

**2006**

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY**

**TERRORISM (EXTRAORDINARY TEMPORARY POWERS) BILL 2006**

**EXPLANATORY STATEMENT**

Circulated with the authority of  
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## Overview

The Terrorism (Extraordinary Temporary Powers) Bill 2005 (the Bill) gives effect in the Australian Capital Territory to the agreement between the Commonwealth, State and Territory Governments adopted at the Council of Australian Government's (COAG) Terrorism Summit held in Canberra on 27 September 2005. At the summit COAG considered the evolving security environment in the context of the terrorist attacks in London in July 2005 and agreed that there is a clear case for Australia's counter-terrorism laws to be strengthened. Leaders agreed that any strengthened counter-terrorism laws must be necessary, effective against terrorism and contain appropriate safeguards against abuse, such as parliamentary and judicial review, and be exercised in a way that is evidence-based, intelligence-led and proportionate.

There is a clear need for laws to combat terrorism. However, in making such laws it is critical that Australia's fundamental legal principles of justice (the rule of law, proportionality, respect for the legal process, the separation of powers and basic human rights such as the right to a fair trial) are preserved. Any legislation must comply with Australia's international human rights obligations, in particular the International Covenant on Civil and Political Rights; must be proportionate; and be subject to judicial review and oversight.

### *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.

To support the section 37 statement in relation to this Bill, the Government obtained independent legal advice on the compatibility of its provisions with the HRA.

In summary, the advice concluded that the Bill is compatible with the HRA.

In particular, the Bill achieves consistency with regard to the following rights:

- Protection from torture, cruel, inhuman or degrading treatment (s 10(1) HRA);
- Protection of the family and children (s 11 HRA);
- Freedom of movement (s 13 HRA);
- Freedom of thought, conscience, religion and belief (s 14 HRA);
- Freedom of assembly and association (s 15 HRA);
- Humane treatment when deprived of liberty (s 19 HRA);
- Fair trial (s 21 HRA);
- Rights in criminal proceedings (s 22 HRA); and
- Rights of minorities (s 27 HRA).

The advice did note possible arbitrary interference with some human rights.

It noted that detention under preventative detention orders may be arbitrary (s 18 HRA) as a consequence of the duration of detention up to 14 days, and the incommunicado nature of detention. It also suggested that interference with the right to privacy may be arbitrary (s 12 HRA) as a consequence of the way in which a person would be detained and held in custody under a preventative detention order and the special powers allowing preventative and investigative authorisations.

However, it concluded that these interferences are likely to be ‘reasonable limits’ that can be ‘demonstrably justified in a free and democratic society’ for the purposes of s 28 of the HRA on the basis that:

- The obligation to respond to the threat of terrorism, including through legislative means, is an important and significant objective;
- The restrictions on rights are reasonable and necessary, taking into account the importance of achieving consistency within a national regime; and
- The bill incorporates extensive safeguards, which, in the context of a national regime, represent the least restrictive options available.

#### *Strict liability offences*

The Bill includes one strict liability offence. Refer to clause 38 for a discussion of the application of strict liability.

## **Clauses**

### **Preamble**

The preamble sets out the background and context of the Bill. In particular, the preamble outlines the agreement between the Commonwealth, State and Territory Governments adopted at the Council of Australian Government’s (COAG) Terrorism Summit held in Canberra on 27 September 2005. The preamble also outlines the Legislative Assembly imperative that the provisions in the ACT Bill preserve Australia’s fundamental legal principles of justice, comply with Australia’s international human rights obligations, be proportionate, and be subject to judicial review and oversight.

### **Part 1 Preliminary**

#### **Clause 1 Name of Act**

Clause 1 is a technical clause and sets out the name of the proposed Act as the *Terrorism (Extraordinary Temporary Powers) Act 2005*.

#### **Clause 2 Commencement**

Clause 2 is the commencement provision. The Bill will commence the day after its notification on the Legislation Register ([www.legislation.act.gov.au](http://www.legislation.act.gov.au)).

### **Clause 3 Dictionary**

Clause 3 is a technical clause and explains that the dictionary at the end of the Act is a part of the Act. The dictionary at the end of the Bill defines certain terms used in the Bill, and includes references (known as signpost definitions) to other terms defined elsewhere. A definition in the dictionary (including a signpost definition) applies to the entire Bill unless the definition, or another provision of the Bill, provides otherwise or the contrary intention otherwise appears.

The dictionary contains two notes. Note 1 explains that the *Legislation Act 2001* contains definitions and other provisions relevant to the Act. For instance Part 19.3 of the Legislation Act deals with the making of appointments under legislation. This is relevant in relation to, for example, clause 62 which provides that the Minister must appoint people to a public interest monitor panel.

Note 2 provides examples of commonly used terms in legislation that are defined in Part 1 of the Legislation Act dictionary. For example, the term ‘child’ is used in the Bill and is defined under Part 1 of the Legislation Act dictionary to mean, in the context of age (as opposed to descendency), an individual who is under 18 years old.

### **Clause 4 Notes**

Clause 4 is a technical clause and explains that a note included in the Act is explanatory and is not part of the Act.

### **Clause 5 Offences against Act – application of Criminal Code etc**

Clause 5 is a technical clause that makes it clear that the *Criminal Code 2002* applies to the Act.

### **Clause 6 Meaning of terrorist act**

Clause 6 defines a “terrorist act”. The definition of “terrorist act” accords (with slight modification) with that of the *Commonwealth Criminal Code Act 1995* as well corresponding legislation in New South Wales, Victoria, Western Australia, South Australia and Tasmania. The definition of terrorism defines the limits for the triggering of these exceptional temporary powers, specifically it is relevant to the ability of a senior police officer to apply for, and the Supreme Court to make a preventative detention order for a person and a prohibited contact order for a person. It also relates to the ability of the Chief Police officer to apply for and the Supreme Court or Magistrates Court to make a preventative authorisation and an investigative authorisation. Consistent with the approach in New South Wales and Western Australia, the definition does not cover “threats” of action.

### **Clause 7 Extraterritoriality of terrorist act no barrier**

Clause 7 clarifies the extraterritorial aspects of the Bill. The Bill permits the Supreme Court to make a preventative detention order for a person who is present in the Australian Capital Territory, even though the relevant actions that are the subject of the grounds for making the order under clause 18 (Making preventative detention order) are not being carried out, have not been carried out or are not likely to be carried out in the Territory. The extension of territorially will enable access of more people to the ACT scheme – the benefits of which is a greater human rights focus.

## **Part 2      Preventative detention orders**

### **Division 2.1   Preventative detention orders - preliminary**

#### **Clause 8      Purpose—pt 2**

Clause 8 sets out the purpose of Part 2. The purpose is to enable the police to take a person into custody and detain that person for a short period of time (being no longer than 14 days) in order to prevent an imminent terrorist act happening (being an attack that is expected to happen at some time in the next 14 days), or to preserve evidence of, or relating to, a recent terrorist act (being an act that has happened within the last 28 days). The note indicates that a person detained under a preventative detention order may only be questioned for very limited purposes, in accordance with clause 58.

#### **Clause 9      Definitions—pt 2**

Clause 9 defines certain terms used under Part 2.

The term “corresponding preventative detention law” refers to Division 105 (Preventative detention orders) of the *Criminal Code Act 1995* (Cwth) and provisions of other States and Territories that provide for the preventative detention of persons consistent with the provisions in Part 2. Regulations may declare the laws of other jurisdictions to be corresponding laws for the purposes of this part to achieve certainty.

The term “corresponding preventative detention order” means an order, however expressed, for a person’s detention under a corresponding preventative detention law.

The term “identification material”, in relation to a person, mean prints of the person’s hands, fingers, feet or toes; or recordings of their voice; or samples of their handwriting; or photographs (including video recordings) of the person. The list is exhaustive.

The term “interim preventative detention order”, also referred to as “interim order”, refers to an order made under clause 20.

The term “part 2 application” means any application to make, set aside or amend a preventative detention order. It includes applications to extend or reinstate such orders.

In addition, it includes any application to make or set aside a prohibited contact order.

The term “preventative detention order” is an order made by the Supreme Court under clause 18 detaining a person under Part 2 and includes the order as extended or further extended under Division 2.4 as well as an interim order made under clause 20.

The term “Prohibited contact order” is an order made by the Supreme Court under clause 32 that prohibits a person detained under a preventative detention order from contacting a person specified in that order.

### **Clause 10 Police officers with functions under preventative detention orders**

Clause 10 ensures that responsibility for exercising functions relating to detention of persons under a preventative detention order is imposed on the most senior officer involved in the detention.

