



Counter-Terrorism and Other Legislation Amendment Bill 2017

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Legal Affairs and Community Safety
Committee
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Legal Affairs and Community Safety Committee

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Abbreviations

ASIO	Australian Security Intelligence Organisation
Bill	Counter-Terrorism and Other Legislation Amendment Bill 2017
CCC	Crime and Corruption Commission
FLPs	fundamental legislative principles
LSA	<i>Legislative Standards Act 1992</i>
OIC	Office of the Information Commissioner
PCO	prohibited contact order
PDO	preventative detention order
PPRA	<i>Police Powers and Responsibilities Act 2000</i>
PSPA	<i>Public Safety Preservation Act 1986</i>
QCCL	Queensland Council for Civil Liberties
QLS	Queensland Law Society
QPS	Queensland Police Service
SLC	(former) Scrutiny of Legislation Committee
TPDA	<i>Terrorism (Preventative Detention) Act 2005</i>

Chair's foreword

This report presents a summary of the Legal Affairs and Community Safety Committee's examination of the Counter-Terrorism and Other Legislation Amendment Bill 2017.

The committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

This report summarises the committee's examination of the Bill, including the views expressed in submissions and information provided by the Queensland Police Service. After considering the evidence and information, the committee has recommended that the Bill be passed.

On behalf of the committee, I thank those organisations who lodged written submissions on the Bill. I also thank the Queensland Police Service and the committee's secretariat for their assistance.

I commend this report to the House.



Duncan Pegg MP

Chair

Recommendations

Recommendation 1

2

The committee recommends the Counter-Terrorism and Other Legislation Amendment Bill 2017 be passed.

1 Introduction

1.1 Role of the committee

The Legal Affairs and Community Safety Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 27 March 2015 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.¹

The committee's primary areas of responsibility include:

- Justice and Attorney-General, Training and Skills, and
- Police, Fire and Emergency Services, and Corrective Services.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles, and
- for subordinate legislation – its lawfulness.

The Counter-Terrorism and Other Legislation Amendment Bill 2017 (Bill) was introduced into the House and referred to the committee on 14 June 2017. In accordance with the Standing Orders, the Committee of the Legislative Assembly required the committee to report to the Legislative Assembly by 11 August 2017.

1.2 Inquiry process

On 21 June 2017, the committee wrote to the Queensland Police Service (QPS) seeking advice on the Bill, and invited stakeholders and subscribers to lodge written submissions.

The committee held a public briefing with the QPS on 18 July 2017 (see Appendix B).

The committee received four submissions (see Appendix A).

The QPS provided a written brief on the Bill dated 5 July 2017, and responses to submissions and to a question taken on notice on 21 July 2017.

The submissions, the correspondence from the QPS and the transcript of the public briefing are available from the committee's webpage at www.parliament.qld.gov.au/lacsc.

1.3 Policy objectives

The primary objective of the Bill is to amend the *Public Safety Preservation Act 1986* (PSPA), the *Police Powers and Responsibilities Act 2000* (PPRA) and the *Terrorism (Preventative Detention) Act 2005* (TPDA) to enhance public and police officer safety and ensure police are able to respond rapidly and effectively to terrorist acts and other person-made critical incidents which pose a serious risk to life.²

Further objectives of the Bill are to enhance the operational effectiveness of surveillance device powers under the PPRA, to amend the PSPA and the PPRA to provide power for police to destroy explosives, and to repeal the *Queensland Police Welfare Club Act 1970*.³

¹ *Parliament of Queensland Act 2001*, s 88 and Standing Order 194.

² Commissioner Ian Stewart, public briefing transcript, Brisbane, 18 July 2017, p 2. See also explanatory notes, p 1.

³ Explanatory notes, p 1.

1.4 Consultation on the Bill

A consultation draft of the Bill was made available by the Queensland Government to the Bar Association of Queensland, the Office of the Information Commissioner, the Queensland Council for Civil Liberties, the Queensland Law Society, and the Public Interest Monitor. A number of amendments were made to the consultation draft as a result of the comments provided by stakeholders.⁴

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend the Bill be passed.

After examination of the Bill and consideration of the information provided by the QPS and submitters, the committee recommends that the Bill be passed.

Recommendation 1

The committee recommends the Counter-Terrorism and Other Legislation Amendment Bill 2017 be passed.

⁴ Explanatory notes, p 22.

2 Overview of the Bill

The Bill proposes to amend the PSPA, the TPDA and the PPRA, and to repeal the *Queensland Police Welfare Club Act 1970*.

Public Safety Preservation Act 1986

The proposed amendments to the PSPA include:

- clarifying that the search powers include the power to search devices such as mobile phones or tablet computers
- giving police the power to require a person to provide assistance to access a person's electronic device
- providing police with the power to take and use a person's biometric information to establish or confirm the identity of a person
- inserting new Division 4 (Extraordinary emergency powers) into Part 2 (Emergency situation) of the PSPA to provide police with the power to control movement of persons; search a person without a warrant; require a person's name, address and date of birth; collect and use biometric information; and require access information to enable a search to be conducted on an electronic advice
- devolving the ability to declare an emergency situation to approved senior sergeants
- clarifying that an emergency situation area can surround a moving activity, such as a person or vehicle
- enabling a commissioned officer to authorise the use of surveillance devices within the declared area or in a stated place for a declared emergency, and
- providing an emergency commander in an emergency situation with the power to dispose of explosives and authorise damage that may result in the disposal process.

Police Powers and Responsibilities Act 2000

The Bill would amend the PPRA in a number of ways, including:

- clarifying that a surveillance device warrant or emergency authorisation can authorise the use of an existing device as a surveillance device
- enabling a commissioned officer to authorise the installation and use of a tracking device to assist in taking persons into lawful custody in certain circumstances
- omitting restrictions applying to communicating certain information to the Australian Security Intelligence Organisation (ASIO)
- removing the requirement for a surveillance device warrant to specify neighbouring premises over which police may cross to gain access to the target premises, unless covert entry into a building is required to gain access to the target premises
- providing separate definitions for 'premises' and 'vehicles' to remove the requirement to specify the premises to be entered to install a surveillance device into a vehicle
- enabling a vehicle to be temporarily relocated to allow installation, retrieval or maintenance of a surveillance device
- enabling the use of information obtained from surveillance devices to be used in relation to applications for Preventative Detention Orders (PDOs) and Prohibited Contact Orders (PCOs) and in proceedings relating to PDOs or CDOs in other jurisdictions

- providing approved police officers with the power to destroy explosives when it is not reasonably practicable, or is dangerous, to move the explosive.

Terrorism (Preventative Detention) Act 2005

The Bill proposes to amend the TPDA by:

- replacing the ‘imminence test’ for the issue of a PDO with a ‘capability threshold test’
- reducing the threshold test for entry into the premises from ‘believes on reasonable grounds’ to suspects on reasonable grounds’ that the person, the subject of the PDO, is on the premises, and
- removing the restrictions on entry of a dwelling (currently between 9:00pm and 6:00am) to take a person into custody under a PDO.⁵

Key amendments are discussed in Section 3 of this report.

⁵ Explanatory notes, pp 8-11.

3 Examination of the Bill

This section of the report discusses key amendments introduced by the Bill to achieve its policy objectives.⁶

3.1 Surveillance devices

The Bill proposes to amend various provisions of the PPRA relating to surveillance device warrants, and to insert new provisions into the PSPA to enable a commissioned officer to authorise the use of surveillance devices during a declared emergency.

