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

**TERRORISM (EXTRAORDINARY TEMPORARY POWERS) AMENDMENT BILL
2022**

REVISED EXPLANATORY STATEMENT

**Presented by
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TERRORISM (EXTRAORDINARY TEMPORARY POWERS) AMENDMENT BILL 2022

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004* (HR Act).

OVERVIEW OF THE BILL

Section 100 of the *Terrorism (Extraordinary Temporary Powers) Act 2006* (the TETP Act) requires a statutory review of the operation and effectiveness of the Act to be undertaken after the TETP Act had been in operation for 13 years (19 November 2019). The Attorney-General was required to table the report on the statutory review in the Legislative Assembly no later than 19 May 2021.

On 13 May 2021, the report ‘Review of the *Terrorism (Extraordinary Temporary Powers) Act 2006*’ (the Review) was tabled in the ACT Legislative Assembly.¹

The Review found that the policy objectives of the TETP Act remain relevant and that the scheme contains a number of important human rights safeguards that distinguish it from comparable schemes in other Australian jurisdictions.

During consultation with stakeholders on the Review, no specific amendments were proposed by stakeholders, though stakeholders reiterated the importance of preventing rights intrusions.

The Review concluded that it is appropriate to give further consideration to opportunities for change that might enhance the right to personal liberty while still ensuring the safety and security of the community.

The policy objective of this Bill is to ensure the Territory maintains strong counter-terrorism laws to ensure the community is kept safe from threats of terrorism, while protecting the human rights of individuals who may be detained under the powers of the TETP Act.

The majority of stakeholders consulted during the Review supported the extension of the Act, with key stakeholders including ACT Policing considering the TETP Act remains necessary for the prevention of, and response to the risk of, terrorism.

Terrorism remains an ongoing and dynamic threat in Australia. Since November 2015, the National Terrorism Threat Level has remained at ‘Probable’. The ACT remains a possible target of terrorist acts, as the seat of the Australian Parliament and Australian Government agencies.

¹ Review of the *Terrorism (Extraordinary Temporary Powers) Act 2006*, available at https://www.parliament.act.gov.au/data/assets/pdf_file/0009/1762587/Statutory-Review-of-the-Terrorism-Extraordinary-Temporary-Powers-Act-2006.pdf.

The TETP Act provides law enforcement with extraordinary powers to detain individuals under a preventative detention order, without charge, for up to 14 days, to respond and investigate where there is evidence that a terrorist act is imminent or where a terrorist act has occurred.

This Bill therefore extends the operation of the TETP Act for a further five years (to 19 November 2027) as it is due to expire on 19 November 2022. The Bill also requires a further statutory review of the TETP Act be submitted to the Legislative Assembly a year before the expiry of the next extension (ie submitted to Assembly by 19 November 2026).

In accordance with the conclusions of the Review, work was undertaken by the Justice and Community Safety Directorate to identify opportunities to further strengthen the human rights safeguards of the Act.

The Bill includes several amendments aimed at strengthening human rights protections for individuals detained under the TETP Act. These amendments ensure that the powers for preventative detention, where a person is detained without charge, are subject to appropriate human rights safeguards.

CONSULTATION ON THE PROPOSED APPROACH

Consultation was undertaken with key justice stakeholders in the development of these amendments. The amendments were provided to the following stakeholders:

- ACT Courts and Tribunal
- ACT Human Rights Commission
- ACT Law Society
- ACT Policing
- Civil Liberties Australia
- Director of Public Prosecutions ACT
- Legal Aid Commission ACT

CONSISTENCY WITH HUMAN RIGHTS

Rights Promoted

Broadly, the Bill engages and supports the following HR Act rights:

- Section 8 – right to equality and non-discrimination
- Section 9 – right to life
- Section 19 – humane treatment when deprived of liberty

The right to equality and non-discrimination (section 8 of the HR Act) recognises that everyone is entitled to enjoy their rights without discrimination of any kind, and that everyone is entitled to equal protection of the law without discrimination.

The right to life (section 9 of the HR Act) includes a positive obligation on government to take reasonable actions to safeguard life and protect individuals against the threats of terrorism.

The right to humane treatment when deprived of liberty (section 19 of the HR Act) recognises that any person who is deprived of liberty must be treated with humanity and respect. This right recognises the vulnerability of people in detention.