## **Division 2.2 Preventative detention orders – general provisions**

### **Clause 11 No preventative detention orders for children**

Clause 11 prohibits a senior police officer from applying for a preventative detention order for a child. It also prohibits the Supreme Court from making a preventative detention order for a child. The *Legislation Act 2001* defines a child as an individual who is under 18 years old (Dictionary, Part 1). The clause is consistent with the *Convention of the Rights of the Child* which provides in Article 37 that States Parties shall ensure that:

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

The detention of children is a disproportionate limitation on the rights of the child.

It is possible that a senior police officer could apply for, and the Supreme Court could make, a preventative detention order in relation to a person without knowing that the person is under 18 years old. Subclause (2) inserts a safeguard that provides that if a police officer detaining a person under a preventative detention has any grounds to suspect that the person may be a child, the police officer must immediately make reasonable inquiries about the person's age.

If, after making the inquiries, the police officer believes on reasonable grounds that the person is a child, the police officer must immediately release the child from detention. In recognition of the fundamental nature of this safeguard, an offence has been included where the police officer fails to release the child in these circumstances.

### **Clause 12 Restrictions on multiple preventative detention orders**

Every preventative detention order issued by the Supreme Court will be issued in order to prevent a particular terrorist act that is expected to happen within a particular period or to preserve evidence relating to a particular terrorist act that has actually happened.

Clause 12 restricts the making of multiple preventative detention orders over the same person relating to the same act or period or based on the same supporting information. However, it will not prevent the making of orders that extend interim or final orders, or that reinstate lapsed orders, up to the maximum period of 14 days (see subclause 21(3)).

The restriction takes account of any corresponding preventative detention orders, to ensure that the maximum period of 14 days applies equally across all jurisdictions.

The restriction will not apply unless or until a person is detained under a relevant order.

Subclauses (1) and (2) prohibit the making of orders where previous orders have been issued relating to the same threat or to a different threat arising in the same period. The note indicates that, should the terrorist act occur, it will be possible to make an order in relation to the same act in order to preserve evidence (see subclause 12(3)).

Subclause (2) will allow subsequent orders that are based on fresh information.

Subclause (3) prohibits the making of orders where previous orders have been made to preserve evidence of, or relating to, the same terrorist act.

Subclause (4) prohibits the making of multiple preventative detention orders that are based solely on the same information. This will prevent, for example, the making of orders in relation to different terrorist acts that are supported by the same evidence.

Subclause (5) relaxes these restrictions in relation to orders that extend interim or final orders or that follow on from previous orders under the laws of other jurisdictions.

This will allow, for example, a person to be taken into detention for up to 48 hours under the Commonwealth *Criminal Code*, then to be detained under the ACT legislation for up to a total of 14 days in order to prevent the same terrorist act, etc.

Subclause (5) also relaxes the restrictions in relation to orders reinstating lapsed orders. (Clause 58 generally prohibits questioning while a person is in detention. They must be released for such purposes. Clause 42 provides that an order will lapse if a person is released. Division 2.4A allows orders to be reinstated if they lapsed to allow questioning under the *Australian Security Intelligence Organisation Act 1979* (Cwth) or *Crimes Act 1914* (Cwth)).

### **Clause 13 Rights in relation to hearing of part 2 applications**

Clause 13 confers a range of procedural and representation rights on persons who are the subject of applications for preventative detention orders or prohibited contact orders.

These do not apply in relation to applications for interim preventative detention orders.

Subclauses (2) to (6) provide that a person is entitled:

- to be served with a copy of an application and to be given written notice of the place, date and time the application is to be heard;
- to be present at the hearing either in person or, if the court directs, by videolink; and
- to be represented by a lawyer of their own choice, or, where relevant, a lawyer appointed by the legal aid commission. They, or their lawyer, are entitled to examine and cross-examine witnesses and make submissions at the hearing.

This is additional to any of the other ordinary rights the person will have in legal proceedings and is subject to the Supreme Court's inherent powers to regulate its proceedings.

Subclause (8) permits the court to hear an application in the absence of a person where it is satisfied that the person or their lawyer was properly notified of the hearing.

#### **Clause 14 Appointment of PIM for applications etc.**

Clause 14 confers certain procedural rights on the public interest monitor in relation to applications for preventative detention orders or prohibited contact orders.

Subclause (2) requires the senior police officer applying for the order to give the Legal Aid Commission a copy of the application and written notice of the details of the hearing.

Subclause (3) then requires the commission to appoint a public interest monitor (PIM) from a panel of lawyers appointed by the Minister under clause 62.

Subclause (4) provides that the public interest monitor is entitled to be present at the hearing and to ask questions of any person giving evidence or making submissions to the court.

#### **Clause 15 Notifying public advocate about applications etc**

Clause 15 confers certain procedural rights on the public advocate in relation to applications for orders over persons with impaired decision-making ability.

Subclause (2) and (3) provide that the public advocate is entitled:

- to be given a copy of an application and written notice of the details of the hearing; and
- to be present at the hearing and to ask questions of any person giving evidence or making submissions to the court.

### **Division 2.3 Preventative detention orders – applications for and making**

#### **Clause 16 Applying for preventative detention order**

Clause 16 allows a senior police officer, with the approval of the Chief Police Officer, to apply to the Supreme Court for preventative detention orders. These orders authorise the detention of a person either to prevent an imminent terrorist act or to preserve evidence relating to a terrorist act that has occurred within the preceding 28 days.

Subclause (3) deals with detention in order to prevent an imminent terrorist act.

Paragraph (3)(a) requires the officer to suspect on reasonable grounds that the person:

- intends, and has the capacity, to carry out a terrorist act; or
- possesses something connected with preparing for or carrying out a terrorist act; or
- has done an act in preparation or planning for a terrorist act.

Paragraph 16(3)(b) requires the officer to be satisfied on reasonable grounds that:

- it is reasonably necessary to detain the person to prevent the terrorist act;
- detaining the person is the least restrictive way of preventing the terrorist act; and
- detention for the stated period is reasonably necessary to prevent the act.

The terrorist act must be imminent and, in any event, expected to happen within 14 days.

Subclause (5) deals with detention to preserve evidence of a terrorist act. It requires the officer to be satisfied on reasonable grounds that:

- a terrorist act has occurred within the last 28 days;
- it is reasonably necessary to detain the person to preserve relevant evidence;
- detaining the person is the only effective way of preserving the evidence; and
- detention for the stated period is reasonably necessary to preserve the evidence.

Evidence is relevant if it relates to the terrorist act. It is not necessary for the evidence to be located in the ACT or for the act to have happened within the ACT, given that the Act applies extraterritorially (see clause 7).

### **Clause 17      Application for preventative detention order – contents etc**

Clause 17 sets out the requirements for a valid preventative detention order application.

Subclause (1) provides that the application must:

- be in writing;
- state the full name and permanent or current address of the person;
- state whether the application incorporates an application for an interim order;
- set out the facts and other grounds which the officer considers justify the order;
- state and provide justification for the period for which the person is to be detained;
- state that the officer does not suspect that any of the supporting facts and other grounds are based on information obtained, directly or indirectly, from torture;
- set out any information about the person's age and decision-making ability;
- state that the officer is satisfied that the person is not a child;
- state whether the officer suspects, or has any grounds to suspect, that the person has impaired decision-making ability;
- set out any details of previous applications, orders or periods of detention, including applications for corresponding preventative detention orders, applications for control orders under the Commonwealth *Criminal Code* and recent periods of detention under the *Australian Security Intelligence Organisation Act 1979*;
- set out any information relating to any child or person with impaired decision making ability who lives with the person or for whom the person is responsible and state the conditions or arrangements are proposed in order to protect their interests; and
- state the inquiries that the officer has made in relation this group of dependents.

If an interim order is being applied for, the officer must also:

- state that the person is not in custody, or being detained under another law;
- state that he or she has not been detained under a corresponding order; and

- state the particular facts and other grounds which justify making the interim order.

If the person has impaired decision making ability the application must state the period within which the public advocate may contact the person. Ordinarily, the public advocate is entitled contact the person within 24 hours (see clause 54). However, this period may be delayed if the contact would significantly increase the risk of a terrorist act or seriously undermine the effectiveness of the order. The application must state the period and the grounds for preventing the contact during this period (subclause (2)).

If a repeat application is being made, subclauses (3) and (4) require the application to address the requirements in subclauses 12(2) and (4) to provide fresh information.

Subclause (5) requires the application to state that it discloses all relevant matters of which the officer is aware, whether they are favourable or adverse to the application.

Subclause (6) provides that the applicant need not set out particulars of any periods of detention under the *Australian Security Intelligence Organisation Act 1979* (required by paragraph 17(1)(k)(vi)) where disclosure would be an offence against that Act.

The officer must swear the information in the application on oath (subclause (7)).

### **Clause 18 Making preventative detention order**

Clause 18 empowers the Supreme Court to make preventative detention orders on the application of a senior police officer under clause 16. These orders authorise the detention of a person either to prevent an imminent terrorist act or to preserve evidence relating to a terrorist act that has occurred within the preceding 28 days.