3.1.1 Amendments to the *Police Powers and Responsibilities Act 2000*

Use of an existing device as a surveillance device

The Bill clarifies that a surveillance device warrant or emergency authorisation can authorise the use of an existing device as a surveillance device.⁷

A security camera is an example of an existing device.⁸ Things that that may be done to or in relation to a device include:

- installing hardware or software on the device
- connecting the device to another device using a wireless connection.⁹

According to the explanatory notes, the Bill proposes to amend the PPRA:

... to clarify that a reference in Chapter 13 of the PPRA to installation of a surveillance device is taken to include a reference to doing anything to an existing device, including the covert manipulation of the device either physically or remotely and including the remote installation of software, to enable the device to be used as a surveillance device. This clause [cl 6], in conjunction with clauses 8, 9(8), 10, 14 and 15 (new section 348B), clarify that a surveillance device warrant, emergency authorisation or tracking device authorisation can authorise an existing device within the target premises, in possession of a person or in a vehicle or object, as a surveillance device or type of surveillance device.¹⁰

Content of surveillance device warrants

The Bill would omit the necessity for a surveillance device warrant to state the parts of the dwelling that the optical surveillance device can be installed. This is because police do not have control of the placement of existing devices such as security cameras and mobile devices. A judge may nevertheless place conditions on the entry or how a surveillance device may be used.¹¹ Also, the explanatory notes state that the QPS's Surveillance Device Warrant – Standing Operating Procedures (Classified) 'sets out specific procedures to be adopted in circumstances where sexual activity or any state of undress is captured by a surveillance device.'¹²

⁶ The policy objectives of the Counter-Terrorism and Other Legislation Amendment Bill 2017 are outlined in section 1.3 of this report. See also explanatory notes, p 1. The Crime and Corruption Commission submitted that it supported the Bill's proposed reforms to the *Public Safety Preservation Act 1986*, the *Terrorism (Preventative Detention) Act 2005* and the *Police Powers and Responsibilities Act 2000*. It did not have any comments to make regarding the proposed repeal of the *Queensland Police Welfare Club Act 1970*: Crime and Corruption Commission, submission 1, p 2.

⁷ Clauses 6, 8, 9(8), 10 and 14 amend Chapter 13 of the *Police Powers and Responsibilities Act 2000*.

⁸ Proposed new s 332A(2) of the *Police Powers and Responsibilities Act 2000*.

⁹ Proposed new s 324A of the *Police Powers and Responsibilities Act 2000*.

¹⁰ Explanatory notes, p 26.

¹¹ *Police Powers and Responsibilities Act 2000*, s 331(1)(xi).

¹² Explanatory notes, p 26.

The Bill proposes to omit the need to specify the route through neighbouring premises that the police intend to take to reach the premises in the surveillance device warrant. The amendment means that the police would not need to return to the issuing judge to vary the warrant if the premises could not be reached using the specified route.¹³ A surveillance device warrant must, however, specifically authorise the covert entry onto premises adjoining or providing access to the target premises for the purposes of installing, using or maintaining a surveillance device in the target premises.¹⁴

Vehicles

The Bill would amend the definitions in Chapter 13 of the PPRA to separate ‘vehicle’ from the definition of ‘premises’.¹⁵ This amendment, together with other proposed amendments, mean that it would no longer be necessary for a surveillance device warrant to specify the premises that can be entered to install a surveillance device in a vehicle.¹⁶ According to the explanatory notes, this ‘takes into account the mobility of a vehicle and removes the inefficiency associated with warrants becoming invalidated due to a vehicle changing location.’¹⁷

At present, a surveillance device warrant authorises, amongst other things, the temporary removal of an object from premises for the purposes of the installation, maintenance or retrieval of a surveillance device or enhancement equipment and the return of the object to the premises.¹⁸ The Bill proposes to expand the power to include the temporary removal and return of a vehicle.¹⁹ So, for example, the police could take a car parked on a road to a safe place to install a surveillance device and then return the car to its original position.²⁰

Provision of information to ASIO

The Bill proposes to remove the prohibition restricting the communication to, or use by, ASIO of information gained under an emergency authorisation for the use of a surveillance device until such time as a Judge has post-approved the emergency authorisation.²¹ The explanatory notes provide the rationale for the amendment:

*Counter-terrorism responses are built upon partnerships between State police services and Commonwealth agencies, including ASIO. This amendment removes impediments to working collaboratively with partner agencies to prevent or resolve acts of terrorism.*²²

Use of protected information

The circumstances in which protected information may be used, communicated or published would be expanded by the Bill.²³ The amendments enable information obtained from the use of a surveillance device to be used for ‘applications for final orders for PDOs and PCOs under the TPDA or proceedings relating to a matter under preventative detention legislation in another jurisdiction or the Commonwealth or for use during proceedings in relation to Commonwealth Control Orders.’²⁴ The amendments also ‘permit the use of information from a surveillance device for an application for initial

¹³ Explanatory notes, p 27. See cl 9(2).

¹⁴ Clause 9(6).

¹⁵ Clause 5.

¹⁶ See cls 9, 11, 12, 15.

¹⁷ Explanatory notes, p 25.

¹⁸ *Police Powers and Responsibilities Act 2000*, s 332(3)(d).

¹⁹ Clause 9(9).

²⁰ Explanatory notes, p 28.

²¹ Clause 16; explanatory notes, p 31.

²² Explanatory notes, p 31.

²³ Clause 17. Protected information is defined in s 351 of the *Police Powers and Responsibilities Act 2000*.

²⁴ Explanatory notes, p 31.

orders for PDOs or PCOs under the TPDA or equivalent application in another jurisdiction or the Commonwealth.’²⁵

Stakeholder views and QPS response

The Queensland Council for Civil Liberties (QCCL) had concerns regarding the potential for damage to equipment, especially that belonging to innocent third parties, caused by the connection of a surveillance device.²⁶ In response, the QPS advised that it is not the intention of the amendment that the equipment of innocent third parties would be used.²⁷

3.1.2 Amendments to the *Public Safety Preservation Act 1986*

The Bill would enable a commissioned officer to authorise a police officer to use a surveillance device in an emergency area during an emergency if the commissioned officer reasonably suspects that:

- an emergency involves, may involve or may lead to a serious risk to the life, health or safety of a person, and
- the use of a surveillance device will help to reduce the risk.²⁸

Under an amendment proposed by the Bill, a surveillance device authorisation would authorise the use of a device (an existing device) that is on the premises, or in or on the vehicle or object, or a vehicle or object of the class, as a surveillance device.²⁹ The explanatory notes explain that the new provision:

*... clarifies that the use of the existing device as a surveillance device under a surveillance device authorisation includes a power to do anything that is necessary to or in relation to the existing device to enable it to be used as a surveillance device. This includes the covert manipulation of the device either physically or remotely and including the remote installation of software onto the device to enable the device to be used as a surveillance device.*³⁰

The Bill proposes that a register of surveillance device authorisations would have to be kept by the commissioner and the commissioner must give the Minister a report stating the number of surveillance authorisations given during the financial year within three months after the end of each financial year.³¹

3.1.3 Tracking device authorisations

The Bill would insert into the PPRA a scheme for a QPS senior officer to authorise the use of a tracking device in Queensland to take a high risk person into custody if the use of a tracking device would minimise the serious risk to the safety of any person.³²

²⁵ Explanatory notes, p 31.

²⁶ Queensland Council for Civil Liberties, submission 4, p 1.

²⁷ Queensland Police Service, correspondence dated 21 July 2017, p 17.

²⁸ Clause 39; proposed new s 43E of the *Public Safety Preservation Act 1986*. An emergency means:

- an emergency situation that, under s 5, has been declared to exist, or
- a terrorist emergency, or
- a CBR [chemical, biological, radiological] emergency declared under s 12: cl 42.

²⁹ Proposed new s 43F of the *Public Safety Preservation Act 1986*. A security camera is an example of an existing device. Proposed new s 43G sets out the circumstances when the surveillance device authorisation ends and proposed new s 43H specifies when a commissioned officer must revoke a surveillance device authorisation.

³⁰ Explanatory notes, p 43.

³¹ Proposed new ss 43J and 43I of the *Public Safety Preservation Act 1986*.

³² Explanatory notes, p 29. See cls 7, 15.

