

QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

Protecting Queenslanders individual rights and liberties since 1967

Watching Them While They're Watching You

Legal Affairs and Community Safety Committee

By email: lacsc@parliament.qld.gov.au

Dear Madam,

Counter-Terrorism and Other Legislation Amendment Bill 2017

Please accept the QCCL's submission in relation to the above Bill.

Clause 9, proposed section 332 (3) (g)--Is this proposed section intended to authorise the connection of the surveillance device to another piece of equipment, such as a computer? We are concerned about implications of this, particularly if the other piece of equipment is that of an innocent third party. We would be concerned if the connecting of the surveillance device to the equipment could cause damage to the other equipment, particularly if the equipment belongs to somebody who is innocent.

If this is the intention of this proposed subsection, we would request the opportunity to make further submissions.

Proposed Part 3A, - whilst the object of this Part seems reasonable, it is a power that is open to abuse and needs to be subject of review. We would submit that all uses of this power should be reviewed by the Public Interest Monitor. We would also submit that any extension of time should be authorised by a Magistrate.

Clauses 35 and 36 -proposed new Part 2 Division 4- our position in relation to emergency powers and declarations of emergency was set out in a submission intended to be made to the Legal Affairs and Community Safety Committee in 17 May 2016, but apparently sent to the wrong email address. A copy of that submission is **attached**. We maintain our position that the current safeguards are in adequate and that no further extension of power should occur until safeguards recommended by us in that submission are adopted.

We make particular reference to proposed sections 8AZE and 8PAB which authorise an officer to require a person to provide a password to their phone or other electronic device. In our view to the extent that this power authorises a police officer to require a person to provide the password to their phone or other electronic device, it is an abrogation of the right to silence. So much has been held to be the case in the United States. - See the *United States v Kirschner* 823 F Supp 665 at 669. We have no doubt that this would be found to be the law in Australia-see *Cross on Evidence* (8th Australian Edition) by Heydon at page 855 to 856

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In so far as a police officer may require a person to provide their fingerprint to open a phone or other device that would not be a violation of privilege against self-incrimination. This was held to be the case in the United States in *Commonwealth of Virginia v Baust* Virginia Second Judicial Circuit 24 October 2014. That is also the law in Australia- *King v McClellan* [1974] VR 773

We oppose the abolition of privilege. The jurisprudence of the High Court now recognises the right to silence is a fundamental right. It is a right that exists to protect citizens from the abuse of state power. The fact that this abrogation occurs in the context of a State of Emergency, rather than pointing towards the abrogation of the privilege, point in the opposite direction. It makes it even more important as a bulwark against the abuse of state power.


We also make this submission because the well-established pattern is that the Parliament chooses first to abolish a right for offenders who are viewed as particularly heinous by the community. Once it is done in relation of those offenders, the process of abolition inevitably moves outwards to other offenders and often finally to the abolition of the right for everyone.

In relation to compelling the offender to provide their fingerprint it is our view that that should only be done by the police first obtaining a warrant. Ordinarily police are required to obtain a warrant to access a phone where consent is refused. Given the types of controls to which many of these offenders are subject there seems to be even less reason to do away with the requirement for a warrant. These devices contain enormous amounts of personal information, most of which will be completely irrelevant to the police enquiry. The need to examine the phone should be proven on the ordinary standard to the satisfaction of a Magistrate and the offender should have recourse to the court to ensure that irrelevant material on the phone is not used by the police.

Clause 40-we object to this clause. There is in our view no justification for permitting information obtained under a compulsory process for specific purposes, to be used for any other.

We trust this is of assistance to you in your deliberations.

Yours faithfully



Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
7 July 2017

Legal Affairs and Community Safety Committee

By email: lacsc@parliament.qld.gov.au

Dear Madam

Re: Counter-Terrorism and Other Legislation Amendment Bill 2016

The Queensland Council for Civil Liberties (“the Council”) thanks you for the opportunity to make a submission to this committee.

We apologise for the lateness of this submission. However, as an organisation of volunteers it is sometimes difficult to comply with deadlines.

The Council is an organisation which has for the last 49 years devoted itself to the implementation of the Universal Declaration of Human Rights in Queensland. As a member of the Australian Council for Civil Liberties it has committed itself to promoting the implementation in Australia of the Universal Declaration of Human Rights.

In this submission, the Council identifies the philosophical perspectives and international human rights law regarding rights in state of emergency situations, comparative law on this area and its historical abuse, and provides recommendations for the Committee to consider.

Summary of the Council’s Recommendations

- Recommendation 1: safeguards re: extension of time
- Recommendation 2: that the use of information in relation to charges relating to the emergency by the police powers during the state of emergency must not be used for other offences
- Recommendation 3: that the declaration of emergency be in writing
- Recommendation 4: that a public interest monitor be appointed

1.0 Philosophical Perspectives

Typically, in a state of emergency, the executive uses its power to suspend the normal rule of law, transferring power to the police or military.¹ It continues to appear as ‘the dominant paradigm of government in contemporary politics.’² However, advanced democracies prefer to utilise ordinary legislation during emergencies which are reviewable within the state’s constitutional system.³ That is, the legislation is regulated in the same way as a normal act of Parliament.