Subclause (4) deals with detention in order to prevent an imminent terrorist act.

Subclause (4) requires the court to be satisfied on reasonable grounds the person:

- intends, and has the capacity, to carry out a terrorist act; or
- possesses something connected with preparing for or carrying out a terrorist act; or
- has done an act in preparation or planning for a terrorist act; and
- it is reasonably necessary to detain the person to prevent a terrorist act; and
- detaining the person is the least restrictive way of preventing the terrorist act; and
- detention for the stated period is reasonably necessary to prevent the act.

The terrorist act must be imminent and, in any event, expected to happen within 14 days.

Subclause (6) deals with detention in order to prevent an imminent terrorist act. It requires the court to be satisfied on reasonable grounds that:

- a terrorist act has occurred within the last 28 days;
- it is reasonably necessary to detain the person to preserve relevant evidence;
- detaining the person is the only effective way of preserving the evidence; and

- detention for the stated period is reasonably necessary to preserve the evidence.

All applications, other than those which incorporate applications for interim orders, must be served on the person along with written notice of the place, date and time the application is to be heard. No orders may be made if this is not done (subclause (2)).

Subclause (7) creates an additional safeguard for people who have impaired decision-making ability. If the person has impaired decision-making ability, the court must consider the nature and extent of the person's impairment and any other way it may be appropriate to deal with the person under a territory law.

If the Supreme Court makes a preventative detention order for a person it must give its reasons for making the order and ensure that reasonable steps are taken to explain the effect of the order to the person (and in a language the person can readily understand).

### **Clause 19 Supreme Court may require further information – preventative detention application**

Clause 19 reiterates the power of the Supreme Court to require further information and to refuse an application unless information is given in a way that the court requires.

### **Clause 20 Making interim preventative detention order**

Clause 20 empowers the Supreme Court to make *ex parte* interim preventative detention orders, pending the hearing of applications for final preventative detention orders.

Paragraph 20(2)(a) allows the court to make interim orders in relation to a person who is not in custody or being detained under a territory law or a law of the Commonwealth, a State or another Territory, including a corresponding preventative detention law.

Paragraph 20(2)(b) requires the court to be satisfied on reasonable grounds that the person has not been detained under a corresponding detention order for the same act.

Paragraph 20(2)(c) requires the court to be satisfied on reasonable grounds that taking the person into custody, and detaining the person, pending hearing and making a final order is reasonably necessary to prevent a terrorist act or to preserve evidence.

Subclause (3) clarifies that interim orders are based on the grounds for final orders.

Subclause (4) provides that the court may make an interim preventative detention order in the absence of, and without notice to, the person or his or her representative.

Subclause (5) requires the court to give its reasons for making the interim order and to fix a date and time for the hearing (not more than 24 hours after making the order).

As soon as possible after a person is detained under the order, subclause (7) requires that they be given a copy of an application and be given written notice of the place, date and time the application is to be heard (similar to the requirements in clause 13).

## **Clause 21 Preventative detention order – contents etc**

Clause 21 specifies the powers and limitations of a preventative detention order and sets out the matters it must contain, including the period for which detention is authorised.

Subclause (1) provides that the authority to detain begins when the order begins (see subclause 22(1)) and ends at a time stated in the order (see subclauses 22(2) and (3)).

Subclauses (2) and (3) define the ‘end times’ for interim and other orders:

- *An interim order may only authorise a person to be detained for 24 hours – the end time must be no later than 24 hours after the person is first detained under the order.*
- *Every other order may only authorise a person to be detained for 7 days – the end time must be no later than 7 days after the person is first detained under the order.*
- *No combination of orders may allow a person to be detained for more than 14 days in relation to the same terrorist act – the end time must be no later than 14 days after the person was first detained under an order or corresponding order for the same act.*

Subclause (4) requires every preventative detention order to be in writing.

Subclause (5) requires that the order must:

- state the full name and permanent or current address of the person;
- state the date and time when the order is made; and
- state the period during which the person may be detained (see subclause 22(1)).

Subclauses (6) to (9) deal with special contact arrangements for persons with impaired decision-making ability, including any special restrictions on contact with the public advocate under clause 54 and any special contact arrangements between a person and their children in addition to provision for contact under clause 50.

Subclause (10) deals with special arrangements for contact by detainees with their children.

## **Clause 22 Start and end of effect of preventative detention order**

Clause 22 formally specifies when an order commences and ceases to have effect.

Generally, the effect will be to follow the terms of the order (see clause 21), allowing for variations resulting from extension (Division 2.4) or reinstatement (Division 2.5).

It also provides that an order will cease in the event that:

- the person is not detained within 48 hours;
- the order lapses under clause 42;
- the order is set aside under Division 2.6; or
- the Act sunsets after 5 years under clause 101.

## **Division 2.4 Preventative detention orders – extensions**

### **Clause 23 Supreme Court may extend interim order**

Clause 23 allows the Supreme Court to extend, or further extend, an interim order and thereby adjourn, or further adjourn the hearing of an application for a final order.

Subclause (3) provides that an extended interim preventative detention order must end no later than 24 hours after the person was first detained under the order.

If the order is for the detention of a person with impaired decision-making ability, subclauses (4) and (5) allow the order to restrict contact with the public advocate under clause 51 on the basis that contact would seriously prejudice national security.

### **Clause 24 Application for extension of preventative detention order**

Clause 24 allows a senior police officer to apply to extend, or further extend, an order.

Subclause (2) requires the officer to be satisfied on reasonable grounds that the extension is reasonably necessary to fulfil the purposes of the original order.

Subclause (3) provides that the application must:

- be in writing;
- set out the facts and other grounds which the officer considers justify the extension; and
- set out any details and outcomes of any previous applications for extension.

If the person has impaired decision making ability the application must state the period within which the public advocate may contact the person. Ordinarily, the public advocate is entitled contact the person within 24 hours (see clause 54). However, this period may be delayed if the contact would significantly increase the risk of a terrorist act or seriously undermine the effectiveness of the order. The application must state the period and the grounds for preventing the contact during this period (subclause (4)).

Subclause (5) requires the application to state that it discloses all relevant matters of which the officer is aware, whether they are favourable or adverse to the application.

The officer must swear the information in the application on oath (subclause (6)).

### **Clause 25 Supreme Court may require further information – extension application**

Clause 25 reiterates the power of the Supreme Court to require further information and to refuse an application unless information is given in a way that the court requires.

### **Clause 26 Supreme Court may extend preventative detention order**

Clause 26 empowers the Supreme Court to extend, or further extend, an order on application under clause 24 if the court is satisfied on reasonable grounds that the extension is reasonably necessary to fulfil the purposes of the original order.

The extension or further extension must be made in writing as an order.

Consistent with the ‘end times’ defined in clause 21, an extension or further extension may only authorise a person to be detained for 7 days. No combination of orders may allow a person to be detained for more than 14 days in relation to the same terrorist act.

Subclauses (3) and (4) deal with special contact arrangements for persons with impaired decision-making ability, including any special restrictions on contact with the public advocate under clause 54.

## **Division 2.5 Preventative detention orders – reinstatements**

### **Clause 27 Application for reinstatement of preventative detention order**

Clause 27 allows a senior police officer to apply to reinstate orders that have lapsed to allow the person to be detained and questioned in respect of an alleged terrorist offence under the Commonwealth Criminal Code or in connection with intelligence gathering under the *Australian Security Intelligence Organisation Act 1979* (Cwlth).

Subclause (3) requires the officer to be satisfied on reasonable grounds that the extension is reasonably necessary to fulfil the purposes of the original order.

Subclause (4) provides that the application must:

- be in writing; and
- set out the facts and other grounds which the officer considers justify the reinstatement.

### **Clause 28 Supreme Court may require further information—reinstatement application**

Clause 28 reiterates the power of the Supreme Court to require further information and to refuse an application unless information is given in a way that the court requires.

### **Clause 29 Supreme Court may reinstate preventative detention order**

Clause 29 empowers the Supreme Court to reinstate an order on application under clause 27 if the court is satisfied on reasonable grounds that the reinstatement is reasonably necessary to fulfil the purposes of the original order.

Subclause (2) limits the length of time that may be reinstated to the maximum period of detention that could have been authorised under the original lapsed order.

### **Clause 30 Start and end of effect of reinstated preventative detention order**

Clause 30 states that a reinstated order starts when it is made. It also defines the ‘end times’ of a reinstated order. Essentially, the reinstated order may exhaust the residue of the original order as if it had not lapsed as a result of the operation of clause 42.

## **Division 2.6 Preventative detention orders – setting aside and amending**

### **Clause 31 Setting aside or amending preventative detention orders**

Clause 31 provides for setting aside and amending of preventative detention orders by the Supreme Court on the application of the person detained or a senior police officer.

