

## CLAUSE NOTES

### *Terrorism Legislation (Miscellaneous Amendments) Bill 2015*

#### PART 1 PRELIMINARY

##### Clause 1 Short Title

This provides the short title to be used when citing the Act for any legal purpose.

##### Clause 2 Commencement

This Act commences on the day on which it receives the Royal Assent.

#### PART 2 TERRORISM (PREVENTATIVE DETENTION) ACT 2005 AMENDED

##### Clause 3 Principal Act

The Principal Act referred to in this Bill is the *Terrorism (Preventative Detention) Act 2005*.

##### Clause 4 Section 3 amended (Interpretation)

This clause:

- Confirms that references to Australian Security Intelligence Organisation employee and Australian Security Intelligence Organisation affiliate have the same meaning as in the *Australian Security Intelligence Organisation Act 1979*.
- Repeals the reference to 'Terrorist Act' being defined in section 4 of the Principal Act.
- Clarifies that for the purposes of the Principal Act 'terrorist act', 'AFP member' and 'Commonwealth Control Order' are to be defined as stated in Part 5.3 of the *Commonwealth Criminal Code*.

##### Clause 5 Repealed

Section 4 of the Principal Act that defines 'terrorist act' is repealed

##### Clause 6 Section 5 Amended (Application for Preventative Detention Order)

###### Subclause 6(a)

This clause amends section 5(1)(a) of the Principal Act by changing the grounds on which an authorised police officer (applicant) may apply for a preventative detention order. It requires that the applicant 'suspect on reasonable grounds' that that the subject:

- will engage in a terrorist act;
- possesses or has under their control a thing that is connected with the preparation for or the engagement of a person in a terrorist act;
- has done an act in preparation for, or planning a terrorist act;
- making the order would substantially assist with preventing a terrorist attack occurring; and
- and it is reasonably necessary to detain the person to preserve evidence of a terrorist act that has occurred in the last 28 days.

The threshold is being changed on the advice of law enforcement experts that the use of the subjective test of suspects on reasonable grounds is more appropriate. It is designed to ensure that, not only are there reasonable grounds upon which to form the suspicion, but the applicant has actually formed the suspicion.

The Supreme Court or senior police officer must be satisfied that there are reasonable grounds for the suspicion of the applicant before making a preventative detention order. The effect of the two clauses is to introduce a subjective and objective test before a preventative detention order can be made.

#### **Subclause (6)(b)**

This clause omits the current objective requirement of 'reasonable grounds to suspect' in section 5(1)(i)

#### **Subclause 6(c)**

This clause amends section 5(b)(ii) of the Principal Act by providing that a preventative detention order may be sought by the applicant where it is 'reasonably necessary' to preserve evidence of, or relating to, the terrorist act. The amendment is necessary because the current requirement is that the applicant be satisfied that the destruction or loss of evidence *will* occur.

This is appropriate and justifiable on the basis that it seeks to achieve a legitimate objective. The legitimate objective in this instance is to allow Tasmania Police to more effectively investigate and gather evidence of, or relating to, terrorist acts. The obtaining of vital evidence

assists in the prosecution of those engaging in terrorist acts and provides a strong deterrent for others who may wish to undertake such acts.

#### **Clause 7      Section 6 amended (Form and content of application)**

This clause amends Section 6 of the Principal Act in relation to the required form and content of an application for a preventative detention by providing:

- That a preventative detention order can be made on the basis of a person's name, alias or physical description. It is important that a person of security concern cannot escape being the subject of a preventative detention order merely because authorities do not know the person's full legal name.
- That, in urgent circumstances, an application for a preventative detention order may be made either in writing, other than by an electronic communication, orally or in person or by fax, email or other form of electronic communication. The inclusive description is designed to ensure other forms of electronic communication, including those not contemplated or not invented at the time of the amendment can be used to make an oral application.
- That where an urgent application for a preventative detention order that is made orally in person or by fax, email or other electronic means of communication, the senior police officer or Supreme Court must not make the order unless satisfied that it is necessary, because of the urgent circumstances, to apply for a preventative detention order by such means. This acknowledges the extraordinary circumstances in which an application for a preventative detention order may be made orally in person or by telephone and is designed to ensure the preventative detention orders are applied for in writing in cases where there are not urgent circumstances sufficient to justify seeking a preventative detention order by using other means (such as applying in writing to a senior police officer or the Supreme Court).
- That where an application for a preventative detention is made orally, information given by the applicant to the Supreme Court or senior police officer in connection with the application must be verified or given on oath or affirmation, unless the Supreme Court or senior police officer is satisfied that it is not practical to administer an oath or affirmation.

This clause also updates references by omitting references to 'person' and adding 'subject'.

**Clause 8            Section 7 amended (Preventative detention orders)**

**Subclause 8(a)**

This clause amends Section 7(1)(a) by omitting 'on reasonable grounds' and substituting 'that there are reasonable grounds to suspect. This is to provide that the Supreme Court or senior police officer must be satisfied that there are reasonable grounds for the suspicion of the applicant before making a preventative detention order. That is, they must be satisfied that there are reasonable grounds to suspect that the person will engage in a terrorist act, possesses a thing connected with the preparation for or engagement in a terrorist act, or has done an act in preparation or planning a terrorist act and that making the order would substantially assist in preventing a terrorist act occurring.