Under the proposed scheme, the authorisation period for a tracking device authorisation must not be longer than 48 hours.³³ A senior officer may extend the authorisation period more than once, but not by more than 48 hours each time, provided the officer is satisfied each time on reasonable grounds that taking the person into custody may pose a serious risk to the safety of the person or another person, and the use of a tracking device will help in taking the person into custody at a time or location that minimises the risk.³⁴ The tracking device authorisation also authorises the use of an existing device as a tracking device.³⁵

The QPS described the type of person who would be subject to the proposed new scheme and why the new scheme would be beneficial:

Persons are considered high-risk due to their propensity for violence, threats made, carriage of weapons, or their level of criminality. These high-risk persons may be sought for arrest in relation to current investigations, be the subject of a return to prison warrant, mental health order or be the subject of a Preventative Detention Order.

Due to the significant risk they pose, it is necessary for these persons to be apprehended at a location which minimises the risk to the public, family members, associates, police and the offender.

*The ability to use a tracking device to take high risk persons into custody reduces the risk of a hostage or siege incident occurring. Furthermore, selecting a time and location which reduces the person's ability to arm himself or herself with a weapon may limit an incident rapidly escalating into a violent confrontation posing an imminent threat to the life of residents, bystanders or police and necessitating police to respond with the use of lethal force.*³⁶

The QPS explained that the current surveillance device powers in Chapter 13 of the PPRA are not suited to the use of a tracking device to take a person into custody:

Surveillance device powers pursuant to Chapter 13 of the PPRA would rarely enable a surveillance device warrant to be issued for the use of a tracking device for the purposes of taking a person into custody.

*While there may be a relationship when a person is to be arrested in relation to a relevant offence, no such connection exists when the person is to be taken into custody in relation to a return to prison warrant, mental health order or even if the person was the subject of a preventative detention order.*³⁷

Stakeholder views and QPS response

The Queensland Law Society (QLS) was of the view that a warrant should be required to authorise the installation and use of a tracking device for taking high risk persons into custody.³⁸ The QLS submitted:

*QLS considers this to be a significant increase in powers, support for which has not been made out in the context of proportionality. Judicial oversight is essential to the protection of due process and ensures that the police officers who are carrying out these functions are adequately protected.*³⁹

³³ Proposed new s 348A(3) of the *Police Powers and Responsibilities Act 2000*.

³⁴ Proposed new s 348E of the *Police Powers and Responsibilities Act 2000*.

³⁵ Proposed new s 348B of the *Police Powers and Responsibilities Act 2000*.

³⁶ Queensland Police Service, correspondence dated 21 July 2017, p 18.

³⁷ Queensland Police Service, correspondence dated 21 July 2017, p 18.

³⁸ Queensland Law Society, submission 2, p 2.

³⁹ Queensland Law Society, submission 2, p 2.

According to the QCCL, the power to authorise a police officer to use a tracking device is open to abuse. It recommended that all uses of this power should be reviewed by the Public Interest Monitor and any extension of time should be authorised by a magistrate.⁴⁰

The QPS was of the view that it is not necessary to amend the Bill with respect to reporting on tracking device authorisations. The QPS advised:

As the tracking device authorisation power is included in Chapter 13 of the PPRA, section 362 (Inspection of records) of the PPRA requires the Public Interest Monitor, as the inspection entity for the QPS, to inspect the records of the QPS to decide on the extent of compliance with Chapter 13 by the QPS.

Section 363 (Report on inspection) of the PPRA requires the Public Interest Monitor to report to the Police Minister at 6 monthly intervals on the results of each inspection. The Minister must cause a copy of the report to be tabled in the Legislative Assembly within 14 sitting days after receiving the report.

Clause 19 of the Bill amends section 358 (Annual reports) of the PPRA to include in the commissioner's annual report to the Minister on prescribed matters relating to Chapter 13 of the PPRA information on the number of tracking devices authorisations and extensions that were given for the financial year and for each tracking device authorisation, a statement about whether or not the use of the tracking device helped in minimising the serious risk to safety in taking the persons into custody. This report is subsequently tabled by the Minister in the Legislative Assembly.⁴¹

The QPS provided the following information regarding the use of tracking devices to investigate a Commonwealth offence:

Police can currently use a tracking device to investigate a Commonwealth offence without the need for a judicial warrant under certain conditions. The Commonwealth Surveillance Devices Act 2004 enables a Queensland superintendent to authorise the use of a tracking device by Queensland police, without warrant, for up to 90 days for the investigation of a Commonwealth offence with a maximum penalty of 3 years imprisonment or greater. However, the authorisation does not enable entry onto premises, or interference with the interior of a vehicle, without permission.⁴²

3.2 Declaration of emergency situation

At present, the ability to declare or revoke an incident as an emergency situation is restricted, in practice, to a police officer of the rank of inspector.⁴³ The Bill proposes to enable a senior officer (emergency commander) to declare or revoke an emergency situation under Part 2 of the PSPA.⁴⁴

A senior officer is:

- a commissioned officer, or
- a police officer of the rank of senior sergeant who has been approved by the commissioner as having the qualifications, experience or standing appropriate to make or revoke a declaration under s 5.⁴⁵

⁴⁰ Queensland Council for Civil Liberties, submission 4, p 1.

⁴¹ Queensland Police Service, correspondence dated 21 July 2017, p 19.

⁴² Queensland Police Service, correspondence dated 21 July 2017, pp 19-20.

⁴³ Queensland Police Service, correspondence dated 21 July 2017, p 7.

⁴⁴ Clause 30. See also *Public Safety Preservation Act 1986*, s 5.

⁴⁵ Clause 42.

The QPS advised that the proposed amendment would:

*... minimise the possibility of delays in the policing response due to the necessity to contact and brief an Inspector on the incident and have the Inspector declare the emergency situation distally and delegate the emergency commander's powers to the Police Forward Commander.*⁴⁶

Officers of the rank of senior sergeant are 'typically' in charge of police stations and hold the position of District Duty Officers, a role which 'provides supervision and assistance to operational officers within a police district.'⁴⁷ Regarding the training and experience of senior sergeants, the QPS advised:

Senior sergeants frequently undertake the role of police forward commanders at incidents, with responsibility for the command, control and coordination of the response to, and resolution of, an incident.

*Senior sergeants, as part of the Management Development Program, attend a two-week residential course on Incident Command which includes emergency situation declarations, incident management and use of powers.*⁴⁸

The explanatory notes state that the ability for a police officer of the rank of senior sergeant to declare an emergency is consistent with the emergency management powers in Victoria and New South Wales.⁴⁹

Stakeholder views and QPS response

The Office of the Information Commissioner (OIC) opposed the devolution of power to lower ranked officers:

*OIC notes that the effect of the amendments ... is a significant devolution of power from 'commissioned officer' to 'senior officer' for the declaration of an emergency situation. Given the declaration of an emergency situation invokes enhanced search and seizure powers that significantly impact on the rights of individuals, including privacy rights, OIC is of the view that the declaration of an emergency should remain with a commissioned officer.*⁵⁰

In response to concerns about the devolution of power from commissioned officers to senior officers, the QPS was of the view that no change needs to be made to the Bill and advised:

The declaration of an emergency situation does not automatically invoke the extraordinary emergency powers. Significant safeguards ensure that the extraordinary emergency powers are only available and used where necessary.

This includes proposed section 8AS (Power to authorise exercise of extraordinary emergency powers) which restricts the ability of an emergency commander to authorise the use of the powers to circumstances where:

- an emergency situation has been declared under section 5 of the PSPA; and*
- the emergency commander is satisfied on reasonable grounds that the emergency situation involves or may involve an explosive, or that a person's life or safety is seriously endangered by an act of another person, for example, being held hostage; and*

⁴⁶ Queensland Police Service, correspondence dated 5 July 2017, attachment, pp 6-7. See also explanatory notes, p 34.

⁴⁷ Explanatory notes, p 16.

⁴⁸ Queensland Police Service, correspondence dated 21 July 2017, p 7.

⁴⁹ Explanatory notes, p 23.