Subclause (1) provides that the person may apply to set aside or amend the order.

Subclause (2) requires that the officer must apply to set aside the order if he or she is satisfied that the original grounds for making the order do not exist or no longer exist.

Paragraph (2)(b) requires other officers who may be detaining the person to communicate any such grounds to a senior police officer to whom subclause (2) applies.

Subclause (3) (a) sets out the obligation of the Supreme Court to set the order aside if it is satisfied that the original grounds for making the order do not exist or no longer exist. Subclause (3) (b) sets out the discretion of the Supreme Court to set the order aside if it is satisfied that it is appropriate to do so because of new facts and circumstances that have arisen since the order was made, extended or last extended, or because of facts and circumstances that were not before the court previously.

Subclause (4) requires that notice of the setting aside of the order must be provided to the chief executive and the public interest monitor.

Subclause (5) empowers the Supreme Court to order the Territory to pay compensation to a person where the order is set aside and the court considers that the order should not have been made (or extended or further extended) due to facts and circumstances that were not before the court when the order was made (or extended or further extended).

Subclause (6) sets out the discretion of the Supreme Court to amend an order if it is satisfied that it is appropriate to do so because of new facts and circumstances that have arisen since the order was made, extended or last extending or because of facts and circumstances that were not before the court previously.

## **Division 2.7 Preventative detention orders – prohibited contact orders**

### **Clause 32 Prohibited contact orders**

Clause 32 provides for the making of orders by the Supreme Court prohibiting a person to contact specified persons during detention under a preventative detention order.

It allows a senior police officer to apply for a prohibited contact order in connection with an application for, or detention under, a preventative detention order.

Subclause (3) requires the officer to be satisfied on reasonable grounds that the order is reasonably necessary for one or more of the following purposes:

- to avoid jeopardising action to prevent a terrorist act;
- to prevent serious harm to a person;

- to preserve evidence of, or relating to, a terrorist act;
- to prevent interference with investigations relating to terrorist acts;
- to prevent interference with the arrest of another person for a terrorist offence or the application of a preventative detention order or control order over another person.

Subclause (4) provides that the application must:

- be in writing;
- set out the terms of the proposed order;
- set out the facts and other grounds which the officer considers justify the order; and
- state that the officer does not suspect that any of the supporting facts and other grounds are based on information obtained, directly or indirectly, from torture.

Subclause (5) requires the application to state that it discloses all relevant matters of which the officer is aware, whether they are favourable or adverse to the application.

The officer must swear the information in the application on oath (subclause (6)).

Subclause (7) allows the court to make an order preventing a person from contacting any identified person(s) while they are detained under a preventative detention order.

### **Clause 33 Supreme Court may require further information – prohibited contact application**

Clause 33 reiterates the power of the Supreme Court to require further information and to refuse an application unless information is given in a way that the court requires.

### **Clause 34 Setting aside prohibited contact orders**

Clause 34 provides for setting aside and amending of prohibited contact orders by the Supreme Court on the application of the person detained or a senior police officer.

Subclause (1) provides that the person may apply to set aside or amend the order.

Subclause (2) requires that the officer must apply to set aside the order if he or she is satisfied that the original grounds for making the order do not exist or no longer exist.

Subclause (2)(b) requires any other officers who may be detaining the person to communicate any such grounds to a senior police officer to whom subclause (2) applies.

Subclause (3) (a) sets out the obligation of the Supreme Court to set the order aside if it is satisfied that the grounds on which the order was made do not exist or no longer exist. Subclause (3) (b) sets out the discretion of the Supreme Court to set the order aside if it is satisfied that it is appropriate to do so because of new facts and circumstances that have arisen since the order was made, extended or last extending or facts and circumstances that were not before the court previously.

Subclause (4) requires that notice of the setting aside of the prohibited contact order must be provided to the chief executive and the public interest monitor.

## **Division 2.8 Preventative detention orders – carrying out**

### **Clause 35 Power to detain person under preventative detention order**

Clause 35 empowers any police officer to give effect to a preventative detention order by taking the subject person into custody and detaining them. The clause should be read with clause 40 which relates to use of force when taking a person into custody.

Subclause (2) requires the officer to tell the person their name and rank and, if they are not in uniform, to provide the person with evidence that they are a police officer.

Subclause (3) allows a person to ask the officer to tell them their place of duty and identification number. Subclause (4) requires the officer to comply with that request.

Subclause (5) provides that a failure by the officer to comply with the requirements in subclauses (2) or (4) does not affect the lawfulness of a person's detention.

### **Clause 36 Nominated senior police officer**

Clause 36 provides that when a preventative detention order is made for a person the chief police officer must nominate an independent senior police officer (not involved in the application for the preventative detention order) to oversee the exercise of functions under and in relation to the order (including applying for the setting aside or amendment of a preventative detention order or a prohibited contact order where appropriate).

The officer must tell the person that he or she is the nominated senior police officer and must supervise the exercise of functions in relation to the preventative detention order.

Subclause (4) provides that the nominated senior police officer must:

- tell the detained person that he or she is the nominated senior police officer;
- supervise the exercise of functions in relation to the preventative detention order;
- ensure compliance with the obligation to apply to have the order set aside where the original grounds for making the order do not exist or no longer exist; and
- receive and consider any representations from any of the following:
  - the detained person or his or her lawyer;
  - the family contact;
  - the public interest monitor;
  - the public advocate (for persons with impaired decision-making ability); and
  - a person exercising authority under or implementing or enforcing the order concerning the exercise of functions by police officers under the order.

Subclause (5) provides that the chief police officer may replace a nominated officer with another nominated senior police officer. Subclause (6) provides that the new nominated senior police officer must tell the person being detained of the nomination.

Subclause (7) requires the nominated senior police officer to arrange for the assistance of an interpreter if they suspect, or have grounds to suspect, an interpreter is necessary. The assistance of the interpreter may be provided by phone if the person being detained agrees or it is not possible to arrange for the interpreter to attend in person.

Subclause (9) provides that a failure to comply with this requirement does not affect the lawfulness of a person's detention.

**Clause 37 Endorsement of order with date and time person detained under order**

Clause 37 provides for the details of the date and time a person is first detained under a preventative detention order to be endorsed in the order by the relevant police officer.

**Clause 38 Power to require name and address**

Clause 38 enables a police officer to request a person to disclose his or her name and home address if the officer believes on reasonable grounds that the person may be able to assist in the execution of a preventative detention order.

Subclause (2) requires the officer to tell the person their name and rank and, if they are not in uniform, to provide the person with evidence that they are a police officer. It also requires the officer to tell the person why they are being asked for their personal details and it requires the officer to record the reason. Subclause (3) allows a person to ask the officer to tell them their place of duty and identification number.

Once the officer complies with subclause (2) and any request under subclause (3), the person must disclose the information requested by the officer (subclause (4)). Failure to comply is a strict liability offence punishable by maximum penalty of 20 penalty units.

Section 23 of the *Criminal Code 2002* provides that if a law that creates an offence provides for strict liability, there are no fault elements for the physical elements of the offence. Essentially, this means that conduct alone is sufficient to make the defendant culpable. However, if strict liability applies, the defence of mistake of fact is available where the person considered whether or not facts existed and was under a mistaken but reasonable belief about the facts. Other defences, such as intervening conduct or event (section 39), are also available.

The use of strict liability was carefully considered in developing the offence. The rationale for its inclusion is to protect public safety. The offence is regulatory in nature and is necessary to ensure the observance of the provision. The penalty for the offence is cast in terms that are lower than for those offences requiring proof of fault.

Subclause (6) provides that a failure by the officer to comply with the requirements in subclauses (2) or (3) does not affect the lawfulness of a person's detention.

**Clause 39 Power to enter premises**

Clause 39 allows the police to enter premises, using reasonably necessary force, in order to search for and apprehend a person who is the subject of a preventative detention order.

Subclause (1) requires the officer to reasonably believe the person is on the premises.

Subclause (2) allows the officer to enter premises at any time of the day or night. The officer may exercise any reasonably necessary force and may obtain reasonably necessary assistance from other officers.

Subclause (3) limits entry onto residential premises between 9 pm and 6 am unless the officer reasonably believes that it is not practicable to take the person into custody at another time or it is necessary to prevent concealment, destruction or loss of evidence.

#### **Clause 40 Use of force – preventative detention order**

Clause 40 provides that an officer, in apprehending or detaining a person, may not use more force or subject the person to greater indignity that is reasonably necessary:

- to apprehend the person or detain the person;
- to prevent the escape of a person who has been apprehended or detained.

#### **Clause 41 Search of person taken into custody under preventative detention order**

Clause 41 allows for searches of a person for seizable items or evidence of terrorist acts.

Subclause (2) allows a police officer to conduct a frisk search or ordinary search for any seizable items. These are items that would present danger to a person, could be used to assist an escape or could be used to contact someone else to operate a remote device.