1.1 Early Uses

¹ Stephen Morton, *States of Emergency: Colonialism, Literature and Law* (Liverpool University Press, 2013) vol 11, 1.

² Giorgio Agamben, *State of Exception* (Kevin Attel trans, University of Chicago Press, 2005) 2 [trans of: *Stato di Eccezione. Homo sacer* (first published 2003)].

³ J Ferejohn and P Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 *Icon-International Journal of Constitutional Law* 210, 215.

The declaration of a state of emergency can be traced back to the Roman Republic.⁴ Cicero, as Senior Consul, used it to rally the republic against Marc Antony.⁵ The citizens of the Republic could be notified that the existence of the Republic was at stake in several ways: by appointment of a dictator; a declaration of a state of emergency; an edict to suspend public business; or the *senatus consultum ultimum*.⁶

Common in the early Roman Republic,⁷ the dictator was given all executive power and bypassed the checks and balances of the *cursus honorum*.⁸ His first duty was to appoint a *magister equitum* ('master of horse'). Then, the dictator led the Roman Army out to battle. Finally, the dictator was to abdicate office once the task was complete.⁹ The dictatorship was also used to combat internal threats in the early period of the Republic.¹⁰

A *tumultus* declaration was to declare a 'disturbance so serious that a greater than normal fear arises.'¹¹ An *iustitium* edict suspended all public business and government activities unrelated to war.¹² It could only be cancelled by the authority that ordered it.¹³ The usual order of affairs, according to Cicero, were as follows: after the *tumultus* declaration via a formal decree of the Senate, the *iustitium* edict was declared. Then, the Senate changed into military dress and all the normal exceptions of the military draft were suspended.¹⁴

The *senatus consultum ultimum* was only passed as a last resort.¹⁵ The Magistrates already had the power to take all measures needed to see the state suffered no harm; therefore, the *ultimum* was merely a public statement declaring that an emergency existed.¹⁶ It did not grant any extra powers or immunities,¹⁷ nor could it confer legal immunity upon a Magistrate who went beyond the normal law.¹⁸

1.2 Philosophy

According to John Locke, the executive possesses legitimate "power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it."¹⁹ However, Benjamin Constant, who wrote in the aftermath of the French

⁴ Kim Lane Scheppele, 'Law in a Time of Emergency: States of Exception and the Temptations of 9/11' (2004) 6 *University of Pennsylvania Journal of Constitutional Law* 1001, 1004.

⁵ Gregory K Golden, *Crisis Management during the Roman Republic: The Role of Political Institutions in Emergencies* (Cambridge University Press, 2013) xxii.

⁶ *Ibid* xiv.

⁷ *Ibid* 11.

⁸ *Ibid* xiv.

⁹ *Ibid* 13.

¹⁰ For example, during the 'Struggle of the Orders'; *Ibid* 22.

¹¹ Cicero, 'Eighth Philippic' (Speech delivered to the Senate, 3 February 43) quoted in Golden, above n 5, 44.

¹² Golden, above n 5, 87.

¹³ *Ibid* 88.

¹⁴ Cicero, 'Fifth Philippic' (Speech delivered to the Senate, Temple of Jupiter, 1 January 43) quoted in Golden, above n 5, 44.

¹⁵ Golden, above n 5, 106.

¹⁶ *Ibid* 148.

¹⁷ *Ibid*.

¹⁸ *Ibid* 108.

¹⁹ John Locke, *Two Treatises of Government and a Letter Concerning Toleration* (revised ed) vol 5, 176.

Revolution,²⁰ stated that while compromises on rights serve their purpose in the short term, it strengthens the enemy in the long term:²¹

The innocent who have been stricken by arbitrary power reappear with new strength; the guilty who have been condemned without being heard appear innocent, while the evil which has been postponed for a few hours returns more terrible, aggravated by the evil which has now been committed.²²

Once arbitrary methods are wielded, they become too economical and convenient, such that other methods no longer seem worthwhile.²³ Thus, persisting in the path of legality serves two purposes: it strengthens society's abhorrence of the enemy, that they have violated the laws of the state; and the timid population who would remain uncertain if extraordinary measures were taken would remain trustful of the government's calm and assured manner.²⁴

Machiavelli held the view that it was necessary for every Republic to make provision for States of emergency on the basis that resort to extra constitutional means would provide a destructive precedent. But that no Republic could survive without such laws.²⁵

1.3 Source of Power

Some view a state of emergency as 'a legal black hole, in which the state acts unconstrained by law.'²⁶ However, Giorgio Amben states that the 'exception does not subtract itself from the rule; rather, the rule, suspending itself, gives rise to the exception, and maintaining itself in relation to the exception, first constitutes itself as a rule.'²⁷ That is, the law first tells us when and how to use the exception, which suspends the application of some laws.

2.0 International Human Rights Standards for States of Emergency

Within international human rights norms there is the acknowledgement that States may be confronted with serious crises and that it may be necessary in responding to a crisis to limit or suspend the enjoyment of individual rights and freedoms.