⁵⁰ Office of the Information Commissioner, submission 3, attachment, pp 4-5.

- *the emergency commander is satisfied on reasonable grounds that the use of one or more of the powers is necessary to effectively deal with the emergency due to the scale or complexity of the situation.*

Additionally, the emergency commander, as soon as is reasonably practicable after giving the authorisation, is required to notify an Assistant Commissioner of the authorisation and note on the emergency certificate when the authorisation was given, the authorisation area for the exercise of powers, the powers that may be used and the circumstances necessitating the authorisation.

*Within three months after the ending of the extraordinary emergency authorisation, the Commissioner is required to give a report to the Police Minister on the exercise of the extraordinary emergency powers. The Minister must table a report on the exercise of the powers within six months of the authorisation ending. ...*⁵¹

3.3 Extraordinary emergency powers and amendments to terrorist emergency powers

The Bill proposes to insert new powers (extraordinary emergency powers) into Part 2 of the PSPA to enable police to 'effectively manage and resolve significant emergency situations involving hostages, armed offenders and [improvised explosive devices]'.⁵² The new powers reflect the powers available during a declared terrorist emergency under Part 2A of the PSPA.⁵³

The explanatory notes state that consistency in powers will benefit the police during critical incidents:⁵⁴

*Currently, there is significant inconsistency in the powers available to police to manage and resolve a critical incident that has been declared a terrorist emergency under Part 2A of the PSPA compared to a similar situation which has been declared an emergency situation under Part 2 of the PSPA. ... This inconsistency inhibits a smooth transition of a critical incident progressing from a declared emergency incident to a declared terrorist emergency under the PSPA.*⁵⁵

3.3.1 New extraordinary emergency powers

The Bill specifies the situations and locations in which an emergency commander may authorise the exercise of extraordinary emergency powers. The area in which the powers may be exercised may surround a moving activity, such as a vehicle or moving person, but must be the smallest area reasonably necessary to effectively deal with the emergency situation.⁵⁶

The extraordinary emergency powers that would be introduced by the Bill include:

- power to control movement of persons⁵⁷
- power to search a person without a warrant⁵⁸

⁵¹ Queensland Police Service, correspondence dated 21 July 2017, pp 8-9.

⁵² Explanatory notes, p 36. Clause 35 proposes to insert new Division 4 (Extraordinary emergency powers) into Part 2 (Emergency situation) of the *Public Safety Preservation Act 1986*.

⁵³ Queensland Police Service, correspondence dated 5 July 2017, attachment, p 4; explanatory notes, p 36.

⁵⁴ Explanatory notes, p 36.

⁵⁵ Explanatory notes, p 3.

⁵⁶ Clause 35; proposed new s 8AS of the *Public Safety Preservation Act 1986*.

⁵⁷ Clause 35; proposed new s 8AZA of the *Public Safety Preservation Act 1986*. See also *Public Safety Preservation Act 1986*, s 8M.

⁵⁸ Clause 35; proposed new s 8AZB of the *Public Safety Preservation Act 1986*. See also proposed amended s 8N of the *Public Safety Preservation Act 1986*.

- power to require name, address and date of birth⁵⁹
- power to collect biometric information⁶⁰
- power to require access information.⁶¹

Search powers

Laptops and mobile phones are examples of things that may be searched under the new powers.⁶² If a storage device such as a computer or smart phone is being searched or has been seized and access information is required, an emergency situation officer⁶³ may require a person to give the officer the access information and any other information or help that is necessary to access or read information stored on the storage device.⁶⁴ The person must comply with the requirement even though complying might tend to incriminate the person or expose the person to a penalty.⁶⁵ The maximum penalty for failing to comply with the requirement without a reasonable excuse is \$5,046⁶⁶ or one year's imprisonment.⁶⁷

The Bill enables the device to be used to access information on the device or accessible through it, such as via an application or stored on the cloud.⁶⁸ For example, 'messages sent from a messaging application or photographs accessible from the device but stored on a remote server.'⁶⁹ It also permits the use of another device to copy information located on the person's storage device or accessible from it and send information relevant to an emergency or evidence of an offence.

Collection of biometric information

The QPS explained that the power to take and use a person's biometric information during a terrorist emergency is useful to establish or confirm a person's identity:

*The proposed power enables digital photographs of the person to be taken and used in relation to the reception and identification of persons, including for the purposes of a Terrorist Emergency Reception Centre. In circumstances where a person has been required to provide evidence of their identity and the person fails to comply or if the officer reasonably suspects that the evidence is false, the amendment enables the use of photographs in a biometric identification system and the taking of a person's fingerprints electronically ('LiveScan' device) to enable real time search of the fingerprints on the National Automated Fingerprint Identification System.*⁷⁰

The QPS advised of limitations on the taking and using of a person's biometric information:

⁵⁹ Clause 35; proposed new s 8AZC of the *Public Safety Preservation Act 1986*. See also *Public Safety Preservation Act 1986*, s 8O.

⁶⁰ Clause 35; proposed new s 8AZD of the *Public Safety Preservation Act 1986*. See also proposed new s 8PAA of the *Public Safety Preservation Act 1986*.

⁶¹ Clause 35; proposed new s 8AZE of the *Public Safety Preservation Act 1986*. See also proposed new s 8PAB of the *Public Safety Preservation Act 1986*.

⁶² Clause 35; proposed new s 8AZB(2) and amended s 8N of the *Public Safety Preservation Act 1986*.

⁶³ An emergency situation officer means the emergency commander or a police officer acting on the emergency commander's instructions: cl 42.

⁶⁴ Clause 35; proposed new s 8AZE(1), (2) of the *Public Safety Preservation Act 1986*. See also proposed new s 8PAB of the *Public Safety Preservation Act 1986*.

⁶⁵ Clause 35; proposed new s 8AZE(3) of the *Public Safety Preservation Act 1986*.

⁶⁶ That is, 40 penalty units. The penalty unit value is \$126.15 (current from 1 July 2017): *Penalties and Sentences Act 1992*, ss 5, 5A; *Penalties and Sentences Regulation 2015*, s 3.

⁶⁷ Clause 35, proposed new s 8AZE(4) of the *Public Safety Preservation Act 1986*.

⁶⁸ Clause 35, proposed new s 8AZF of the *Public Safety Preservation Act 1986*. See also proposed new s 8PAC.

⁶⁹ Explanatory notes, p 38.

⁷⁰ Queensland Police Service, correspondence dated 5 July 2017, attachment, p 3.

*The power to take a person's biometric information is limited to during the period of the operation of the declared terrorist emergency. The person's biometric information that is in the possession of the QPS, is to be destroyed, as soon as is reasonably practicable, when it is no longer needed for an investigation or prosecution or for an inquiry or inquest or proposed inquiry or inquest.*⁷¹

3.3.2 Powers for terrorist emergencies

The Bill proposes to amend the PSPA to reflect the extraordinary emergency powers search and seizure powers in the context of declared areas for terrorist emergencies.⁷²

The amendment to the power to search a person without a warrant under s 8N of the PSPA was introduced to address recent decisions in Queensland's Supreme and District Courts 'which have identified a necessity to ensure that there is clear lawful authority to conduct a search of a mobile phone.'⁷³ The QPS explained:

Section 8N currently enables police, during a declared terrorist emergency, to search a person, without warrant, for anything relevant to the terrorist emergency. The search power ensures police have the powers to minimise the risk to persons and maximise the ability for police to manage and resolve the declared terrorist emergency. Section 8N also enables police to seize anything that may provide evidence of the commission of an offence or anything that the person may use to cause harm to any person.

While it is arguable the existing search powers would enable [police] to search electronic devices, there is no specific authority which clearly articulates such power.

The ability to search devices assists police in identifying possible offenders, for example, through examining any communications that have taken place leading up to, or during, the terrorist emergency. It also enables police to obtain images captured by witnesses which may be of immense intelligence, tactical or evidentiary value. For example, photographs identifying potential offenders, equipment they possess or have access to, the number and description of persons being held hostage or the physical layout of the premises.