Subclause (3) prohibits the use of frisk searches or ordinary searches for evidence of a terrorist act, unless the officer reasonably suspects the person is carrying such evidence.

Schedule 1 contains definitions and relevant provisions governing these searches.

#### **Clause 42 Release of person from preventative detention**

Clause 42 provides that a police officer detaining a person under a preventative detention order may release the person from detention. Signed, written notice of the release must be given to the person and must identify the police officer who signs it.

A person is taken to be released if they are detained under another basis (subclause (4)).

Once a person is released, the order, and the authority to detain, lapses (subclause (5)). A person must not be detained under the order unless it is reinstated (see Division 2.5).

#### **Clause 43 Detention Arrangements**

Clause 43 provides for the making of formal written detention arrangements.

Subclause (1) allows the chief police officer, with ministerial approval, to make written arrangements in relation to the detention of people under preventative detention orders.

Subclause (2) requires that, before seeking approval, the chief police officer must consult with the human rights commissioner, the ombudsman and the public advocate.

Subclause (3) requires the arrangements to be consistent with human rights (that is, the various civil and political rights contained in Part 3 of the *Human Rights Act 2004*).

Subclause (4) sets out the information that the arrangements must include, including guidelines about the minimum condition of detention and standards of treatment for detainees. Subclause (5) sets out the information that the guidelines must include.

Subclause (6) requires that the chief police officer ensure a copy of the arrangements, and any amendments, is given to the human rights commissioner and the ombudsman.

Subclause (8) acknowledges that a person may be detained at a correctional centre.

Subclause (8)(a) formally authorises the person in charge of the correctional centre to detain the person and clarifies that the person is detained under the above arrangements.

Subclause (8)(b) clarifies that the obligations relating to humane treatment of detainees attach to the person in charge of the centre and the relevant officers involved.

Subclause (10) creates an offence against detaining someone under a preventative detention order in breach of the terms of the arrangements. The offence is punishable by a maximum penalty of 100 penalty units or imprisonment for 1 year or both.

## **Division 2.9 Preventative detention orders – informing detained people**

### **Clause 44 Effect of preventative detention order to be explained to person detained**

Clause 44 requires the police officer detaining a person under a preventative detention order to inform them of certain matters as soon as possible after they are first detained.

A police officer is not required to disclose the existence of a prohibited contact order or the persons named in any prohibited contact order relating to that person's detention.

### **Clause 45 Person being detained to be informed of extension of order**

Clause 45 requires the police officer detaining a person under an extended order to inform the person of the extension as soon as possible after it is made.

### **Clause 46 Compliance with obligation to inform**

Clause 46 relaxes the requirements in clause 44 and 45 if the actions of the person being detained under the preventative detention order made it impracticable to do so.

Subclause (2) requires the officer to record that this has occurred and the reasons why.

Subclause (3) allows the officer to inform the person in substance of these matters.

Subclause (4) requires the officer to arrange for the assistance of an interpreter if they suspect, or have grounds to suspect, an interpreter is necessary. The assistance of the interpreter may be provided by phone if the person being detained agrees or it is not possible to arrange for the interpreter to attend in person.

Subclause (6) provides that a failure to comply with certain requirements does not affect the lawfulness of a person's detention.

#### **Clause 47 Copies of orders to be given to detained person**

Clause 47 requires that, as soon as possible after a person is first detained under a preventative detention order, they are to be given a copy of the original order.

Subclause (2) requires that, as soon as possible after any other orders are made (for example, an extension of an order), the person is to be given a copy of the order.

### **Division 2.10 Preventative detention orders – treatment of detained people generally**

#### **Clause 48 Humane treatment of detained person**

Clause 48 requires a person being taken into custody or detained under an order is:

- to be treated with humanity and respect for human dignity; and
- not to be subjected to cruel, inhuman or degrading treatment

by anyone exercising authority under the order or implementing or enforcing the order.

Failure to comply is an offence punishable by a maximum penalty of 200 penalty units or imprisonment for 2 years or both.

#### **Clause 49 Restriction on contact with other people**

Clause 49 provides that while a person is detained under an order, they are not entitled to contact another person and may be prevented from contacting another person.

This is subject to rules regarding contact with family members, etc.; the ombudsman; and lawyers and contacts by persons with impaired decision making ability.

### **Division 2.11 Preventative detention orders—contact provisions**

#### **Clause 50 Contact with family members etc**

Clause 50 allows a person detained under an order to contact once by telephone or fax: a family member, a cohabitant who is not a family member, an employer, an employee, a business partner and any other person agreed to by the police officer, to let them know:

- that they are safe, but is being detained under a preventative detention order;
- the period for which they are being detained under the order; and
- their place of detention (but only in relation to family members and cohabitants).

Subclause (4) provides that the order itself may allow additional forms of contact that may include visits by the relevant person or communications by phone, fax or email.

### **Clause 51 Contact with human rights commissioner and ombudsman**

Clause 51 permits the person being detained to contact and be contacted by the human rights commissioner and the ombudsman.

### **Clause 52 Contact with lawyer**

Clause 52 permits the person being detained to private contact with a lawyer in order to:

- obtain advice about their legal rights in relation to an application for a preventative detention order and/or a prohibited contact order under Part 2;
- arranging for the lawyer to act for them in relation to an application under Part 2;
- arranging for the lawyer to seek remedies in relation to the implementation or enforcement of, or their treatment or detention in connection with, the order;
- arranging for the lawyer to act for the person in relation to a complaint before the ombudsman or other entity including in relation to these and other matters; and
- arranging for the lawyer to act for the person in relation to other proceedings before a court or tribunal that are to take place while the person is detained under the order.

The person is otherwise entitled to reasonable contact with a lawyer (subclause (9)).

Subclause (2) provides that the lawyer may visit the person and/or may communicate with them by telephone, fax or email (subject to any prohibited contact order).

Subclause (3) allows the person to contact the legal aid commission by phone, fax or email to ask for assistance to choose, and make arrangements to retain, a lawyer.

Subclause (4) requires the commission to provide assistance to secure a lawyer.

Subclause (5) requires the commission to provide legal assistance, or arrange for it to be provided, where the person requests it and cannot afford to pay for it themselves.

In this way, the provision of legal assistance will be subject to a means test as provided for in the *Legal Aid Act 1977* and the Guidelines made by the Legal Aid Commission. Initial hearings will be subject to the 'duty lawyer services' provisions in that Act and subsequent hearings will be subject to an appropriate means test under the Guidelines.

Subclause (6) gives the commission the same contact rights as a lawyer for this purpose.

Subclause (7) and (8) allow the commission to give priority to security-cleared lawyers, with the proviso that the person may choose a lawyer who is not security cleared.

Subclause (10) requires the officer detaining the person to arrange for the assistance of an interpreter if they suspect, or have grounds to suspect, an interpreter is necessary and the person may have difficulty in understanding or exercising these particular rights.

Subclause (11) requires records to be made relating to requests under these provisions.

Subclause (12) provides that privilege is preserved and the communication between the person and their lawyer is not admissible in any proceedings against the person.

**Clause 53 Special contact rules for people with impaired decision-making ability**

Clause 53 provides that persons detained under an order, who have impaired decision-making ability, are entitled to have additional contact with a parent or guardian or somebody who is acceptable to the person, other than a police officer or ASIO officer.

Paragraph (3)(c) requires that the first contact must occur within 24 hours.

Subclause (5) entitles the person to contact periods of at least 2 hours.

**Clause 54 Persons with impaired decision-making ability to be contacted by public advocate**

Clause 54 provides a mechanism for the police to notify the public advocate where a person with impaired decision-making ability is detained under an order.

As soon as possible after such a person has been detained, the public advocate must be told (subclause (2)). They may have such contact with the person as is necessary to ensure that the person understands the order and to assess their welfare (subclause (3)).

Subclause (4) requires the contact to occur within 24 hours of the person being detained under an order, or further detained under an extension to an order. This is subject to any restrictions in the terms of the order (subclause (5)) (see subclauses 21(6) to (9)).

**Clause 55 Monitoring contact with family members etc**

Clause 55 requires that contacts under clauses 50 or 53 must be conducted in a way that allows the content and meaning of the communication to be monitored by the police.

While contact may take place in a language other than English, the content and meaning of the communication must be able to be monitored with the assistance of an interpreter.

If the persons asks for this form of contact, the police officer detaining the person must arrange for an appropriate interpreter unless it is impracticable to do so.

**Clause 56 Monitoring contact with Lawyer**

Clause 56 establishes a general presumption that contact with a lawyer will be private. However, it does allow monitoring of contact with a lawyer in limited circumstances. Subclause (2) allows the senior police officer to direct in writing that contact between a person and a specified lawyer be monitored if they are satisfied on reasonable grounds that one or more of the following consequences may happen if it is not monitored:

- interference with or harm to evidence relating to a serious offence;
- interference with or physical harm to a person;
- the alerting of a person suspected of committing a serious offence;
- interference with investigations relating to terrorist acts;
- the alerting of a person which interferes with actions to prevent a terrorist act; or

- the alerting of a person which interferes with their arrest for a terrorist act.