**Subclause 8(b)**

This clause amends Section 7(1)(b)(ii) of the Principal Act by providing that a preventative detention order may be made by the Supreme Court or senior police officer if they are satisfied on reasonable grounds that it is 'reasonably necessary' to preserve evidence of, or relating to, the terrorist act.

**Clause 9            Section 8 amended (Nature of Preventative Detention Order)**

This clause amends Section 8(4) of the Principal Act so that that a preventative detention order can be made on the basis of a person's name, alias or physical description.

This clause also updates references by omitting references to 'person' and adding 'subject'.

**Clause 10            Section 11 amended (Extension of preventative detention order)**

This clause amends Section 11 of the Principal Act so that application for an extension to a preventative detention order must be in writing but can be made in relation to the name of a person, an alias or a physical description.

**Clause 11            Section 14 amended (Prohibited contact order (person in relation to whom a preventative detention order is being sought))**

This clause amends Section 14 of the Principal Act so that if an applicant is seeking a prohibited contact order and a preventative detention order, the application for a prohibited contact order can be made orally in person or by telephone or by fax, email or other electronic means of communication.

This clause also provides that before making the prohibited contact order on the basis of an oral or verbal application, the Supreme Court or senior police officer must be satisfied that it was necessary because of urgent circumstances to apply for a prohibited contact order by such means.

This clause includes an important safeguard requiring the Supreme Court or senior police officer to ensure there is either an audio or audio-visual recording of the application (at the time the application is made) or that a written record of the details of the application and any information given in support of the application is made as soon as practicable after the order is made. It also provides a safeguard to the applicant and Supreme Court or senior police officer by ensuring there is an accurate record of the information relied upon for both the application and making of the order.

**Clause 12                      Section 15 amended (prohibited contact order (person in relation to whom a preventative detention order is already in force))**

This clause amends Section 15 of the Principal Act so that if an applicant is seeking a prohibited contact order in relation to a person to whom a preventative detention order is already in force, the application for a prohibited contact order can be made orally in person or by telephone or by fax, email or other electronic means of communication.

This clause also provides that before making the prohibited contact order on the basis of an oral or verbal application, the Supreme Court or senior police officer must be satisfied that it was necessary because of urgent circumstances to apply for a prohibited contact order by such means.

This clause includes an important safeguard requiring the Supreme Court or senior police officer to ensure there is either an audio or audio-visual recording of the application (at the time the application is made) or that a written record of the details of the application and any information given in support of the application is made as soon as practicable after the order is made. It also provides a safeguard to the applicant and Supreme Court or senior police officer by ensuring there is an accurate record of the information relied upon for both the application and making of the order.

**Clause 13                      Section 36 amended (Special contact rules for person under 18 or incapable of managing own affairs)**

This clause amends Section 36 of the Principal Act consistent with the updates to the definition of ASIO Employee and ASIO Affiliate in section 3. A person being detained under a preventative detention order that is under 18 or incapable of managing their affairs is entitled to have contact with a person who is able to represent their interests but that person must not be an ASIO employee or affiliate.

**Clause 14                      Section 40 amended (taking identification material)**

This clause amends Section 40 of the Principal Act consistent with the updates to the definition of ASIO Employee and ASIO Affiliate in section 3. It clarifies that both an ASIO Employee and ASIO Affiliate are not considered an 'appropriate person' to:

- Be present when identification material is taken from a person that is under 18 or incapable of managing their own affairs, for the purposes of subsection (6); or
- Agree in writing to the taking of identification material from a person under 18 or one that is capable of managing their own affairs, for the purposes of subsection (7).

**Clause 15                      Section 54 amended (Sunset provision)**

This clause amends Section 54 of the Principal Act by extending the operation of the legislation for a further ten years until 31 December 2025. This recognises the enduring nature of the terrorist threat and the important role of preventative detention orders in mitigating and responding to that threat. It is vital that law enforcement agencies continue to have access to all tools that could be required to combat this threat and protect Australia and Australians from terrorist acts.

**PART 3                      POLICE POWERS (PUBLIC SAFETY) ACT 2005 AMENDED**

**Clause 16                      Principal Act**

The Principal Act referred to in this Bill is the *Police Powers (Public Safety) Act 2005*.

**Clause 17                      Section 3 amended (interpretation)**

This clause adds a definition of *Commonwealth Criminal Code* and clarifies that for the purposes of the Principal Act 'terrorist act' is to be defined as stated in Part 5.3 of the *Commonwealth Criminal Code*.

**Clause 18                      Section 4 repealed**

This clause repeals section 4 as 'terrorist act' is to be defined with reference to the *Commonwealth Criminal Code Act 1995*.

**Clause 19                      Section 34 substituted**

This clause extends the operation of the legislation for a further ten years until 31 December 2025.