*The search power, however, does not provide unfettered access to information stored on the device, or accessible from the device. As the search power is restricted to information relevant to the terrorist emergency, this confines the search to the period of, or leading up to, the emergency. Searching of information or photographs well before this period would be outside the lawful authority of the search and any evidence obtained may be excluded from any subsequent prosecution.*⁷⁴

Stakeholder views and QPS response

The OIC commented that the Bill 'provides for a significant expansion of search and seizure powers exercisable by police'⁷⁵ and stated that the 'enhanced powers are particularly privacy invasive and as such consideration needs to be given to whether the proposed amendments strike the right balance between privacy and other rights, including the community's right to safety and security.'⁷⁶

⁷¹ Queensland Police Service, correspondence dated 5 July 2017, attachment, p 3.

⁷² Clauses 36-38.

⁷³ Queensland Police Service, correspondence dated 5 July 2017, attachment, p 1. See also explanatory notes, p 2.

⁷⁴ Queensland Police Service, correspondence dated 5 July 2017, attachment, pp 1-2.

⁷⁵ Office of the Information Commissioner, submission 3, attachment, p 2.

⁷⁶ Office of the Information Commissioner, submission 3, attachment, p 2.

Both the QCCL and OIC drew attention to the considerable amount of personal information available on a mobile phone, and the QCCL contended that most of the information on a phone would be ‘completely irrelevant to the police enquiry.’⁷⁷

The QCCL was particularly concerned about proposed new provisions which would give officers the power to require a person to provide a password to their mobile phone or other storage device.⁷⁸ The QCCL was of the view that the provisions abrogate the right to silence.⁷⁹ The QCCL explained:

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 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 to 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 [to open a phone or other device] it is our view that that should only be done by the police first obtaining a warrant. ...*⁸⁰

The QPS stated that it was arguable that requiring a person to provide access information for an electronic device ‘does not activate the potential for self-incrimination any more than requiring a person to unlock a locked briefcase to enable examination of its contents under a search power.’⁸¹ The QPS added:

*The question of whether disclosing access information breaches the privilege of self-incrimination has not been tested in relation to section 154 of the PPRA or in relation to equivalent provisions in other Australian Jurisdictions.*⁸²

The QLS acknowledged that the proposed provisions are ‘not intended to provide unfettered access to information stored on or accessible from [a] device’, but considered the search powers relating to electronic devices to be ‘excessively intrusive and [representing] a gross breach of privacy.’⁸³ The QLS explained:

*Personal electronic devices may contain highly sensitive information. Mobile phones are often used as a work tool and contain material that should be kept confidential.*⁸⁴

...

In the Society’s view, the power to search a person, and their electronic device, should be restricted to persons whom are reasonably suspected to be involved in or connected to a terrorist act. In this regard, the Society considers that it is imperative that the protections of derivative use immunity be strictly applied.

*The Society supports the implementation of safeguards, and in particular, reporting on the details of the emergency situation within three months.*⁸⁵

In response to QLS’s concerns, the QPS advised:

⁷⁷ Office of the Information Commissioner, submission 3, attachment, p 4; Queensland Council for Civil Liberties, submission 4, p 2.

⁷⁸ Proposed new ss 8AZE and 8PAB of the *Public Safety Preservation Act 1986*.

⁷⁹ Queensland Council for Civil Liberties, submission 4, p 1.

⁸⁰ Queensland Council for Civil Liberties, submission 4, p 2.

⁸¹ Queensland Police Service, correspondence dated 21 July 2017, p 6.

⁸² Queensland Police Service, correspondence dated 21 July 2017, p 6.

⁸³ Queensland Law Society, submission 2, p 2.

⁸⁴ Queensland Law Society, submission 2, p 2.

⁸⁵ Queensland Law Society, submission 2, p 2.

With regard to the protection of sensitive information that may be viewed during the course of the search, section 10.1 (Improper disclosure of information) of the Police Service Administration Act 1990, provides offences for the unlawful disclosure of information that has come to the officer's knowledge through the exercise or use of any power. Depending on the individual circumstances of the disclosure, the officer may also be dealt with for misconduct or corrupt conduct pursuant to the Crime and Corruption Act 2001.⁸⁶

Further:

While section 154 of the PPRA enables a Judge or Magistrate to issue a search warrant with orders for the provision of access information, this is not practicable during an extraordinary emergency situation or a terrorist emergency.⁸⁷

OIC expressed concern about the potentially large number of innocent bystanders who may be subject to the enhanced search and seizure powers, particularly noting the impact the declarations may have on 'youth and other marginalised members of society'.⁸⁸

With respect to the search and seizure powers, the OIC stated:

Given the exceptional nature of these powers, it is the OIC's view that any limitations on an individual's right to privacy must be reasonable and necessary to achieve the stated purpose and subject to appropriate and ongoing accountability measures and independent reviews about how the powers are used.

OIC notes that the Bill seeks to restrict the exercise of extraordinary emergency powers to the more serious emergencies such as those incidents involving explosives or where the life of a person is seriously endangered such as in a hostage situation (Section 8AS(1)). However, it is OIC's view that the ability to conduct a search without a warrant (or seek post-search approval) combined with the devolution of power to a lower ranking officer for declaration of an emergency situation may result in a disproportionate response to the threat posed to public safety in Queensland. While new section 8AS(2) and 8AS(4) of the Bill seeks to restrict the authorised area within which the emergency commander can authorise the use of extraordinary powers to be the smallest area necessary to deal with the emergency situation, determination of the size of the authorisation area remains at the discretion of the senior officer. Given the significant implications for a person's individual rights and liberties, including privacy rights, OIC considers that some form of independent review or oversight of decision-making by senior officer with regards to the appropriateness of the size of the declared area is required.⁸⁹

The OIC submitted that the following measures could reduce the privacy impacts of the proposed new extraordinary emergency powers and the amended terrorist emergency powers:

- inclusion of a mechanism for post event scrutiny of search and seizure powers
- requiring a closer nexus between the commission of an offence and the exercise of search and seizure powers
- defining the period a seized device may be retained
- giving individuals a right to be present during a search of their storage device
- imposing greater controls on how QPS may use a storage device to send information stored on the device to another person

⁸⁶ Queensland Police Service, correspondence dated 21 July 2017, p 3.

⁸⁷ Queensland Police Service, correspondence dated 21 July 2017, p 6.

⁸⁸ Office of the Information Commissioner, submission 3, attachment, p 4.

⁸⁹ Office of the Information Commissioner, submission 3, attachment, pp 3-4.

- subjecting declarations by senior officers of areas specified in respect of an emergency situation to independent oversight and review to ensure boundaries are not being drawn too broadly and are appropriate to the emergency incident.⁹⁰

In response to the OIC's recommendations, the QPS was of the view that no changes need to be made to the Bill. With respect to reporting, the QPS advised that the commissioner is required to report to the Minister for Police under s 8R (terrorist emergency powers) or s 8AZG (extraordinary emergency powers) within three months of the ending of the exercise of the powers.⁹¹ Regarding the search and seizure powers, the QPS explained the importance of being able to search people, including their mobile devices, during critical incidents:

The ability to search all persons within the authorised area is the specific intent of the legislation. Police responding to critical incidents, including terrorist emergencies, are forced to act on minimal information in a time critical and high-risk environment. Due to the nature of these types of emergencies, police need to intervene early to prevent the attack from occurring or to prevent the act from continuing.

...

The ability to search electronic devices assists police in identifying possible offenders through examining communications that have taken place leading up to, or during, the terrorist emergency. Communications may also reveal specifics of additional simultaneous or planned attacks.

Additionally, witnesses may capture footage on these devices which is of immense intelligence, tactical and evidentiary value, including the identification of potential offenders and equipment they may possess or have access to, the number and description of all persons inside the premises and the physical layout of the premises.

This information is critical for developing situational awareness and for the formulation of tactical plans to manage or resolve the emergency.