Subclause (3) requires the senior police officer to give written notice to the legal aid commission and to consult with, and consider any submissions made by, the public interest monitor.

Subclause (4) requires the commission to appoint a public interest monitor once it is notified. If monitoring is authorised, similar provisions will apply to those in clause 55.

Subclause (10) prohibits the recording of monitored communications with lawyers.

Subclause (11) creates an offence against unauthorised monitoring of such contacts, punishable by a maximum penalty of 100 penalty units or imprisonment for 1 year or both.

### **Clause 57 Entitlement to contact subject to prohibited contact order**

Clause 57 provides that the contact entitlements contained in clauses 50, 52 and 53 are subject to any prohibited contact order made in relation to a person's detention.

### **Clause 58 Questioning of detained person prohibited**

Clause 58 prohibits anybody from questioning a person detained under an order other than for specific purposes relating to the person's identity, welfare and legal rights.

Subclause (2) creates an offence for failure to comply with this prohibition, punishable by a maximum penalty of 200 penalty units or imprisonment for 2 years or both.

Subclause (3) requires any questioning to be videoed or, if this is impracticable, taped.

If questions are asked, any answers or information, documents or things obtained from answers may not be used in any subsequent civil or criminal proceeding (subclause (5)).

The prohibition on questioning does not apply to questioning that is part of contact with family members or lawyers or with the public advocate or human rights commissioner.

## **Division 2.12 Preventative detention orders – identifying material**

### **Clause 59 Taking identifying material**

Clause 59 sets out the extent to which, and manner in which, a police officer may take identifying particulars from a person being detained under a preventative detention order. Subclause (2) enables a police officer of or above the rank of sergeant to take identification material from a detained person if the person consents in writing or if the officer believes in reasonable grounds that it is necessary to confirm the person's identity. Reasonable force can be used to take identifying material in the latter situation.

If the detained person is with impaired decision-making ability, the Supreme Court must order identification material (other than prints of the hand, fingers, foot or toes) be taken. That material must be taken in the presence of a parent or guardian or another person appropriate to represent the person's interests.

**Clause 60 Use of identification material**

Clause 60 provides that identifying materials taken from a person being detained under a preventative detention order may only be used to ascertain whether the person is the person stated in the preventative detention order. Identifying materials are required to be destroyed 1 year and 1 month after the material was taken if proceedings for the preventative detention order or the person's treatment under a preventative detention have not been started. If relevant proceedings are started within 1 year of the material being taken, identifying material are required to be destroyed 1 month after the proceedings are no longer on foot.

**Division 2.13 Preventative detention orders – public interest monitor****Clause 62 Public interest monitor**

Clause 62 provides for the public interest monitor. The Minister must appoint people to a public interest monitor panel. Provisions in Part 19.3 of the Legislation Act apply in relation to the appointment of the public interest monitors.

To be appointed as a public interest monitor, the person must be a lawyer, have suitable qualities and experience and have an appropriate security clearance.

**Part 3 Special powers****Division 3.1 Special powers – preliminary****Clause 63 Definitions – pt 3**

Clause 63 defines certain terms used under Part 3.

The term “investigative authorisation” refers to an order made by the Supreme Court to permit the exercise of special powers to substantially assist in apprehending a terrorist suspect, in investigating a terrorist act or in reducing its impact (see clause 73).

The term “preventative authorisation” refers to an order made by the Supreme Court to permit the exercise of special powers in circumstances where a terrorist act is happening or will happen in the next 14 days and the order would substantially assist in preventing the terrorist act (see clause 66).

The term “special powers authorisation” is a preventative or investigative authorisation.

The term “target area” refers to an area named or described in such an authorisation.

The term “target person” refers to a person named or described in this way.

The term “target vehicle” refers to a person named or described in this way.

The term “vehicle” is defined in accordance with standard drafting practice.

## **Division 3.2 Special powers authorisation – preventative authorisation**

### **Clause 64 Applying for preventative authorisation**

Clause 64 allows the chief police officer, with written approval from the Chief Minister, to apply to the Supreme Court or Magistrates Court for a preventative authorisation. These orders authorise the exercise of special powers by police officers (see Division 3.4) to prevent a terrorist act or reduce its impact or both.

The chief police officer must believe on reasonable grounds that a terrorist act is imminent and be satisfied on reasonable grounds that the authorisation will substantially assist in the prevention of the terrorist act or reduction of its impact or both.

### **Clause 65 Application for preventative authorisation – contents**

Clause 65 sets out the requirements for a valid preventative authorisation application.

Subclause (1) provides that the application must:

- be in writing;
- state when the authorisation should start and end (this ensures the chief police officer must specifically consider the duration for which the authorisation should be in effect); and
- describe the general nature of the terrorist act and name or describe (if appropriate by using a picture map or other visual depiction) one or more of the following:
  - an area in which the special powers may be exercised;
  - a person sought in connection with the terrorist act;
  - a vehicle sought in connection with the terrorist act.

The application must explain:

- why the authorisation would substantially assist in preventing a terrorist act or reducing its impact or both; and
- why it is reasonably necessary for the authorisation to be given in relation to an area.

The chief police officer must set out all of the facts and grounds on which the authorisation is based.

### **Clause 66 Making preventative authorisation order**

Clause 66 empowers the Supreme Court or the Magistrates Court to make a preventative authorisation to authorise the exercise of powers under Division 3.4 on the application of the chief police officer under clause 64. The court must be satisfied on reasonable grounds that:

- a terrorist act is expected to happen within the next 14 days;
- the authorisation would substantially assist in preventing the terrorist act, reducing its impact, or both; and

- that it is reasonably necessary for the authorisation to be given in relation to an area.

### **Clause 67 Court may require further information – preventative authorisation order**

Clause 67 reiterates the power of the Supreme Court or Magistrates Court to require further information and to refuse an application unless information is given in a way that the court requires.

### **Clause 68 Preventative authorisation – contents**

Clause 68 sets out the matters that must be contained in the authorisation. The authorisation must be in writing, be directed to all police officers, state that it is a preventative authorisation and:

- state the time when it starts and ends (the authorisation may not be in force for more than 7 days); and
- describe the general nature of the terrorist act and name or describe (if appropriate by using a picture map or other visual depiction) one or more of the following:
  - an area in which the special powers may be exercised;
  - a person sought in connection with the terrorist act;
  - a vehicle sought in connection with the terrorist act.

Conditions and restrictions on the exercise of the powers may be placed on the authorisation (subclause 68 (3)).

### **Clause 69 Setting aside or amending preventative authorisation**

Clause 69 provides that the Supreme Court or Magistrates Court may set aside or amend a preventative authorisation on application by the chief police officer or interested person.

### **Clause 70 No extension of preventative authorisation**

Clause 70 prohibits the extension of a preventative authorisation. However there is no restriction on multiple preventative authorisations or investigative authorisations, including where an authorisation is to start immediately after the end of a preventative authorisation.

## **Division 3.3 Special powers authorisation – investigative authorisation**

### **Clause 71 Applying for investigative authorisation**

Clause 71 allows the chief police officer, with written approval from the Chief Minister, to apply to the Supreme Court or Magistrates Court for an investigative authorisation. These orders authorise the exercise of special powers by police officers (see Division 3.4) for the purpose of apprehending a person, investigating a terrorist act or reducing its impact.

The chief police officer must believe on reasonable grounds that a terrorist act has happened within the last 28 days, is happening or is imminent and be satisfied on

reasonable grounds that the authorisation would substantially assist in one or more of the following purposes:

- the apprehension of a person;
- investigating the terrorist act (including preservation of evidence); or
- reducing the impact of a terrorist act.

### **Clause 72 Application for investigative authorisation – contents**

Clause 72 sets out the requirements for a valid investigative authorisation application.

Subclause (1) provides that the application must:

- be in writing;
- state when the authorisation should start and end (this ensures the chief police officer must specifically consider the duration for which the authorisation should be in effect); and
- describe the general nature of the terrorist act and name or describe (if appropriate by using a picture map or other visual depiction) one or more of the following:
  - an area in which the special powers may be exercised;
  - a person sought in connection with the terrorist act;
  - a vehicle sought in connection with the terrorist act.

The application must explain:

- why the authorisation would substantially assist in apprehending a person, investigating a terrorist act or reducing its impact; and
- why it is reasonably necessary for the authorisation to be given in relation to an area.

The chief police officer must set out all of the facts and grounds on which the authorisation is based.