Most notably, Article 4(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent

²⁰ Benjamin Constant, *Political Writings* (Biancamaria Fontana trans, Cambridge University Press, 1988) 12 [trans of: *Principes de Politique Applicables a Tous les Gouvernements* (first published 1806–1810)].

²¹ *Ibid* 12.

²² *Ibid* 137

²³ *Ibid* 135.

²⁴ *Ibid* 136.

²⁵ Machiavelli *The Discourses* (edited by Bernard Crick) Pelican Classics, 1970 pages 193 to 198

²⁶ David Dyzenhaus, 'Schmitt v. Dicey: Are States of Emergency Inside Or Outside the Legal Order?' (2006) 27 *Cardozo Law Review* 2005, 2006.

²⁷ Giorgio Amben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen trans, Stanford University Press, 1998) 18 [trans of: *Homo Sacer: Il potere sovrano e la vita nuda* (first published 1995)] quoted in Stephen Morton, *States of Emergency: Colonialism, Literature and Law* (Liverpool University Press, 2013) vol 11, 4.

strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

The derogation of rights in a state of emergency is also reflected in regional human rights instruments, including the American Convention on Human Rights,²⁸ the European Convention on Human Rights²⁹ and the European Social Charter.³⁰

Embedded in these provisions are safeguards to protect the exception from abuse. These safeguards include two preconditions before derogation is permissible, as well as safeguards governing how States can derogate and prohibitions against certain derogations.

2.1 Preconditions to Derogation

Before a State can act in a manner that derogates from their legal obligations under human rights law, two preconditions must be satisfied:

1. The situation must amount to a public emergency which threatens the life of the nation
2. The State must have officially proclaimed a state of emergency

The first requirements involves a State justifying why a particular situation constitutes a threat to the life of the nation. This test provides a threshold as not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation.³¹ Accordingly, riots or mere internal disturbances do not satisfy this test. Further, embedded in this requirement is a temporal restriction: derogation is restricted to a time of emergency. "Emergency legislation cannot therefore remain in force for so long that it becomes institutionalised so that it is the rule rather than the exception."³² This ensures that respect for individual rights and freedoms is upheld

How States proclaim a state of emergency is governed by a State's constitutional and domestic laws.³³ This is a procedural rather than a substantive requirement. That is, States are given a wide berth in how a state of emergency is proclaimed, but what constitutes a state of emergency is governed by international law. The UN Human Rights Committee has expressed concern over States' internal laws that allow for derogation in situations not covered by Article 4 of the ICCPR.³⁴

2.2 Permissible Derogations

²⁸ *American Convention on Human Rights*, Article 27(1).

²⁹ *European Convention on Human Rights*, Article 15(1).

³⁰ *European Social Charter*, Article 30.

³¹ UN Human Rights Committee, *CCPR General Comment No.29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, [3].

³² Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations, 2003), 824.

³³ UN Human Rights Committee, *CCPR General Comment No.29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, [2].

³⁴ See Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations, 2003), 823-4.

Derogations from human rights obligations are permissible only to the extent that the exigencies of the situation strictly requires. This safeguard looks to the purpose of the derogation. The key issue is whether the objective of the measure that derogates from human rights is the restoration of a state of normalcy.³⁵ A measure that is alien to this objective is unlawful.

2.3 Prohibited Derogations

Article 4 of the ICCPR provides that there are certain legal obligations that cannot be derogated from, even in a state of emergency. These include:

- Discrimination on the grounds of race, colour, sex, language, religion or social origin
- Right to life
- Right to freedom from torture, cruel, inhuman or degrading treatment or punishment, and medical or scientific experimentation without one's free consent
- Right to freedom from slavery, the slave trade and servitude
- Right not to be imprisoned on a ground of inability to fulfil a contractual obligation
- Right to recognition as a person before the law
- Right not to be subjected to retroactive legislation
- Right to freedom of thought, conscience and religion
- Right to a fair trial³⁶

The Second Optional Protocol to the ICCPR also provides that the right not to be subjected to the death penalty is non-derogable.³⁷

In states of emergency that constitute armed conflict, international humanitarian law continues to apply.³⁸ This includes the protection of civilians and restriction on the means of warfare.

It should be noted that the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child do not provide for derogation such that there is a presumption that its provisions are applicable at all times, including in a state of emergency.

2.4 Summary of International Human Rights Standards

The exception to the derogation of human rights under international human rights in states of emergency has safeguards. These include two preconditions: that the state of emergency must constitute a threat to the life of the nation and that it must be proclaimed. It is further limited by a test of strict proportionality to the state of emergency. There are also rights that are strictly non-derogable, even in cases of states of emergency.

A Queensland law dealing with states of emergency must comply with these standards to be consistent with international human rights law.

³⁵ UN Human Rights Committee, *CCPR General Comment No.29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, [1].

³⁶ *Ibid* [16].

³⁷ Second Optional Protocol to the ICCPR, Article 6.

³⁸ ICCPR, Article 4(1).

3.0 Comparative View of State of Emergency Laws in Queensland and Other Jurisdictions

3.1 Queensland

Queensland's emergency situation laws are governed primarily by the *Police Powers and Responsibilities Act 2000*, *Public Safety Preservation Act 1986* and *Terrorism (Preventative Detention) Act 2005*. The Bill in question seeks to amend these Acts to introduce further government powers in declared emergencies.

