

TERRORISM (PREVENTATIVE DETENTION) AMENDMENT BILL 2019

EXPLANATORY MEMORANDUM

OVERVIEW

This Bill amends the *Terrorism (Preventative Detention) Act 2006* (the Act). Specifically it:

- amends the basis upon which a preventative detention order can be applied for, and made, from being that a ‘terrorist act is imminent and expected to occur within 14 days’ to a ‘terrorist act is capable of being carried out and could occur within the next 14 days’;
- provides preventative detention orders for detainees whose names are not able to be specified, but where there is sufficient identifying information enabling the person to be identified;
- extends the scope of authorised contacts for detainees; providing the ability to have contact with an approved religious or spiritual adviser; and
- clarifies the requirements regarding the provision of reasonable assistance to detainees who are under the age of 18 or incapable of managing their own affairs in exercising their entitlement to contact authorised persons, as set down in Part 6 of the Act.

CLAUSE NOTES

CLAUSE 1 – SHORT TITLE

This clause provides that the Bill, once enacted, will be known as the *Terrorism (Preventative Detention) Amendment Act 2019* (the Amendment Act).

CLAUSE 2 – COMMENCEMENT

This clause provides for the Amendment Act to come into operation as follows:

- a) Sections 1 and 2 - on the day on which the Amendment Act receives Royal Assent;
- b) The rest of the Amendment Act - on the day after the Amendment Act receives Royal Assent.

CLAUSE 3 – ACT AMENDED

This clause provides that the Amendment Act will amend the *Terrorism (Preventative Detention) Act 2006*.

CLAUSE 4 – SECTION 4 AMENDED

This clause inserts two definitions into section 4(1) of the Act. These definitions support the proposed amendments.

The term ‘approved religious or spiritual adviser’ is defined as meaning a person approved under section 43A(1) of the Act;

The term ‘photograph’ is defined as including a digital image and a video recording.

CLAUSE 5 – SECTION 9 AMENDED

Section 9 of the Act sets out the basis upon which a preventative detention order (PDO) can be applied for and made.

The current test focuses on timing, requiring a terrorist act to be imminent and expected to occur within 14 days. The imminence component of this test requires the existence of a capability to undertake, and an immediacy about, the act. The second requirement is that the

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act is expected to occur within 14 days. These components are problematic as it is possible that a law enforcement agency might be aware of individuals who intend to commit terrorist acts and who possess the ability to do so, but who do not have a clear timeframe as to when they might perpetrate the act. The timeframe might be dependent upon receiving an instruction or signal to carry out the act. Under the current test it may not be possible to apply for, or make, a PDO.

Clause 5 subsequently amends the threshold test in two respects. It requires that the terrorist act be capable of being carried out, and that it could occur within the next 14 days. This amendment retains the preparedness and timing components of the current provisions, while providing appropriate parameters for law enforcement agencies to take preventative actions.

This amendment is based upon changes made to the Commonwealth *Criminal Code 1995* and to the preventative detention legislative schemes in New South Wales, Victoria and Queensland.

CLAUSE 6 – SECTION 13 AMENDED

Section 13 of the Act empowers an issuing authority to make a PDO. Subsection (4) provides that the PDO must specify a number of matters relating to the PDO. One of the requirements is to specify the name of the person in relation to whom the PDO is made. It is possible that law enforcement agencies might not be able to ascertain the name of the person in relation to whom the PDO is sought.

Clause 6 amends the Act to allow for a PDO to be able to be made in circumstances where the full name of the person is not able to be specified, but where sufficient identifying information exists to satisfy the issuing authority about the identity of the person. The identifying information may include a part of the person's name, an alias or nickname, a physical description or a photograph of the person that is attached to the PDO.

CLAUSE 7 – SECTION 33 AMENDED

Section 33 of the Act relates to arrangements that may be made for a person subject to a PDO to be detained in a prison or detention centre.

Clause 7 makes two amendments to section 33 of the Act that are consequential to the amendments enabling a detainee to have contact with an approved religious or spiritual adviser in accordance with Clause 10 of the Bill.

Firstly, the reference in subsection (4)(b) to section 53 of the *Prisons Act 1981* (the Prisons Act) is replaced with a reference to section 95E(b) of the Prisons Act. Section 95E of the Prisons Act replaced section 53 of that Act by virtue of the *Prisons and Sentencing Legislation Amendment Act 2006*. Section 95E(b) of the Prisons Act allows for the receipt of religious or spiritual guidance and visits from an approved religious or spiritual adviser. This amendment clarifies that the ability to have contact with a religious or spiritual adviser is subject to the conditions imposed by sections 40, 44 and 46 of the Act, as well as any prohibited contact orders made under the Act.

The second amendment clarifies that the contact a person has with an approved religious or spiritual adviser remains subject to the Prisons Act or the *Young Offenders Act 1994* (the Young Offenders Act). This refers to legislative provisions and regulations, as well as any policies, rules and orders made under these, that govern a person's contact with third parties.

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CLAUSE 8 – SECTION 35 AMENDED

Section 35 of the Act requires that the PDO be explained to the person who has been detained. It lists the matters and entitlements that are to be explained to the detainee.

Clause 8 amends the provision to require that the ability to have contact with an approved religious or spiritual adviser must also be explained to the detainee.

This clause contains a further minor technical amendment, inserting the word ‘and’ between matters listed in section 35(2). This clarifies that all matters are to be explained to the detainee.

CLAUSE 9 – SECTION 40 AMENDED

Section 40 of the Act restricts a detainee from contact with people except as provided for in the Act.