The Bill engages and promotes the right to equality and non-discrimination and the right to humane treatment when deprived of liberty as it introduces additional protections for individuals with impaired decision-making ability, who may be detained under the TETP Act. These amendments increase the period for which the detained person is entitled to have daily contact with a parent, guardian or other person from 2 hours to 4 hours. The amendments also require police officers to take reasonable steps to assist a person with impaired decision-making ability to exercise their contact rights under the Act. These amendments recognise that people with impaired decision-making ability may be especially vulnerable if they are detained under a preventative detention order and aim to provide appropriate support for these individuals while they are detained.

The Bill further promotes these rights by introducing a right for foreign nationals (that is those who are not Australian citizens or permanent residents) to have a diplomatic or consular representative of their country informed of their detention. This amendment mirrors existing practices under the *Corrections Management Act 2007* for individuals who are detained in a correctional facility in the ACT.

The Bill engages and promotes the right to life, as the Bill will extend the operation of the TETP Act which provides law enforcement with extraordinary powers to respond to and detain terrorism suspects. These powers ensure action can be taken to safeguard and secure the right to life for individuals in the ACT community.

Rights Limited

Broadly, the Bill may engage and limits the following rights:

- Section 12 – right to privacy
- Section 13 – freedom of movement
- Section 18 – right to liberty
- Section 19 – humane treatment when deprived of liberty
- Section 21 – right to a fair trial
- Section 22 – rights in criminal proceedings

The preamble to the HR Act notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. Section 28(2) of the HR Act contains the framework that is used to determine the acceptable limitations that may be placed on human rights.

The limitations on human rights in the Bill are proportionate and justified in the circumstances because they are the least restrictive means available to achieve the purpose of protecting the broader community from the threats of terrorism, whilst balancing the need to protect the human rights of individuals who may be detained under the TETP Act.

Detailed human rights discussion

The taking and use of identification material (sections 59 and 60)

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

The amendment to section 59 allows police officers to take identification material of a person detained under the TETP Act to record when that person has suffered an illness or injury while detained under the Act. The amendment to section 60 provides that any identification material taken to record an illness or injury may only be used in a complaint, an investigation or a proceeding that relates to the person's apprehension or detention.

These amendments limit 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, and the right to humane treatment while deprived of liberty. This amendment limits these rights as it provides police officers with the power to take identification material from an individual and to use this material in certain circumstances, including to record any illness or injury that the person suffered while detained under a preventive detention order. 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.

The TETP Act defines identification material in section 9. For the purposes of these amendments, this identification material will mainly include photographs or video recordings of a person.

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

The legitimate purpose of this amendment is to protect the welfare of any individual that may be detained by police under the TETP Act and enhance police accountability, through the recording of any illness or injury suffered while a person is detained in custody.

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

The limitations on the rights to privacy and humane treatment are necessary to achieve the aim of ensuring and protecting the welfare of individuals detained under the TETP Act and enhancing police accountability. These amendments will allow for there to be a photographic record of any injury or illness which may be necessary to record the circumstances of the welfare of a detainee. It will contribute to ensuring

police are accountable for any injury or illness that may occur to a person detained under the TETP Act in custody as the amendment to section 60 of the TETP Act will only allow these photographic records to be used in a complaint, an investigation or a proceeding that relates to a person's apprehension or detention.

4. Proportionality (s 28(2)(e))

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

The amendment to section 60 of the TETP Act will act as a safeguard to the taking of identification material, as it stipulates that the identification can only be used for the purpose of a complaint, an investigation or a proceeding that relates to the person's apprehension or detention. Section 60 of the TETP Act makes it an offence for this identification material to be used for any other purpose.

A pre-existing safeguard that will also apply to the taking of identification material is section 61 of the TETP Act which outlines requirements for destroying identification material. The timeframe for the destruction of identification material taken under section 59 of the TETP Act is dependent on whether a relevant proceeding has been started within 1 year of the material being taken. If a relevant proceeding has not been started, the identification material must be destroyed within 1 month after the end of the 1-year period. If a proceeding has started, the material must be destroyed within 1 month after the last of the proceedings is discontinued or finally decided.