While most witnesses willingly provide the information, some refuse due to their intention to sell footage to the media or circulate it on social media.⁹²

As regards safeguards for information on storage devices, the QPS stated:

The search and seizure powers under the extraordinary emergency powers and the terrorist emergency powers are subject to the normal PPRA safeguards provided under Chapter 20 (Standard safeguards) and Part 3 (Dealing with things in the possession of police service) of Chapter 21 (Administration). These include sections:

- 622 (Receipt for seized property);
- 623 (Right to inspect documents);
- 637 (Supply police officer's details);
- 691 (Return of relevant things);
- 692 (Application by owner etc. for return of relevant things); and
- 695 (Application for order in relation to seized things).⁹³

⁹⁰ Office of the Information Commissioner, submission 3, attachment, pp 5-6.

⁹¹ Queensland Police Service, correspondence dated 21 July 2017, p 9.

⁹² Queensland Police Service, correspondence dated 21 July 2017, pp 11-12.

⁹³ Queensland Police Service, correspondence dated 21 July 2017, p 12.

3.3.3 Use of particular evidence in proceedings

Proposed new s 47C would enable information obtained after a person has had to provide access information under new s 8AZE or new s 8PAB to be admissible in evidence against the person in criminal proceedings:

- relating to a declared emergency situation or a terrorist emergency
- for an indictable offence for which the maximum penalty is at least seven years imprisonment or an offence against s 218B (Grooming children under 16) of the Criminal Code.⁹⁴

The QCCL objected to the proposed insertion of new s 47C into the PSPA: 'There is in our view no justification for permitting information obtained under a compulsory process for specific purposes, to be used for any other.'⁹⁵

The QPS explained the rationale of the provision:

*It is the policy intent of the Bill to limit the use of some evidence in criminal proceedings, where the information has been obtained as a result of a search of the electronic devices following compliance with an access requirement under new sections 8AZE and 8PAB. New section 47C (Use of particular evidence in proceedings) ensures that evidence located as a result of chance discovery, is not admissible in evidence, unless the offence to which the proceeding relates either relates to any declared emergency or an indictable offence with a maximum penalty of 7 years imprisonment or for an offence against section 218B (Grooming children under 16) of the Criminal Code. Section 47C does not limit the derivative use of information that is inadmissible as evidence in criminal proceedings.*⁹⁶

3.4 Replacement of the 'imminence test'

The object of the TPDA is to allow a person to be taken into custody and detained for a short period of time in order to:

- prevent a terrorist act occurring in the near future, or
- preserve evidence of, or relating to, a recent terrorist act.⁹⁷

At present, a police officer may apply under the TPDA for a PDO for a person in order to prevent a terrorist act occurring only if the terrorist attack is imminent and expected to occur within the next 14 days.⁹⁸

The Bill proposes to amend the TPDA to replace the 'imminence test' for the issue of a PDO with a 'capability threshold test'.⁹⁹ The capability threshold test requires the police officer or issuing authority to be satisfied that there are reasonable grounds to suspect a terrorist act is capable of being carried out, and could occur, within the next 14 days.¹⁰⁰

The QPS advised that the current imminence test 'imposes impractical constraints on police' because it requires that the terrorist act would occur in the next 14 days.¹⁰¹ The QPS further advised that the

⁹⁴ Clause 40.

⁹⁵ Queensland Council for Civil Liberties, submission 4, p 2. See cl 40.

⁹⁶ Queensland Police Service, correspondence dated 21 July 2017, p 5. See also explanatory notes, p 44.

⁹⁷ *Terrorism (Preventative Detention) Act 2005*, s 3.

⁹⁸ *Terrorism (Preventative Detention) Act 2005*, s 8.

⁹⁹ Queensland Police Service, correspondence dated 5 July 2017, attachment, p 8. See cl 45.

¹⁰⁰ Fourteen days was the timeframe that was agreed at the Australia-New Zealand Counter-Terrorism Committee: Commissioner Stewart, public briefing transcript, Brisbane, 18 July 2017, p 8.

¹⁰¹ Queensland Police Service, correspondence dated 5 July 2017, attachment, p 8.

amendment ‘replicates ... amendments made to the Commonwealth PDO scheme in 2016.’¹⁰² According to the explanatory notes, the PDO scheme ‘was designed to enable the transition of the detention of a person from the Commonwealth PDO to a State PDO. This was necessary due to constitutional constraints limiting detention under a Commonwealth PDO to 48 hours.’¹⁰³

Stakeholder view

The QLS expressed concerns about the replacement of the imminence test because of the reduction in safeguards around the use of the power. The QLS acknowledged the need to improve the utility of PDOs and the benefit of consistency between Commonwealth and Queensland legislation regarding PDOs, and stated its view that it ‘strongly supports the protection of current safeguards and oversight mechanisms, including judicial oversight and notification to the Public Interest Monitor.’¹⁰⁴

3.5 Power to enter premises

Section 41 of the TPDA provides for entry of a police officer onto premises where a person who is subject to a PDO is believed to be. The Bill proposes to amend s 41 to reduce the threshold for entry into premises by replacing ‘believes on reasonable grounds’ with ‘suspects on reasonable grounds’ that a person, the subject of a PDO, is on the premises.¹⁰⁵

In relation to the legal distinction between ‘believes on reasonable grounds’ and ‘suspects on reasonable grounds’, the QPS advised:

There is well-established common law authority in relation to the distinction between reasonable suspicion and reasonable belief. The principles were outlined by the High Court in the Queensland case of George v Rockett (1991) 170 C.L.R. 104 at 115. In that case it confirms that a suspicion and a belief are different states of mind. ‘A suspicion is a state of conjecture or surmise. It is more than idle wondering. It is positive feeling of apprehension or mistrust, but it is a slight opinion without sufficient evidence. Facts which reasonably ground a suspicion may be quite insufficient to reasonably ground a belief. Nonetheless, to have a reasonable suspicion some factual basis for the suspicion must exist. There must be sufficient factual grounds reasonably to induce the suspicion. The facts must be sufficient to induce the suspicion in the mind of a reasonable person. The suspicion must be reasonable, as opposed to arbitrary, irrational or prejudiced.’

*Both standards are used throughout the criminal law and Queensland Police are trained in the application of each when applying both tests as they appear in the Criminal Code, the Police Powers and Responsibilities Act 2000 and other legislation.*¹⁰⁶

Currently, in most circumstances, a police officer is not permitted to enter a dwelling between 9:00pm and 6:00am to search the premises for a person, the subject of a PDO, and take the person into custody.¹⁰⁷ The Bill proposes to remove this time restriction.¹⁰⁸ The explanatory notes contend that, given the purpose of a PDO is to prevent a terrorist act or to preserve evidence following a recent terrorist act, it should not unnecessarily restrict the time when an entry into premises can occur.¹⁰⁹

¹⁰² Queensland Police Service, correspondence dated 5 July 2017, attachment, p 9.

¹⁰³ Explanatory notes, p 4.

¹⁰⁴ Queensland Law Society, submission 2, p 2.

¹⁰⁵ Queensland Police Service, correspondence dated 21 July 2017, p 1. See cl 46(2).

¹⁰⁶ Queensland Police Service, correspondence dated 21 July 2017, p 1.

¹⁰⁷ *Terrorism (Preventative Detention) Act 2005*, s 41.

¹⁰⁸ Clause 46(3).

¹⁰⁹ Explanatory notes, p 4. See also p 45.