Definition of emergency

An emergency situation is defined in schedule one of the *Public Safety Preservation Act 1986* as any of the following:

- (a) any explosion or fire; or
- (b) any oil or chemical spill; or
- (c) any escape of gas, radioactive material or flammable or combustible liquids; or
- (d) any accident involving an aircraft, or a train, vessel or vehicle; or
- (e) any incident involving a bomb or other explosive device or a firearm or other weapon; or
- (f) any impact of a naturally occurring event such as a flood or a landslide; or
- (g) any other accident;

that causes or may cause a danger of death, injury or distress to any person, a loss of or damage to any property or pollution of the environment, includes a situation arising from any report in respect of any of the matters referred to in paragraphs (a) to (f) which if proved to be correct would cause or may cause a danger of death, injury or distress to any person, a loss of or damage to any property or pollution of the environment.

The *Police Powers and Responsibilities Act 2000* in section 211(1) defines a terrorist act as:

(1) An action is a terrorist act if—

(a) it does any of the following—

- (i) causes serious harm that is physical harm to a person;
- (ii) causes serious damage to property;
- (iii) causes a person's death;
- (iv) endangers the life of someone other than the person taking the action;
- (v) creates a serious risk to the health or safety of the public or a section of the public;
- (vi) seriously interferes with, seriously disrupts, or destroys an electronic system; and

(b) it is done with the intention of advancing a political, religious or ideological cause; and

(c) it is done with the intention of—

(i) coercing, or influencing by intimidation, the government of the Commonwealth, a State or a foreign country, or of part of a State or a foreign country; or

(ii) intimidating the public or a section of the public.

(2) A threat of action is a terrorist act if—

(a) the threatened action is likely to do anything mentioned in subsection (1)(a)(i) to (vi); and

(b) the threat is made with the intentions mentioned in subsection (1)(b) and (c).

(3) However, an action or threat of action is not a terrorist act if the action or threatened action—

(a) is advocacy, protest, dissent or industrial action; and

(b) is not intended—

(i) to cause serious harm that is physical harm to a person; or

(ii) to cause a person's death; or

(iii) to endanger the life of a person, other than the person taking the action; or

(iv) to create a serious risk to the health or safety of the public or a section of the public.

(4) Terrorism is—

(a) criminal activity that involves a terrorist act; or

(b) something that is—

(i) preparatory to the commission of criminal activity that involves a terrorist act; or

(ii) undertaken to avoid detection of, or prosecution for, criminal activity that involves a terrorist act.

Powers of government

Under the current legal framework, a commissioned officer and terrorist emergency forward commander respectively can declare emergency or terrorist emergency situations if the above criteria are satisfied. An emergency will exist until revoked by the emergency commander, or another commissioned officer of the same or more senior rank. A terrorist emergency will exist for 7 days unless the Minister and Premier are satisfied that there are grounds to extend it to a maximum of 14 days. The Bill in question plans to change this, permitting extension in 7-day increments up to 28 days, and beyond 28 days by making a regulation under the Act.

In these circumstances, declared officers (known as emergency commanders and terrorist emergency commanders) are vested with an array of powers for the length of the emergency situation.

For emergency commanders, section 8(1) of the *Public Safety Preservation Act* grants them the following powers:

- Direct an owner or person in control of a resource to surrender it to the commander or police officer
- Take control of any resource
- Direct people in charge of resources to operate them for the emergency commander
- Direct the evacuation and exclusion of any person/s from any premises, and remove those who do not comply
- Close any road, street, motorway, private road etc. or any public place
- Enter or cause to be entered any premises
- Search or cause to be searched any premises
- Direct any person to assist them in the manner specified by him (help directions)

Terrorist emergency commanders are empowered to do the following by sections 8L – 8O of the same Act:

- Power to control the movement of persons in respect of a declared area
- Power to stop, detain and search any persons suspected to have just left or about to enter a declared area.
- Power to seize anything found in these searches that may provide evidence of a commission of an offence or if the person intends to cause harm to themselves or others
- Power to require a name and address of anyone suspected to have just left a declared area.

According to the Minister, the new laws in the *Counter-Terrorism and Other Legislation Amendment Bill* will:

- Enable police to require any person or organisation to provide information during a declared emergency
- Create an offence for refusing to provide information sought by police or to give false or misleading information with penalties of up to 10 years' imprisonment to apply
- Extend the power to search and seize vehicles as they leave or enter a declared area
- Broaden the power for police to seize things from a person during a declared emergency to include things that a person may use to cause harm.

3.2 Canada

The Canadian *Emergencies Act 1988* was introduced to authorise special temporary measures in declared situations, replacing the previous *War Measures Act*. Two key elements of the Canadian system are the compulsory review by the Cabinet of any emergency declaration, and that any temporary laws made under the Act are subject to the Canadian Charter of Rights and Freedoms. This means that even in an emergency situation, any attempt to suspend civil rights are subject to the reasonable and justified test under the Charter.