Clause 9 clarifies that contact with an approved religious or spiritual adviser is an exception to the restriction on contact with other people.

This clause also clarifies that the entitlement to have contact with an approved religious or spiritual adviser is also subject to any prohibited contact order that may be made in relation to the detainee’s detention.

CLAUSE 10 – SECTION 43A INSERTED

New section 43A enables a detainee to have contact with an approved religious or spiritual adviser for the purpose of receiving religious or spiritual guidance.

The type of contact that the detainee may have is in the form of a visit from the approved religious or spiritual adviser. The visit will be arranged by a police officer. Clause 10 requires that the police officer provides reasonable assistance in arranging the visit by the approved religious or spiritual adviser.

Only a religious or spiritual adviser approved by the Commissioner or by a senior police officer authorised by the Commissioner will be able to visit the detainee. The Commissioner, or senior police officer authorised by the Commissioner, must consult with the Chief Executive Officer of the department principally assisting the Minister administering the Prisons Act prior to approving any person who is not already authorised under section 95E(b) of that Act as an approved religious or spiritual adviser. This requirement acknowledges the existence of a mechanism to approve a range of religious and spiritual advisers to visit prisons. It also recognises that there may be different considerations for approving religious or spiritual advisers to visit a detainee subject to a PDO.

Clause 10 also provides that the detainee may disclose to the religious or spiritual adviser that the detainee is subject to a PDO and the period of its application.

This provision is based upon a provision in the NSW equivalent PDO legislation, however, the terminology in this Bill aligns with WA statutes, especially the terminology contained in the Prisons Act.

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CLAUSE 11 – SECTION 44 AMENDED

Section 44 provides that a detainee's authorised contact with another person under the Act can only take place if it is conducted in such a way that the contact, and the meaning of any communication, is able to be effectively monitored by a police officer who is authorised to do so under the Act.

Clause 11 amends section 44 by extending this requirement to the contact a detainee has with an approved religious or spiritual adviser. This includes the situation whereby the assistance of an interpreter is required.

Clause 11 also amends the heading of section 44 to include the term 'religious or spiritual adviser'.

CLAUSE 12 – SECTION 45 AMENDED

Section 45 of the Act sets out special contact provisions for detainees who are under 18 years of age or who are incapable of managing their own affairs.

Clause 12 amends section 45 to clarify the appropriate assistance to be provided to these categories of detainees. The appropriate assistance required is for police to assist, as far as reasonably practicable, a detainee to exercise their contact entitlements under Part 6 of the Act. This assistance by police includes reasonable assistance in locating any person the detainee is entitled to have contact with under that Part.

Clause 12 also provides further clarity surrounding the situation whereby a person the detainee is able to have contact with pursuant to section 45(2)(b) is not acceptable to the police officer. In this circumstance, the police officer must explain the reasons why the person is unacceptable and give the detainee an opportunity to nominate another person. The disclosure of reasons is not required if it would also disclose criminal intelligence information. The term 'criminal intelligence information' is defined in this clause.

Additionally the police officer must nominate another person who the detainee may have contact with. It is intended that the person nominated by the police officer has relevant experience working with the identified category of persons that is most appropriate in the circumstances. This includes the key categories of young people and persons incapable of managing their own affairs. It also provides for other categories to be prescribed in the regulations, such as persons with relevant experience working with culturally and linguistically diverse communities, Aboriginal or Torres Strait Islander communities, or with people with disability.

This provision is based upon amendments made to the NSW preventative detention legislation.

CLAUSE 13 – SECTION 46 AMENDED

Section 46 sets out a number of offences relating to disclosure of information contrary to the Act. Section 46(1) prohibits the detainee from disclosing specified information about the PDO unless they are entitled to do so under the Act. Clause 13 extends the entitlement to disclose information by a detainee to a religious or spiritual adviser. This re-affirms the ability established in section 43A of the Act.

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Clause 13 also amends section 46 by inserting a new provision making it an offence for a religious or spiritual adviser to disclose that the detainee is subject to a PDO or other specified information during the term of the detainee's PDO. The penalty for contravention is 5 years imprisonment, consistent with other offences contained in section 46 of the Act.

CLAUSE 14 – SECTION 47 AMENDED

Section 47 provides that a detainee cannot be questioned whilst in detention under a PDO. The prohibition on questioning contains three limited exceptions: to determine the detainee is the person specified in the PDO; to ensure the detainee's safety and wellbeing; or to allow the police officer to comply with a requirement of a PDO under the Act.

Clause 14 makes a minor amendment to the first exception. Allowing for questioning to be undertaken to determine if the detainee is the person specified or identified in the PDO. This gives effect to the amendment to section 13 that allows, where a person's name is not able to be specified, for a PDO to be made based on sufficient identifying information.

CLAUSE 15 – SECTION 48 AMENDED

Section 48 provides for the taking of identification material from the detainee. Clause 15 amends the section to expressly enable the provision to apply to a person specified or identified in the PDO. This gives effect to the amendment to section 13 that allows, where a person's name is not able to be specified, for a PDO to be made based on sufficient identifying information.

CLAUSE 16 – SECTION 49 AMENDED

Section 49 relates to the use of identification material that is taken pursuant to section 48. Clause 16 amends section 49(2) to expressly enable the provision to apply to a person specified or identified in the PDO. This gives effect to the amendment to section 13 that allows, where a person's name is not able to be specified, for a PDO to be made based on sufficient identifying information.