3.6 Explosives

In some instances, explosives are unstable, making them likely to explode without warning. As a result, it is safer to explode them in situ rather than risk moving them.¹¹⁰ The Bill provides power under the PSPA for an emergency commander to destroy an explosive located in an emergency area. If the destruction of the explosive is likely to cause structural damage to a building, the emergency commander or another police officer must, if it is reasonably practicable to do so, obtain the approval of a State police officer of at least the rank of assistant commissioner. If approval is not obtained and the destruction causes structural damage, the emergency commander or another police officer must, as soon as reasonably practicable, inform a State police officer of at least the rank of assistant commissioner of the destruction and the structural damage.¹¹¹

The Bill would also empower the Commissioner under the PPRA to authorise police officers with the necessary experience or expertise to move or destroy explosives.¹¹²

Stakeholder view

The QLS was of the view that judicial oversight is required for dealing with explosives, amongst other things. It contended that judicial oversight 'is essential to the protection of due process and ensures that the police officers who are carrying out these functions are adequately protected.'¹¹³

3.7 Repeal of the *Queensland Police Welfare Club Act 1970*

The Bill proposes to repeal the *Queensland Police Welfare Club Act 1970*. The Minister explained the rationale for the repeal:

[The Queensland Police Welfare Club] ... was deregistered as an association in 1998 and was wound up by receivers in 2004-05. Retaining this act is simply not justifiable for a number of reasons. Obviously, there seems to be little point in retaining an act to regulate a club that no longer exists. Additionally, this act allows the police minister to interfere with the running of a police social club. This is not an appropriate ministerial function nor a desirable use of ministerial time.

Finally, this act has become redundant. It was designed to overcome a specific problem that arose in another era and will never occur again. Retaining this act is inefficient and unnecessary. The repeal of this act is the only sensible approach this parliament may adopt.

*There are currently 20 registered clubs and associations formed by police officers ranging from sporting associations to social clubs. This government recognises the benefits, both direct and indirect, for police officers in participating in these types of clubs and supports these officers joining these clubs and associations to pursue their individual interests. If, in the future, the Queensland Police Welfare Club was to be re-established, it would also receive similar support. However, just like existing police clubs, it may do so in accordance with the Associations Incorporation Act 1981.*¹¹⁴

¹¹⁰ Commissioner Ian Stewart, Queensland Police Service, public briefing transcript, Brisbane, 18 July 2017, p 5.

¹¹¹ See cls 33, 34.

¹¹² See cl 25.

¹¹³ Queensland Law Society, submission 2, p 2.

¹¹⁴ Hon Mark Ryan, Minister for Police, Fire and Emergency Services and Minister for Corrective Services, Queensland Parliament, Record of Proceedings, 14 June 2017, p 1606. See cl 48.

4 Compliance with the *Legislative Standards Act 1992*

Section 4 of the *Legislative Standards Act 1992* (LSA) states that ‘fundamental legislative principles’ are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill. The committee brings the following to the attention of the House.

4.1 Rights and liberties of individuals

Section 4(2)(a) of the LSA requires that legislation has sufficient regard to the rights and liberties of individuals.

4.1.1 Clauses 15, 35, 36, 37, 39 and 45

A significant number of provisions have implications for the rights and liberties of individuals.

Clause 15 inserts new chapter 13, part 3A into the PPRA, which includes proposed new:

- Section 348A (PPRA), which allows an authorised police officer to use a tracking device for a stated period to find or monitor the geographical location of a person who is to be taken into custody in instances where there are reasonable grounds to believe that taking the person into custody may pose a serious risk to their safety or the safety of others, and the use of a tracking device will help with taking them into custody at a time or location that minimises that risk. The ‘tracking device authorisation’ remains operative for a specified period that is not more than 48 hours.
- Section 348E (PPRA), which allows a senior police officer to extend the above tracking device authorisation period if the officer is satisfied on reasonable grounds of the matters in s 348A(1)(b), being (as above) that the tracking device will help with taking a person into custody at a time or location that minimises the serious risk that they pose to the safety of themselves or others. The authorisation period may be extended more than once, but must not be extended by more than 48 hours each time (s 348E(2)).

Clause 35 inserts new part 2, division 4 into the PSPA, which includes proposed new sections 8AZ and 8AZA(2), 8AZB, 8AZC, 8AZD, 8AZE and 8AZF.

Sections 8AZ and 8AZA(2) (PSPA) will allow an emergency situation officer to direct a person who is in an authorisation area, not to enter a stated place within that area or, conversely, to go to, or stay at or in, a stated place in the authorisation area. This exercise of an ‘extraordinary emergency power’ requires the officer be satisfied that giving a person a direction under s 8AZA(2) is necessary:

- for the safety of the person or another person; or
- to effectively manage the evacuation of the person; or
- to effectively receive, identify or assess the person; or
- otherwise to effectively deal with the emergency situation.

In exercising an extraordinary emergency power, an emergency situation officer may use the force that is reasonably necessary (s 8AZ(2)).

Section 8AZB authorises an emergency situation officer to, without a warrant, stop, detain and search a person who is in the authorisation area, and anything in the person’s possession such as, for example, a laptop or mobile phone, for anything relevant to the emergency situation. The emergency situation officer may seize all or part of a thing if the officer reasonably suspects that the thing may provide evidence of the commission of an offence or that the person may use the thing to cause harm to themselves or another person.

Section 8AZC authorises an emergency situation officer to require a person who is in the authorisation area to state their correct name, address and date of birth and to (where reasonable) require the person to give evidence of the correctness of the stated information.

Section 8AZD allows an emergency situation officer to take and keep a photograph of a person who is in an authorisation area, for the purposes of identifying the person.

In addition, where a person has not provided their correct name, address or date of birth, or not given evidence of those, or where an emergency situation officer reasonably suspects that the name, address or date of birth stated by the person is false, or the evidence provided to prove those matters is false, the emergency situation officer may, for the purpose of identifying the person or confirming their identity, electronically take and keep the person's fingerprints; and use a biometric system to compare the person's biometric information with other biometric information stored in the system (s.8AZD(4)).

A key safeguard for this power is in subsection (6) which requires the Police Commissioner to take reasonable steps to destroy that biometric information and any data about the biometric information that is held by the QPS, if the Commissioner is satisfied that a person's biometric information taken under s.8AZD is no longer required for the investigation or prosecution of an offence relating to an emergency, or for an inquiry or inquest related to the emergency.

Section 8AZE applies where a storage device is being searched or has been seized under a s 8AZB search of a person and their possessions, and information stored on the device is accessible or readable only by using access information. In that circumstance an emergency situation officer may require the person to give the officer the access information and any other information or help necessary to access or read information stored on the device. If the device is being searched and the person does not comply with the requirement, the officer may seize the device.

Section 8AZF provides that the powers to search or seize a storage device includes powers to access, examine, copy or send for copying, information stored on the device.

Clause 36 replaces the current s 8N(1) (PSPA) to provide that a terrorist emergency officer may, without a warrant, stop, detain and search a person (and anything in their possession such as, for example, a laptop or mobile phone) for anything relevant to the terrorist emergency, when the person:

- a) is in a declared area for a terrorist emergency
- b) is about to enter the declared area for a terrorist emergency, or
- c) is reasonably suspected of having recently left the declared area for a terrorist emergency.

Clause 37 inserts new s 8PAA (PSPA) to allow, in the same circumstances as (a)-(c) above, a terrorist emergency officer to take and keep a photograph of a person for the purpose of identifying the person; or, where the person has not provided correct details of their name, address or date of birth or given proof of those things or it is reasonably suspected that the information or ID they have provided is false, a terrorist emergency officer may, to identify the person or confirm their identity, electronically take and keep the person's fingerprints and use a biometric system to compare their biometric information with other stored biometric information.

A key safeguard is in subsection (6) which requires the Police Commissioner to take reasonable steps to destroy that biometric information and any data about it held by the QPS, if the Commissioner is satisfied a person's biometric information is no longer required for the investigation or prosecution of an offence relating to an emergency, or for an inquiry or inquest related to the emergency.

Clause 37 also inserts new s 8PAB (PSPA) which applies where a storage device is being searched or has been seized under a s 8N or s 8P search of a person and their possessions, and information stored on the device is accessible or readable only by using access information. In that circumstance a terrorist emergency officer may require the person to give the officer the access information and any other information or help necessary to access or read information stored on the device. If the device is being searched and the person does not comply with the requirement, the officer may seize the device.