ACT Policing has policies and practices in place that contribute to pre-existing safeguards, including in relation to the right to privacy, to protect detained individuals who suffer an injury or illness.

ACT Policing processes require officers to undertake assessments on the intake of a detainee into custody. Officers are required to regularly check on detainees in custody to ensure their wellbeing and safety. A nurse is also present or on call to provide medical assistance for any detainees who may suffer an injury or illness in detention, with the ACT Ambulance Service being called on a case-by-case basis. These processes act as safeguards to ensure detainees are given appropriate care and treatment while in custody.

Appropriate processes are also in place where it may be necessary for a detainee's clothing to be removed for recording an illness or injury. This will not be undertaken without medical professionals from the ACT Ambulance Service present and/or the stationed ACT Watch House nurse. The removal of a detainee's clothing is only undertaken by police if it is for the purposes of preventing or responding to immediate potential instances of self-harm of the detainee.

Extending the operation of the TETP Act – section 101

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

This amendment will extend the operation of the TETP Act for a further five years to 19 November 2027. Extending the operation of the powers in the TETP Act is likely to engage and limit numerous rights under the HR Act, principal of which are the right to liberty (section 18 of the HR Act), right to fair trial (section 21), rights in criminal proceedings (section 22) and the right to freedom of movement (section 13 of the HR Act).

Section 18 of the HR Act provides that everyone has the right to liberty and security of person, in particular, no-one may be arbitrarily arrested or detained or deprived of their liberty except on the grounds and in accordance with the procedures of the law. Extending the operation of the TETP Act will impact on the right to liberty as it allows for the preventative detention of terrorism suspects, without charge, for up to 14 days.

Section 13 of the HR Act provides that everyone has the right to move freely within the ACT and to enter and leave it, and the freedom to choose his or her residence in the ACT. The right to freedom of movement is linked to the right to liberty. This right is not absolute and so may be subject to reasonable limitations pursuant to section 28 of the HR Act. The right to freedom of movement may be limited through the special powers that may be exercised under the TETP Act in response to terrorist threat (Part 3).

Section 21 of the HR Act provides that everyone has the right to a fair trial and fair hearing in the determination of criminal charges or the determination of rights or obligations recognised by law. The right to a fair trial and fair hearing may be limited by the preventative detention orders which may be made or extended by the Supreme Court under Part 2 of the TETP Act.

Section 22 of the HR Act provides that everyone has the right to minimum guarantees in criminal proceedings, including the right to be presumed innocent until proved guilty. The right to minimum guarantees in criminal proceedings is linked to the right to a fair trial and fair hearing. These rights may be limited by preventative detention orders which may be made under the TETP Act.

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

The legitimate purpose of this amendment is to ensure the safety and protection of the community from threats of terrorism, through extending the operation of the TETP Act, while also ensuring the extraordinary powers of the TETP Act remain balanced with human rights. These restrictions are necessary to ensure that law enforcement can respond appropriately to the threat of terrorism and also achieve consistency within a national regime for the preventative detention of terrorism suspects.

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

The limitations on rights are likely to be effective in protecting the safety of the broader community as well as ensuring the human rights protections for persons who may be detained under the TETP Act. Extending the operation of the TETP Act will provide law enforcement in the ACT with extraordinary powers to be able to respond to, and investigate, terrorist acts. The ACT scheme for preventative detention under the TETP Act also includes significantly more safeguards than the corresponding Commonwealth preventive detention regime to protect detainees and their human rights.

4. *Proportionality (s 28(2)(e))*

The TETP Act has been expressly constructed to ensure that it is only used in exceptional circumstances and designed to be the least restrictive to achieve the protection of community safety. If the TETP Act's operation is not extended further, the legislation will lapse. This would leave the ACT without effective counter-terrorism laws and would require law enforcement to rely on the Commonwealth's more rights restrictive preventative detention scheme to detain terrorism suspects.

The Commonwealth preventative detention scheme contains significantly fewer human rights protections than detainees are afforded under the TETP Act. Extending the operation of the TETP Act is the least restrictive means reasonably available that achieves the objective of ensuring community safety whilst balancing human rights protections for people detained under the TETP Act.