Definition of emergency

The Canadian Act defines four types of emergencies:

(1) Public Welfare Emergency. This is defined in section 5 as an emergency that is caused by a real or imminent:

- (a) fire, flood, drought, storm, earthquake or other natural phenomenon,

(b) disease in human beings, animals or plants, or

(c) accident or pollution

(2) Public Order Emergency. This is defined in section 16 as an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency. Section 3 defines a national emergency as an urgent and critical situation of a temporary nature that

(a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or

(b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada

and that cannot be effectively dealt with under any other law of Canada.

(3) International Emergency. This is defined in section 27 as an emergency involving Canada and one or more other countries that arises from acts of intimidation or coercion or the real or imminent use of serious force or violence and that is so serious as to be a national emergency

(4) War Emergency. This is defined in section 37 as war or other armed conflict, real or imminent, involving Canada or any of its allies that is so serious as to be a national emergency.

Powers of government

The first two types of emergency will be the focus as they are directly relevant to the purposes of this analysis.

Where a Public Welfare Emergency is declared, the Governor in Council is equipped with the following powers under section 8(1):

(a) the regulation or prohibition of travel to, from or within any specified area, where necessary for the protection of the health or safety of individuals;

(b) the evacuation of persons and the removal of personal property from any specified area and the making of arrangements for the adequate care and protection of the persons and property;

(c) the requisition, use or disposition of property;

(d) the authorization of or direction to any person, or any person of a class of persons, to render essential services of a type that that person, or a person of that class, is competent to provide and the provision of reasonable compensation in respect of services so rendered;

(e) the regulation of the distribution and availability of essential goods, services and resources;

(f) the authorization and making of emergency payments;

(g) the establishment of emergency shelters and hospitals;

(h) the assessment of damage to any works or undertakings and the repair, replacement or restoration thereof;

(i) the assessment of damage to the environment and the elimination or alleviation of the damage; and

(j) the imposition

(i) on summary conviction, of a fine not exceeding five hundred dollars or imprisonment not exceeding six months or both that fine and imprisonment, or

(ii) on indictment, of a fine not exceeding five thousand dollars or imprisonment not exceeding five years or both that fine and imprisonment,

for contravention of any order or regulation made under this section.

Where a Public Order Emergency is declared, the Governor in Council is equipped with the following powers under section 19(1):

(a) the regulation or prohibition of

(i) any public assembly that may reasonably be expected to lead to a breach of the peace,

(ii) travel to, from or within any specified area, or (iii) the use of specified property;

(b) the designation and securing of protected places;

(c) the assumption of the control, and the restoration and maintenance, of public utilities and services;

(d) the authorization of or direction to any person, or any person of a class of persons, to render essential services of a type that that person, or a person of that class, is competent to provide and the provision of reasonable compensation in respect of services so rendered; and

(e) the imposition

(i) on summary conviction, of a fine not exceeding five hundred dollars or imprisonment not exceeding six months or both that fine and imprisonment, or

(ii) on indictment, of a fine not exceeding five thousand dollars or imprisonment not exceeding five years or both that fine and imprisonment,

for contravention of any order or regulation made under this section.

3.3 New Zealand

The New Zealand's *Civil Defence Emergency Management Act 2002* permits the declaration of either a national or a local state of emergency depending on the circumstances, which will last for seven days unless revoked or extended. The Act requires each regional council and territorial authority to establish a Civil Defence Emergency Management Group for the purposes of carrying out this Act. Powers in emergency situations are generally vested in these groups, National and Group Controllers, and the Director of Civil Defence Emergency Management, and can be exercised by others on their authority.

Definition of emergency

The New Zealand Act contains a broad, single definition of emergency in Part One:

emergency means a situation that—

(a) is the result of any happening, whether natural or otherwise, including, without limitation, any explosion, earthquake, eruption, tsunami, land movement, flood, storm, tornado, cyclone, serious fire, leakage or spillage of any dangerous gas or substance, technological failure, infestation, plague, epidemic, failure of or disruption to an emergency service or a lifeline utility, or actual or imminent attack or warlike act; and

(b) causes or may cause loss of life or injury or illness or distress or in any way endangers the safety of the public or property in New Zealand or any part of New Zealand; and

(c) cannot be dealt with by emergency services, or otherwise requires a significant and co-ordinated response under this Act

Powers of government

Under section 93, any person exercising powers under Part 5 must carry and produce evidence of their identity and provide an explanation of their authority when requested.

Part 5 of the Act vests an array of powers in the Director and Emergency Management Groups, including:

- The power to require information that is reasonably necessary for the exercise of civil defence emergency management
- Power to obtain information in urgent cases where authorised by a District Court Judge through a warrant
 - This allows the entrance and search of premises to obtain information that is urgently required to prevent or limit the extent of the emergency.
 - The necessity of this must be sworn on oath by the Director

Section 85 grants the following specific powers to the Emergency Management Groups:

While a state of emergency is in force in its area, a Civil Defence Emergency Management Group may—

(a) carry out or require to be carried out all or any of the following:

(i) works:

(ii) clearing roads and other public places:

(iii) removing or disposing of, or securing or otherwise making safe, dangerous structures and materials wherever they may be:

(b) provide for the rescue of endangered persons and their removal to areas of safety:

(c) set up first aid posts, and provide for first aid to be given to casualties and for their movement to hospital, other place of treatment, or areas of safety:

(d) provide for the relief of distress, including emergency food, clothing, and shelter:

(e) provide for the conservation and supply of food, fuel, and other essential supplies:

(f) prohibit or regulate land, air, and water traffic within the area or district to the extent necessary to conduct civil defence emergency management:

(g) undertake emergency measures for the disposal of dead persons or animals if it is satisfied that the measures are urgently necessary in the interests of public health:

(h) disseminate information and advice to the public:

(i) enter into arrangements, including employment arrangements, with any person for the purpose of carrying out civil defence emergency management as may be agreed:

(j) provide equipment, accommodation, and facilities for the exercise of any of the powers conferred by this subsection.

Section 85(2) provides that a Civil Defence Emergency Management Group must not act inconsistently with any directions given by the Minister or the Director.

In the same Part, the Controllers and any constables are empowered to:

- Direct the evacuation or exclusion of persons from any premises or place
- Enter any premises or place within the area of the state of emergency for the purposes of saving life, preventing injury or permitting or facilitating the carrying out of any urgent measure for the relief of suffering or distress
- Close roads and public places
- Removal of aircraft, vessels, vehicles from an emergency area where they are impeding civil defence emergency management
- Requisition of a broad array of property, however this must be accompanied with a written explanation
- Give directions and carry out inspections

3.4 The United Kingdom

Section 20 of the United Kingdom's *Civil Contingencies Act 2004* permits emergency regulations to be made by the Queen on advice of the Privy Council, or if this would not be possible without serious delay, a senior Minister of the Crown. These include the Prime Minister, Principal Secretaries of State and Commissioners of the Treasury. An emergency (as defined below) must have occurred, be occurring or is about to occur, and there is a need for such regulations either due to risk of delay or insufficient legislation. Any regulation declared must be brought before each house of parliament and confirmed, otherwise it will lapse after 7 days. If confirmed, the regulations will last for 30 days unless specified earlier. Crucially, the regulations cannot be used to alter any aspect of the *Human Rights Act 1998*

Definition of emergency

Emergencies are defined in section 19 of the Act as follows:

(1) In this Part "emergency" means—

(a) an event or situation which threatens serious damage to human welfare in the United Kingdom or in a Part or region,

(b) an event or situation which threatens serious damage to the environment of the United Kingdom or of a Part or region, or

(c) war, or terrorism, which threatens serious damage to the security of the United Kingdom.

(2) For the purposes of subsection (1)(a) an event or situation threatens damage to human welfare only if it involves, causes or may cause—

- (a) loss of human life,
- (b) human illness or injury,
- (c) homelessness,
- (d) damage to property,
- (e) disruption of a supply of money, food, water, energy or fuel,
- (f) disruption of a system of communication,
- (g) disruption of facilities for transport, or
- (h) disruption of services relating to health.

(3) For the purposes of subsection (1)(b) an event or situation threatens damage to the environment only if it involves, causes or may cause—

- (a) contamination of land, water or air with biological, chemical or radio-active matter, or
- (b) disruption or destruction of plant life or animal life.

Powers of government

Section 22 outlines the scope of emergency regulations that can be made. The defining factor is outlined in subsection one, that any regulation must be appropriate for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency. Subsection 3 also sets out the power to make any provisions that could be made by an Act of Parliament or Royal Prerogative.

Subsection 2 sets out particular purposes for carrying out this function:

- (a) protecting human life, health or safety,
- (b) treating human illness or injury,
- (c) protecting or restoring property,
- (d) protecting or restoring a supply of money, food, water, energy or fuel,
- (e) protecting or restoring a system of communication,
- (f) protecting or restoring facilities for transport,
- (g) protecting or restoring the provision of services relating to health,
- (h) protecting or restoring the activities of banks or other financial institutions,
- (i) preventing, containing or reducing the contamination of land, water or air,
- (j) preventing, reducing or mitigating the effects of disruption or destruction of plant life or animal life,
- (k) protecting or restoring activities of Parliament, of the Scottish Parliament, of the Northern Ireland Assembly or of the National Assembly for Wales, or

(l) protecting or restoring the performance of public functions.

Section 23 places limits on these powers, reiterating that they must only for the overriding purpose in section 22(1). Furthermore, they must specify where the regulations apply in the United Kingdom. These regulations cannot require a person to provide military service or be used to prohibit or enable industrial action. They also place limits on what offences can be created under such a regulation.

3.5 The United States

The United States of America does not have a centralised legislative system for states of emergency. Rather, individual Acts contain provisions under which the President may invoke a state of emergency depending on the requirements outlined. The United States Constitution also provides for emergency powers, such as calling forth the militia to execute the laws, suppress an insurrection or repel an invasion. Therefore, no single definition of a state of emergency exists, neither is there a definitive list of powers. This system is subject to the oversight of the *National Emergencies Act 1976*, which was designed to stop open-ended state of national emergencies and introduce formal checks and balances.

