

Legitimate purpose (s 28(2)(b))

The legitimate purpose of the Government amendment to make it mandatory for police officers to take identification material when a detained person suffers an injury or illness is to protect the welfare of any individual that may be detained by police under the TETP Act and enhance police accountability, by ensuring documentation and evidence is collected of any injury or illness which may later be used in certain proceedings regarding a persons treatment while being detained.

Rational connection between the limitation and the purpose (s 28(2)(d))

The limitations on the right to privacy and humane treatment are necessary to achieve the aim of ensuring and protecting the welfare of individuals detained under the Act and enhancing police accountability.

This Government amendment will ensure there is documented evidence of any injury or illness which can be used in a complaint, investigation or proceeding into the circumstances of the injury or illness suffered in detention, to enhance police accountability for a detained person's treatment in custody.

Proportionality (s 28(2)(e))

The limitations on the right to privacy and humane treatment are proportionate to the primary aims of protecting the wellbeing of detainees and ensuring police accountability for any injury or illness a person detained in custody may suffer.

A less restrictive approach was considered in the Bill, however the original amendment in the Bill did not place a mandatory obligation on officers to take the identification material in all circumstances where a detained person might suffer an injury or illness. The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) raised concerns that as this original amendment is permissive, officers were not obligated to record an injury or illness in all circumstances, and this amendment would not achieve the aim of ensuring a detainee's welfare and enhancing police accountability.

The Government amendment to make the taking of a photograph or video recording mandatory where a police officer has a reasonable belief a detainee has suffered an injury or illness also includes additional safeguards and protections which aim to minimise any limitations on the right to privacy and humane treatment.

Providing detained persons with a right to request a copy of the photograph, video recording and the written record detailing this request may reduce the limitation on the right to humane treatment, as it provides an added layer of accountability through complaints mechanisms. Under the Act, detained persons may contact the ACT Human Rights Commission, the ACT Ombudsman or the ACT Public Advocate with a complaint of their treatment in custody, and a copy of the photograph or video recording documenting their injury or illness may be useful in these complaints.

Additionally, police officers are required to tell a detained person before taking a photograph or video recording that they may request the photograph or video recording be taken by a person of a particular sex. This will ensure that all detained persons are provided with a choice on the sex of police officer they would like to take their photograph or video recording. This is an important safeguard, particularly if a detained person has suffered an injury or illness in a sensitive area of the body, or if there are cultural, religious or personal reasons an individual may want an officer of a particular sex taking a photograph (for example, the detainee may be a transgender or intersex person). This safeguard will ensure that detained persons are not treated in a cruel, inhuman or degrading manner.

Other safeguards include requiring that the photograph or video recording is taken in circumstances providing reasonable privacy to the detainee and must not involve the removal or more clothing or more visual inspection than is necessary, may reduce the limitation on the right to privacy.

The amendment to section 60 of the Act, which outlines how the identification material, may be used, will act as a safeguard to the taking of identification material, as it stipulates that the identification material can only be used for the purpose of a complaint, investigation or proceeding that relates to the injury or illness suffered by the person while detained under a preventative detention order.

Terrorism (Extraordinary Temporary Powers) Amendment Bill 2022

Government Amendments

Detail

Government amendment 1 – Proposed new clause 3A, page 2, line 10

This is a technical amendment to insert new clause 3A into the Bill. Part 3A inserts subsection (aa) into section 49 (2) of the Act. This will ensure that the restriction of contact with other people under section 49 of the Act is subject to the amendment at clause 4 of the Bill to include new section 50A which allows contact with a consular or diplomatic representative.

Government amendment 2 – Clause 7, proposed new section 53 (8) (c), page 4, line 15

This clause inserts new section 53 (8) (c) into the Bill. This clause introduces a requirement for police officers to make a written record where a police officer refuses a detained person with impaired decision-making ability contact with a person under section 53(2)(b) of the TETP Act as they are not acceptable.

New section 53 (8) (c) requires the written record to include details of the person whom the detained person sought to have contact with, the reasons why the officer refused contact, the date and time the detained person made a request for contact under section 53 of the Act, and whether the detained person was reminded of their right to nominate another person under section 53(2) to have contact with, and whether they nominated another person to contact.

Government amendment 3 – Clause 8, page 4, line 16

This Government amendment substitutes clause 8 of the Bill to insert new clauses 8, 8A and 8B into the Bill.

New clause 8 inserts new section 59 (2A) to the Bill to provide that if a police officer believes on reasonable grounds that the person has suffered an injury or illness while detained under a preventative detention order, the officer must as soon as practicable make a written record of the injury or illness and where the injury or illness can be recorded visually, take, or cause to be taken, a photograph or video recording the injury or illness.

This amendment places a mandatory obligation on police to take evidence of an injury or illness suffered by a person while detained under a PDO in custody. Allowing police officers to cause a photograph or video recording to be taken will allow other staff members at the

ACT Policing Watch House to take this photograph or video recording, for example, a nurse or medical practitioner.

New clause 8A makes technical amendments to new subsections proposed in the Government amendments to the Bill.

New clause 8B inserts new section 59A into the Bill to provide additional safeguards and protections in the Bill for the taking of identification material to record an injury or illness.

Subsection 59A (2)(a) provides a safeguard which requires police officers to tell the detained person that they may request that the photograph or video record be taken by a person of a particular sex. Subsection 59 (2A) (5)(d) also requires the taking of the photograph or video recording be carried out in the presence or view of a person only if the person is reasonably necessary for taking, or assisting in the taking, of the photograph or video and is the same sex as the sex requested by the detained person.

Subsection 59A (2)(b) to (4) provide a safeguard to the taking of identification material by requiring a police officer to tell a detained person they are able to request a copy of the photograph or video recording taken under section 59 (2A). For accountability, officers are required to make a written record of giving the photograph or video recording and any response from the detained person. If requested by the detained person, police officers must give a copy of the photograph, video recording and written record.

Subsection 59A (5)(a) to (c) includes a suite of additional protections that govern how police officers must take identification material under section 59 (2A). These protections require that the taking of a photograph or video recording:

- must be carried out in circumstances providing reasonably privacy to the detained person;
- must not involve the removal of more clothing than is necessary for the taking of the photograph or video recording.; and
- not involve more visual inspection than is necessary for the taking of the photograph or video recording.

These safeguards aim to provide additional protections for detained persons, particularly in circumstances where a detained person's clothing may need to be removed to document the injury or illness or where the injury or illness is located on a sensitive part of the body.

Government amendment 4 – Clause 9, proposed new section 60 (1) (b), page 5, line 9

This clause substitutes proposed new section 60 (1) (b) into the Bill to require that identification material taken to record an injury or illness may only be used for the purpose

of a complaint, investigation or proceeding that relates to the injury or illness suffered by the person while detained under the order.

This ensures that identification material taken under section 59 (2A) cannot be used for any other purpose or in connection with any other proceedings.