### **Clause 73 Making investigative authorisation order**

Clause 73 empowers the Supreme Court or the Magistrates Court to make an investigative authorisation to authorise the exercise of powers under Division 3.4 on the application of the chief police officer under clause 71. The court must be satisfied on reasonable grounds that:

- a terrorist act has happened within the last 28 days, is happening or is imminent (i.e. is expected to happen within the next 14 days); and
- the authorisation would substantially assist in apprehending a person, investigating a terrorist act or reducing its impact (including one or more of these purposes);
- that it is reasonably necessary for the authorisation to be given in relation to an area.

#### **Clause 74 Court may require further information – investigative authorisation application**

Clause 74 reiterates the power of the Supreme Court or Magistrates Court to require further information and to refuse an application unless information is given in a way that the court requires.

#### **Clause 75 Investigative authorisation – contents**

Clause 75 sets out the matters that must be contained in the authorisation. The authorisation must be in writing, be directed to all police officers, state that it is an investigative authorisation and:

- state the time when it starts and ends (the authorisation may not be in force for more than 24 hours);
- describe the general nature of the terrorist act and name or describe (if appropriate by using a picture map or other visual depiction) one or more of the following:
  - an area in which the special powers may be exercised;
  - a person sought in connection with the terrorist act;
  - a vehicle sought in connection with the terrorist act.

Conditions and restrictions on the exercise of the powers may be placed on the authorisation (subclause (3)).

#### **Clause 76 Setting aside or amending investigative authorisation**

Clause 76 provides that the Supreme Court or Magistrates Court may set aside or amend an investigative authorisation on application by the chief police officer or interested person.

#### **Clause 77 No extension of investigative authorisation**

Clause 77 prohibits the extension of an investigative authorisation. However there is no restriction on multiple preventative authorisations or investigative authorisations, including where an authorisation is to start immediately after the end of an investigative authorisation.

### **Division 3.4 Authorised Special Powers**

#### **Clause 78 Exercising authorised special powers – general provisions**

Clause 78 deals with the exercise of special powers under a special powers authorisation.

Subclause (1) provides that any police officer may exercise the special powers while a special powers authorisation is in force. The exercise of powers is subject to any conditions or restrictions set out in the authorisation. Special powers may be exercised under a preventative authorisation for the purpose of preventing the terrorist act or reducing its impact or both. Special powers may be exercised under an investigative authorisation for the purpose of apprehending a person, investigating a terrorist act or reducing its impact (including one or more of these purposes).

Subclause (2) provides that a police officer may exercise the powers without any other authority. It is not necessary for the police officer to have a copy of a special powers authorisation when exercising the special powers.

Subclauses (3) and (4) set out the obligations on police officers when exercising special powers relating to identifying people, searching people, searching vehicles and entering and searching premises. The officer is required to tell the person why the power is being exercised and, if they are not in uniform, to provide the person with evidence that they are a police officer.

Subclauses (5) and (6) set out the obligations relating to moving vehicles, entering and searching premises, cordoning areas, etc. and seizing things. The officer is required, if they are asked, to tell the person why the power is being exercised and, if they are not in uniform, to provide the person with evidence that they are a police officer.

Subclause (7) provides that a failure by the officer to comply with the requirements in subclauses (4) and (6) does not affect the lawfulness of a person's detention.

Subclauses (8) and (9) are safeguard provisions that apply if a person or their vehicle or premises is searched. The person may ask the chief police officer in writing for a written statement that the search was conducted in accordance with the Act. The chief police officer must provide such a statement or written reasons why a statement cannot be provided.

#### **Clause 79 Power to require personal details under special powers**

Clause 79 empowers police to require a person's full name, date of birth or current or permanent address in circumstances where the personal details are not known to the officer. To exercise the power the officer must suspect, on reasonable grounds, that the person:

- is a person named or described in a special powers authorisation;
- is in the company of the above person, in suspicious circumstances;
- is on, about to enter, or has recently left a vehicle named or described in a special powers authorisation; or
- is about to enter, or has recently left an area named or described in a special powers authorisation.

Subclause (2) empowers the police officer to require proof of the correctness of details where the officer suspects, on reasonable grounds, that information provided to the officer is false.

Subclause (3) creates an offence against a person who fails to comply with a requirement by a police officer to provide personal details (under subclause (1)) or proof of the correctness of those details (under subclause (2)). The offence is punishable by a maximum penalty of 50 penalty units or imprisonment for 6 months or both. It is not an offence if a person had a reasonable excuse not to comply with a requirement.

### **Clause 80 Power to search people under special powers**

Clause 80 empowers police to stop and search a person, including anything in the person's possession or control (for example, bags or luggage carried by the person). To exercise the power the police officer must suspect, on reasonable grounds, that the person:

- is a person named or described in a special powers authorisation;
- is in the company of the above person, in suspicious circumstances;
- is on, about to enter, or has recently left a vehicle named or described in a special powers authorisation; or
- is about to enter, or has recently left an area named or described in a special powers authorisation.

Schedule 1 contains definitions and relevant provisions governing these searches.

Subclause (3) empowers police to detain a person for as long as is reasonably necessary to conduct the search.

Subclause (4) creates an offence against a person who fails to comply with a requirement by a police officer in relation to the search. The offence is punishable by a maximum penalty of 50 penalty units or imprisonment for 6 months or both. It is not an offence if a person had a reasonable excuse not to comply with a requirement.

### **Clause 81 Power to search vehicles under special powers**

Clause 81 empowers police to stop and search a vehicle (including anything in or on the vehicle). To exercise the power the police officer must suspect, on reasonable grounds, that:

- the vehicle is named or described in a special powers authorisation;
- a person who is about to enter, is in or on, or has recently left the vehicle is a person named or described in a special powers authorisation; or
- the vehicle is about to enter, or has recently left an area named or described in a special powers authorisation.

Subclause (2) empowers police to detain a vehicle for as long as is reasonably necessary to conduct the search.

Subclause (3) empowers police to detain a person who is on or on a vehicle for as long as is reasonably necessary to conduct the search of the vehicle.

### **Clause 82 Powers to move vehicles under special powers**

Clause 82 empowers police to move or cause to be moved a vehicle that is parked or left standing in an area named or described in a special powers authorisation. To exercise the power the officer must consider, on reasonable grounds, that the vehicle is dangerous to other vehicles or people, causing or is likely to cause traffic congestion or hindering the exercise of powers in the target area.

Subclause (2) empowers police to enter a vehicle to move it (and may use any reasonably necessary force) and move the vehicle to the nearest convenient place.

### **Clause 83 Power to enter and search premises under special powers**

Clause 83 empowers police to enter and search premises in an area named or described in a special powers authorisation. To exercise the power the officer must suspect, on reasonable grounds, that a person or vehicle that is named or described in a special powers authorisation is at, on or in the premises.

Subclause (3) empowers police to detain a person who is at, on or in premises entered for as long as is reasonably necessary to conduct the search of the premises.

### **Clause 84 Power to cordon target area etc under special powers**

Clause 84 empowers police to cordon off (including by using physical barriers or roadblocks on roads near the area) an area named or described in a special powers authorisation. If an area is cordoned off reasonable steps must be taken to ensure the cordon is apparent to persons approaching; and police officer must remain near the area.

Subclause (3) empowers police to require a person not to enter, to leave or remain in an area that is named or described in a special powers authorisation or cordoned off.

Subclause (4) empowers police to require a person in charge of a vehicle not to take the vehicle into or to remove or not remove the vehicle from an area that is named or described in a special powers authorisation or cordoned off.

Subclause (5) creates an offence against a person who fails to comply with a requirement by a police officer in relation to subclauses (3) and (4). The offence is punishable by a maximum penalty of 50 penalty units or imprisonment for 6 months or both. It is not an offence if a person had a reasonable excuse not to comply with a requirement.

### **Clause 85 Power to seize things under special powers**

Clause 85 applies in relation to a search under Division 3.4. It empowers police to seize:

- all or part of a thing (including a vehicle) that the officer suspects on reasonable grounds may provide evidence of the commission of a terrorist act; or
- all or part of a thing (including a vehicle) that the officer suspects on reasonable grounds may provide evidence of the commission of a serious offence (whether or not related to a terrorist act).

A power to seize and detain a thing includes a power to remove a thing from the place where it is found or to guard the thing in or on the place where it is found.

### **Clause 86 Use of force by police under div 3.4**

Clause 86 provides that it will be lawful for a police officer to use such force as is reasonably necessary to exercise a power (including force reasonably necessary to break into premises or a vehicle or anything in or on premises, a vehicle or a person).

However, a safeguard has been included to ensure a police officer take steps to ensure that any harm to a person or damage to a thing or premises arising from the exercise of a power is limited to that which is reasonably necessary to enable the effective exercise of the power.