Under this Act, the President is required to expressly state the legislative power relied on when making a declaration, and is required to keep a record of all orders made. Furthermore, the President is required to transmit all orders made to Congress, and must report all expenditures at the end of each six-month period after the declaration.

Any state of emergency will remain in force for one year unless terminated earlier by the President or Congress, or renewed by the President. Congress is required to meet every six months while the state of emergency is in place to determine whether to terminate it by concurrent resolution.

Two prominent examples of emergency powers in the United States are the *International Emergency Economic Powers Act 1977* ('IEEPA') and Proclamation 7463 made by George W. Bush in the aftermath of 9/11. Under the IEEPA, a number of national emergencies have been declared, many of which were for the purpose of restricting trade with certain foreign entities. In respect of the latter, the state of national emergency has been renewed annually since 2001.

4.0 Historical Abuses of State of Emergency Laws

4.1 The Failure of the Weimar Constitution – Germany (1933)

Article 48 of the Weimar Constitution allowed the President to take emergency measures without consent of the Reichstag. The provision was broadly drafted, and allowed the use of armed forces to compel a State to perform its duties, the taking of necessary measures for restoring public security and order, as well as suspending fundamental rights such as habeas corpus and freedoms of association, assembly and expression.

In the wake of the *Reichstag* Fire, Adolf Hitler convinced President Paul von Hindenburg to invoke Article 48 and suspended the aforementioned fundamental rights. Through doing so, the Nazi party was able to intimidate and arrest their political opposition and attain a narrow majority in the *Reichstag*. This permitted the passage of the *Enabling Act* by the required two-thirds majority, allowing Hitler's government to pass legislation itself. Throughout his twelve-year reign, Hitler frequently based his ruling authority on the decree, and as such,

Article 48. By abusing such a power, he was able to give himself an appearance of legal legitimacy despite his authoritarian rule.

4.2 The United Kingdom in the 1970s

4.2.1 State of Emergency Convictions - The Guildford Four and the Birmingham Six

In response to growing violence from the Irish Republican Army (IRA), the British government passed the *Prevention of Terrorism Act 1973*, which contained a number of powers designed to combat terrorism. Among these was the power to detain suspects for 48 hours, which could be extended for a further five days without charge.³⁹ After bombings in Guildford and Birmingham, a number of people were arrested on suspicion of terrorist acts and subjected to ill-treatment in police custody. This significant pressure, manifested by police misconduct and sustained over a seven-day period as permitted by the Act resulted in confessions from the accused. Gerard Conlon, one of the 'Guildford Four' recognised this in his autobiography, arguing that a key factor in his confession was the period of interrogation permitted by these laws.⁴⁰

4.2.2 The Diplock Courts in Northern Ireland

Another aspect of this state of emergency was the Diplock Courts arising from the enactment of the *Northern Ireland (Emergency Provisions) Act 1973* in response to nationalist conflict in Northern Ireland during the period. The Act suspended trial by jury for a number of criminal offences in the country as a means of addressing concerns about perverse acquittals and intimidation of jurors.⁴¹ The scheduled offences included murder and manslaughter (subject to the Attorney-General determining otherwise), arson and riot as well as property damage and terrorism related offences. This was despite Lord Gardiner's 1972 *Minority Report*, which formed part of the *Parker Report*, finding that there was no evidence of intimidation or of perversity in juries.⁴² These courts existed in Northern Ireland until their abolition in July 2007 by the *Justice and Security (Northern Ireland) Act 2007*.

4.3 Egypt (1967-2012)

Throughout this period, Egypt was under a declared state of emergency aside from an 18-month period in between 1980-1981. Such an act was permitted by *Law No. 162 of 1958*, which allows the President to declare a state of emergency and impose various restrictions on human rights. Included in this list are the abolition of habeas corpus, expansion of police powers (in particular arresting, searching and detaining), imposition of censorship and restricting freedom of movement and association. While the People's Assembly must renew the state of emergency every three years, the government has frequently used its majority to force the extension through. This led to a prolonged period of rights abuses in the country and was one of the key driving points behind the 2011 Egyptian Revolution.

³⁹ Kevin Toolis, *When British Justice Failed*, (25 February 1990), The New York Times <<http://www.nytimes.com/1990/02/25/magazine/when-british-justice-failed.html?pagewanted=all>>.

⁴⁰ Gerard Conlon, *Proved Innocent: the story of Gerry Conlon and the Guildford Four* (Penguin Books, 1991).

⁴¹ Lord Diplock, Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland, para 37

⁴² Lord Gardiner, Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland.

5.0 The Council's Recommendations

Recommendation 1: safeguards re: extension of time

The above abuses highlight the need for states of emergency to be limited in time frame so that they are legitimately used to respond to the emergency.

Clause 36 of the Bill inserts new sections 8H (Extension of terrorist emergency beyond 7 days) and 8HA (Extension of terrorist emergency beyond 28 days) into the *Public Safety Preservation Act 1986* to enable extension of a terrorist emergency. This allows the extension of a terrorist emergency beyond the initial seven days, up to a maximum of 28 days, by up to seven day increments.

The Explanatory Notes identifies that this power to extend a terrorist emergency is safeguarded by the requirement of seven day increments, and further by the ability to end the terrorist emergency (if satisfied that it is no longer necessary for police officers to continue to exercise terrorist emergency powers to maintain public safety, protect life or health at serious risk or to protect critical infrastructure).