Without the extension of the Act, there is a risk that terrorist suspects may not be apprehended and detained, which poses a risk to the safety and livelihoods of the broader ACT community. Extending the operation of the TETP Act allows law enforcement to respond appropriately to terrorist threats provides justification for continuing the limitation on rights, particularly the rights of liberty and freedom of movement, as the extension promotes the right to life (section 9 of the HR Act) by ensuring the safety of the ACT community.

The amendment to provide for a further statutory review is a pre-existing safeguard which requires the TETP Act to be reviewed publicly prior to the expiry of the TETP Act and for a report to be tabled in the Legislative Assembly. This is an important protection as it ensures the extraordinary measures in the TETP Act are reviewed regularly to ensure they remain proportionate to their objectives.

Therefore, the limitations on human rights arising from the extension of operation of the TETP Act are reasonable and proportionate to achieving the aim of protecting community safety and safeguarding the right to life (section 9 of the HR Act).

CLAUSE NOTES

Clause 1 Name of Act

This is a technical clause that provides the title of the Bill, once enacted is the *Terrorism (Extraordinary Temporary Powers) Amendment Act 2022*.

Clause 2 Commencement

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

Clause 3 Legislation amended

This clause states the legislation amended by the Bill. It will amend the *Terrorism (Extraordinary Temporary Powers) Act 2006*.

Clause 4 New section 50A

This clause inserts new section 50A which introduces a new right for people who are nationals of a foreign country who are detained under the Act to have access to diplomatic or consular contact. New section 50A(5) defines ***national of a foreign country*** to mean a person who is not an Australian citizen or permanent resident (as defined).

New section 50A(2) provides that a person who is a national of a foreign country is entitled to have the nominated senior police officer tell a diplomatic or consular representative of the country about the person's detention as soon as practicable after the person is detained under a preventative detention order.

New section 50A(3) provides that a police officer detaining such a person must, as soon as possible after the person is detained, tell them of their right to have a diplomatic or consular representative of the country informed of their detention.

New section 50A(4) provides that, if requested by the detained person, the nominated senior police officer must tell the diplomatic or consular representative of the person's detention, as soon practicable after receiving the request.

Clause 5 Contact with lawyer etc Section 52 (3) note

This is a technical amendment to the note in section 52(3) to replace an incorrect reference.

Clause 6 Special contact rules for people with impaired decision-making ability Section 53 (5) (a)

This clause amends section 53(5)(a) which currently provides that the daily period for which a detained person with impaired decision-making ability is entitled to have

contact with a parent, guardian or other contact person is 2 hours. The amendment substitutes a new daily contact period of 4 hours.

Clause 7 New section 53 (7) and (8)

This clause inserts new section 53 (7) to provide that a police officer is required to take reasonable steps to assist a detained person in exercising the person's rights under section 53 to have contact with a person in accordance with section 53(2).

This clause also inserts new section 53 (8) which provides that where a police officer finds a person under subsection unacceptable to have contact with a detainee, the police officer must tell the detained person the reason why, unless this would result in the disclosure of information relating to a terrorist act. In addition, the police officer detaining the person must allow the detained person an opportunity to nominate another person with whom the detained person wishes to have contact.

Clause 8 Taking identification material Section 59 (2) (b)

This clause substitutes section 59 (2) (b) to introduce a new ground on which a detaining police officer may take identification material from a detained person. New section 59(2)(b)(ii) will allow a police officer to take identification material to record any illness or injury that the person suffered while detained under a preventative detention order.

Clause 9 Using identification material Section 60 (1)

This clause amends section 60 to introduce a new use for identification material taken under new section 59(2)(b)(ii) of the Act. Identification material taken for the purposes of recording an injury or illness that a person suffered while detained must not be used for a purpose other than in a complaint, an investigation or a proceeding that relates to the person's apprehension or detention.

Clause 10 Section 100

This clause substitutes section 100 to insert dates for the next review of the Act. This must take place on or after 18 November 2025 and the report of the review must be presented to the Legislative Assembly no later than 19 November 2026.

Clause 11 Expiry of Act etc Section 101 (1)

This clause substitutes the provision for the expiry date of the Act and sets a new expiry date of 19 November 2027, extending the Act's operation for a further five years.

Clause 12 Dictionary, note 2

This clause inserts a new definition of *Australian citizen* in the Dictionary.