### **Division 3.5 Authorisation special powers – miscellaneous**

#### **Clause 87 Damage etc to be minimised**

Clause 87 requires a police officer to take steps to ensure that as little inconvenience, detriment and damage is caused in the exercise, or purported exercise of special powers. Written notice of any damage must be given to the owner of a thing, or left in a secure, conspicuous place at a premises.

#### **Clause 88 Compensation for exercise of special powers**

Clause 88 creates a right for people who suffer loss or expense because of the exercise (or purported exercise) of special powers to seek compensation. Claims are dealt with by the courts. Regulations may be made to prescribe matters that may, must or must not be considered in making a compensation order.

#### **Clause 89 Power to give directions to departments etc for special powers**

Clause 89 enables the chief police officer, in order to facilitate the exercise of special powers, to direct the exercise of powers and functions by departments and territory entities.

#### **Clause 90 Return of things seized etc under special powers**

Clause 90 provides that a police officer who has seized a thing must return it to the owner or person who had lawful possession of it before it was seized if the officer is satisfied that its retention as evidence is not required and it is lawful for the person to have possession of the thing.

#### **Clause 91 Disposal of seized property on application to court**

Clause 91 provides that a court may make an order that property that has been seized by a police officer be delivered to the person who appears to be lawfully entitled to it or, if that person cannot be ascertained, be dealt with as the court thinks fit.

In determining an application, the court may do any 1 or more of the following:

- adjust rights to property as between people who appear to be lawfully entitled to the same property or the same or different parts of property;
- make a finding or order as to the ownership and delivery of property;
- make a finding or order as to the liability for and payment of expenses incurred in keeping property in police custody;
- order, if the person who is lawfully entitled to the property cannot be ascertained, that the property be forfeited to the Territory; or
- make incidental or ancillary orders.

### **Clause 92 Records of exercise of authorised special powers**

Clause 92 provides that the chief police officer must ensure records are made, and kept, about the exercise of special powers (including under Schedule 1).

### **Clause 93 Human rights training**

Clause 93 provides that the chief police officer must ensure that police officers who exercise special powers are trained about their obligations under human rights legislation applying in the ACT. This training includes discrimination training.

### **Clause 94 Relationship with other territory laws**

Clause 94 clarifies that provisions in Part 3 are additional to any other territory laws and does not limit the powers that a police officer has under any other territory law.

### **Clause 95 Report to Minister about exercise of special powers etc.**

Clause 95 requires the chief police officer to give the Minister a written report about a special powers authorisation and the exercise of powers under it. The report must:

- be provided as soon as possible after an authorisation ends;
- identify the terms of the authorisation;
- state the period of operation of the authorisation;
- include a summary of the grounds for applying for the authorisation;
- include a general description of the powers exercise, and how the powers were exercised;
- state the result of the exercise of powers; and
- outline any inconvenience or adverse impact arising out of the exercise of powers.

## **Part 4 Miscellaneous**

### **Clause 96 Evidence obtained from torture inadmissible**

Clause 96 creates a blanket prohibition on the admissibility of evidence obtained directly or indirectly from torture, regardless of where the torture was carried out.

Torture is defined in the *Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, article 1, paragraph 1. Which at the time of writing states:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

**Clause 97 Delegation by chief police officer**

Clause 97 provides that the chief police officer may delegate a function under the Act to a senior police officer. The making of a delegation is dealt with in Part 19.4 of the Legislation Act.

Subclause (2) lists a number of provisions in which functions must not be delegated.

**Clause 98 Annual report on the use and effectiveness of Act**

Clause 98 requires the chief executive to prepare an annual report about the use and effectiveness of the Act. The chief police officer must provide information and assistance to the chief executive to assist the preparation of the report.

Without limiting the matters that the report may contain, it must include information relating to the number of preventative detention and prohibited contact orders made, the number of persons detained and particulars of any complaints in relation to detention.

**Clause 99 Transitional provision – references to correctional centre**

Clause 99 clarifies the meaning of a ‘correctional centre’ in the event that the Bill commences before the *Crimes (Sentence Administration) Act 2005* commences. In this instance a reference to a ‘correctional centre’ is a reference to a remand centre or a detention centre under the *Periodic Detention Act 1995*.

**Clause 100 Review of Act after 3 years operation**

Clause 100 requires the Minister to review the operation and effectiveness of the Act after it has been in operation for 3 years, and to present a report of the review to the Legislative Assembly before the end of the Act’s fourth year of operation.

**Clause 101 Expiry of Act etc**

Clause 101 provides that the Act expires five years after the day it commences.

Subclause (2) provides that any order in force under the Act ceases to have effect on expiry. subclause (3) provides that orders may not be made once the Act expires.

**Clause 102 Regulation-making power**

Clause 102 is the regulation making power.

## **Schedule 1 Conduct of personal searches**

Schedule 1 establishes the governing the conduct of personal searches. Personal searches may only be conducted in limited circumstances in accordance with clauses 41 and 80.

### **1.1 Application – sch 1**

Clause 1.1 provides that the schedule applies to a search of a person conducted, or authorised to be conducted, by a police officer under clauses 41 and 80.

### **1.2 Definitions – sch 1**

Clause 1.2 defines certain terms used under Schedule 1.

The term “frisk search” means a search of the person conducted by quickly running the hands over the person’s outer clothing or by passing an electronic metal detection device (that can detect the presence of metallic objects) over or close to the person’s outer clothing, and an examination of anything worn or carried by the person (such as a hat or jacket) that is conveniently and voluntarily removed by the person, including an examination conducted by passing an electronic metal detection device over or close to the thing.

The term “ordinary search” means a search of the person or anything in the person’s possession and may include requiring the person to remove only the person’s overcoat, coat, jacket or similar article of clothing and any footwear, gloves or headwear and an examination of these items.

The term “strip search” means a search of the person or of anything in the person’s possession and may include requiring the person to remove their clothing and an examination of the person’s body (excluding body cavities) and of the person’s clothing.

### **1.3 Frisk searches and ordinary searches**

Clause 1.3 provides that an authorised police officer may conduct the search for any purpose in clauses 41 or 80.

### **1.4 Strip searches**

Clause 1.4 provides that an authorised police officer may conduct a strip search of a person if the officer suspects on reasonable grounds that—

- the person is the target of an authorisation; and
- it is necessary to conduct the strip search to find and seize something; and
- the thing can only be found and seized by conducting the strip search.

If a strip search is conducted, the officer is required to record reasons for conducting the search.

### **1.5 Preservation of privacy and dignity during search etc**

Clause 1.5 provides that a police officer must comply, as far as possible, with the rules for preserving the privacy and dignity of a person during a search. Any non-compliance, and reasons for the non-compliance, must be recorded.

The following rules apply to the conduct of any search:

- a person must be told whether they will be required to remove any clothing, and reasons for this;
- the cooperation of the person must be sought;
- the search must be conducted as quickly as possible and in a way that provides reasonable privacy;
- a search must be the least invasive search practicable;
- if the person seeks an explanation of the reasons for the search being conducted in a particular manner, an explanation must be offered;
- the person's genital area (or female's breasts) must not be searched unless it is necessary to do so;
- a search may only be conducted by a police officer of the opposite sex if the seriousness and urgency of the circumstances require it (and reasons must be recorded as to why);
- a search must not be carried out during questioning; and
- if clothing or footwear is seized because of the search and the person is left without adequate clothing or footwear, the person must be offered adequate replacements.

### **1.6 Rules for conduct of strip searches**

Clause 1.6 provides that a police officer must comply, as far as possible, with the rules for conducting a strip search. Any non-compliance, and reasons for the non-compliance, must be recorded.

The following rules apply to the conduct of a strip search:

- the search must be conducted in a place that provides reasonable privacy for the person searched;
- the search must not be conducted in the presence or view of—
  - a person who is not of the same gender as the person being searched; or
  - a person whose presence is not necessary for the purposes of the search or the safety of all present,

except as follows:

- a search may be conducted in the presence of a medical practitioner or nurse not of the same gender if the person consents;
- a search of a person who is under 18 years of age or has impaired decision making ability must be conducted in the presence of a parent or guardian of the person or of another person (other than a police officer) who can provide the person with support and represent the person's interests;

- a search must not involve the removal of more clothes, or the removal of more clothes at any time, than is reasonably necessary. A person must not be more than half undressed at one time;
- the search must not involve more visual inspection of the persons body than is reasonably necessary, visual inspection of the person's genital area, anal area, buttock and breasts must be kept to a minimum; and
- the person must be allowed to dress in private as soon as the search is finished.

### **1.7 Search of transgender or intersex person**

Clause 1.7 includes additional requirements where the person being searched is a transgender or intersex person. A transgender or intersex person is may require that a search be conducted by a male or female. If the person requires a female, she is taken to be a female for the purpose of the schedule, if the person requires a male, he is taken to be a male for the purpose of the schedule.

### **Dictionary**

The dictionary defines certain terms for the Bill.