Our submission is that there should be more safeguards in place before the emergency can be extended. Machiavelli emphasised the value of the control of the appointment of the dictator by the Consuls. He also emphasised that states of emergency had to be clearly limited in time. It is indeed, our view that a significant level of political control needs to be imposed. However, in our system, where there is no Upper House that can only be achieved by including politicians outside the government in the process. It is our submission, therefore, that the extension of an emergency beyond 7 days ought to require the approval of the Premier, the Attorney General, the Commissioner of Police and the Leader of the Opposition.

Approval beyond 28 days ought to require the approval of those 4 individuals plus the leaders of all other recognised political parties in the Parliament and the Chief Justice. It should within 7 days be confirmed by a vote of the whole Parliament.

Recommendation 2: the use of information obtained under the information requirements must not be used for other offences

Clause 28 of the Bill introduces a new section 8AE (Making of information requirement) into the *Public Safety Preservation Act 1986* (Qld) which authorises the emergency commander or a police officer acting on the emergency commander's instructions, during the period of an emergency situation, to require the provision of information which is necessary for the management or resolution of the emergency situation.

The Council takes note that under section 8AE(7) a person who is reasonably suspected of having committed or committing an indictable offence that is directly related to the emergency situation cannot be required to give information. However, the Council would strongly recommend that information obtained under the proposed subdivision 2 is restricted to offences pertaining to the emergency, and that the information is not to be used against a person for offences unrelated to the emergency. This is an important safeguard against the disproportionate use of police emergency powers.

It follows from this that we oppose clause 8A1. Why should information obtained under compulsion for a specific emergency purpose be kept by the police for some general police purpose? This is entirely inappropriate. It is a clear violation of basic privacy principles. Has this provision been referred to the Privacy Commissioner for comment?

Recommendation 3: that the declaration of emergency be in writing

The Council recommends that the declaration of emergency be in writing and sufficiently detailed so as to identify the cause, the location and the relevant time period that such a declaration is relevant. This provides further accountability and assists in the proper exercise of power. A significant way this could be implemented is based on the New Zealand model, where those vested with authority require a warrant from a District Court Judge to obtain information in urgent cases in relation to the emergency.

The Council is concerned about the proposed amendments to the *Public Safety Preservation Act 1986*, in particular Division 3 and sections 8N to 8P. The lack of a warrant requirement renders these provisions open to abuse. Therefore, the Council submits implementing a version of the New Zealand model, which would ensure a further safeguard on the use of power, as well as greater accountability.

Recommendation 4: that a public interest monitor (PIM) be appointed to oversee the terrorist emergency commander.

Section 8A of the *Public Safety Preservation Act 1986* sets out when the commissioner or deputy commissioner can appoint a terrorist emergency commander and terrorist emergency forward commander. This commander has the ability to stop, detain and search a person, without a warrant, in certain circumstances (s 8N), outside of the usual circumstances prescribed in the Act.

While the requirement of a warrant is preferable, in the alternative, it is the Council's submission that a public interest monitor (PIM) is appointed under the *Public Safety Preservation Act 1986*, similar to that prescribed in section 740 *Police Powers and Responsibilities Act 2000*. Specifically, the PIM's functions would be to monitor compliance of the terrorist emergency commander and forward commander; to gather statistical information about the use and effectiveness of the commander; and, to produce a report to be submitted to Parliament once the emergency period has ended. This report would be publically available after it has been reviewed by Parliament. Any information that is not in the public interest to publicise would be redacted.

Other specific issues

Clause 45 enables the application of emergency powers to declared evacuation areas or to areas to which people evacuate but are not officially declared as such. The requirement that the emergency powers be restricted to a specifically identified and limited geographic area is one of the fundamental restrictions on the powers designed to prevent their abuse.

The case is made that the powers should be extended to officially declared evacuation areas which may be reasonable but also to other areas where people simply evacuate. This

presumably means that if there is an incident in the Brisbane Central Business District and a few people decide to evacuate to Ipswich when there is no designated centre large parts of Ipswich will be declared. We see no reasonable basis for that proposition. Surely the power in both cases should be limited to areas where a significant number of people have evacuated and there is some reason to suspect that there are potential terrorists amongst those people.

We submit the power to detain conferred in the proposed section 8PC of the Bill should only be exercised if the terrorist emergency officer has reasonable grounds to be satisfied that that the detention is necessary to ensure that the person does not pose a serious risk to the life or health of anyone. Clause 8B(1)(d) is too vague a basis upon which to authorise the detention of someone for what could be a significant period of time.

It should be provided in relation to the proposed new powers of search and to control the movement of persons that a decision under these provisions is to be communicated in writing as soon as reasonably applicable to the "terrorist emergency commander" together with the reasons for that decision.

A person should be released immediately from detention if grounds exist to suppose the person does not pose a serious risk to the life or health of anyone.

The QCCL thanks our interns Mark Young, Myrella-Jane Byron and Ameera Ismail for preparing this submission

We trust this is of assistance to you in your deliberations.