Clause 37 also inserts new s 8PAC (PSPA) which provides that the s 8N, 8P and 8PAB(6) powers to search or seize a storage device include powers to access, examine, copy or send for copying, information stored on the device.

Clause 39 inserts new s 43E (PSPA) which gives a commissioned officer power to authorise the use of a surveillance device where they reasonably suspect that an emergency involves, may involve, or may lead to, a serious risk to the life, health or safety of a person and the use of a surveillance device will help to reduce the risk. Subsection (2) allows the commissioned officer to authorise a police officer to use a surveillance device, in the emergency area and during the period of the emergency, to assess and monitor the risk.

Potential FLP issues

Provisions such as those above impact on the expectation of privacy and freedom of movement (rights and liberties) of individuals who may be within particular areas during an emergency.

The above provisions variously allow:

- the use of tracking devices to monitor a person's location (cl 15)
- repeated extensions to the authorisation period for using a tracking device (cl 15)
- an emergency situation officer to direct a person (using force as reasonably necessary) to not enter a stated place within an authorisation area or, conversely, to go to, or stay at or in, a stated place in the authorisation area (cl 35)
- an emergency situation officer in the authorisation area to, without a warrant, stop, detain and search a person and anything in their possession and seize all or part of a thing reasonably suspected to be evidence of an offence or able to be used to cause harm (cl 35)
- the search and/or seizure of a storage device including powers to access, examine, copy or send for copying, information stored on the device (cls 35 and 37)
- an emergency situation officer to direct a person in an authorisation area to give their name, address and date of birth and, generally, ID to prove that (cl 35)
- an emergency situation officer to take and keep a photograph of a person in an authorisation area (cl 35)
- an emergency situation officer to electronically take and keep a person's fingerprints and to use a biometric system to compare the person's biometric information with other biometric information (cl 35)
- a terrorist emergency officer to, without a warrant, stop detain and search a person and their possessions in or around a declared area for a terrorist emergency (cl 36)
- a terrorist emergency officer to take and keep a photograph of a person in a declared area for a terrorist emergency (cl 37)
- a terrorist emergency officer to electronically take and keep a person's fingerprints and to use a biometric system to compare the person's biometric information with other biometric information for persons in a declared area for a terrorist emergency (cl 37)
- a commissioned officer to authorise a police officer to use a surveillance device, in an emergency area during the period of the emergency, to assess and monitor the risk to the life, health or safety of a person (cl 39).

The exercise of such powers impacts, to varying degrees, on the expectation of privacy and freedom of movement of individuals who may be within particular areas during an emergency. The use of tracking devices, the photographing, fingerprinting and searching of individuals and their possessions without a warrant, and the use of surveillance devices are all, to varying degrees, intrusive and an incursion on the rights and liberties of individuals.

Each provision ties the exercise of intrusive powers to the need to maintain public safety.

The submission from the QLS notes:

QLS supports proportionate legal responses to the threat of terrorism. Such legal responses must respect the principles of necessity, legality and proportionality. QLS acknowledges that, in some circumstances, preventative legal measures (that intervene early in the chain of events leading up to a potential terrorist act) may be justified.

However, QLS remains concerned that expanding the breadth of anti-terrorism laws can shift expectations and could lead to the replication of extraordinary measures in other areas in criminal law.

Appropriate oversight and review mechanisms are crucial to ensuring that the proposed amendments represent a measured and suitable means of response to the threat of terrorism.¹¹⁵

Clause 15 – tracking devices –would allow a senior police officer to authorise the installation and use of a tracking device to assist with taking persons into custody when that person may pose a serious risk to the safety of themselves or others. The QLS expressed its view that a warrant should be required to authorise the installation and use of a tracking device.

Clauses 35 and 37 – search of persons and items including laptops and mobile phones – would allow an emergency situation officer to, within the authorisation area and without a warrant, stop, detain and search a person and their possessions, including the search and/or seizure of a storage device with commensurate powers to compel access to the device, and to examine, copy or send for copying information stored on the device. Similar powers exist under clause 36 for terrorist emergency officers.

The submission from the OIC noted a number of concerns, including:

- ‘the powers are exercisable without a warrant’
- ‘it does not appear police will be required to comply with usual practices regarding obtaining post-search approval from a magistrate after a search has been conducted’
- ‘there is a lack of sufficient nexus between use of the expanded powers and the commission of an offence’
- ‘these enhanced powers are particularly privacy invasive’
- ‘this authorisation area can encompass several residential streets potentially subjecting a large number of innocent bystanders to enhanced search and seizure powers. The number of potential bystanders and witnesses captured by new extraordinary powers will increase substantially in densely populated areas and other public areas.’
- ‘mobile phone data can contain a large amount of personal information of the mobile phone user and other persons’
- ‘s 8AZB(2) provides that a police officer can search anything in the person’s possession for “anything relevant to the emergency situation” and require the person to provide access information for the device. This is a relatively low threshold test for a police officer to satisfy and will potentially capture innocent persons who just happen to be in the vicinity at the time an emergency situation is declared’.¹¹⁶

The OIC’s submission suggested that individuals should have a right to be present during a search of their storage device.¹¹⁷

¹¹⁵ Queensland Law Society, submission 2, p 1.

¹¹⁶ Office of the Information Commissioner, submission 3.

¹¹⁷ Office of the Information Commissioner, submission 3, attachment, p 6.

The QLS expressed similar concerns noting:

- ‘in our view this power is excessively intrusive and represents a gross breach of privacy’
- ‘Personal electronic devices may contain highly sensitive information. Mobile phones are often used as a work tool and contain material that should be kept confidential.’
- ‘sensitive material that could be inadvertently viewed in the course of a search’
- ‘in the Society’s view, the power to search a person and their electronic device should be restricted to persons whom are reasonably suspected to be involved in or connected to a terrorist act.’

The QLS submission considered that ‘it is imperative that the protections of derivative use immunity be strictly applied’ and supported the implementation of safeguards.¹¹⁸

The QCCL submission echoed these concerns noting ‘[i]n 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.’¹¹⁹

The rationale behind these additional powers was addressed by the Police Commissioner, who advised:

The terrorist emergency powers contained in part 2A of the Public Safety Preservation Act provide police only during a declared terrorist emergency with the powers to search a person, vehicle and premises without warrant for anything relevant to the terrorist emergency. While it is arguable that the existing search powers allow police to search electronic devices such as smart phones and tablet computers, they do not in fact provide specific authority for police to search electronic devices or information assessable from the devices as part of the response to an emergency situation. The ability to search electronic devices assists police in identifying possible offenders through examining communications that have taken place leading up to or during the terrorist emergency.

Communications may also reveal specifics of additional simultaneous or planned attacks similar to those which occurred in Paris in November 2015 where gunmen and suicide bombers attacked a concert hall, a major stadium and restaurants and bars. Additionally, witnesses may capture footage on these devices which is of immense intelligence, tactical and evidentiary value including the identification of potential offenders and equipment they may possess or have access to, the number and description of all persons inside the premises, and the physical layout of the premises. This information is critical for developing situational awareness and for the formulation of tactical plans to manage or resolve the emergency.

...

Where evidence of an offence or information relevant to the emergency is located on the device, the bill enables the information to be immediately copied or downloaded to prevent it from being remotely deleted or manipulated. In circumstances where information relevant to the terrorist emergency is located and the information is necessary for managing or resolving the emergency

¹¹⁸ Queensland Law Society, submission 2, p 2. The application of derivative use immunity would mean that incriminating information of (presumably non-terrorism related) offences that was found by police while searching a phone under these emergency circumstances – eg. text messages suggestive of drug deals etc – could not be used as evidence in a prosecution of that person for a non-terrorism related offence because the person had been compelled under these provisions to provide access to their phone during the emergency and hence had been denied the ability to claim privilege against self-incrimination.

¹¹⁹ Queensland Council for Civil Liberties, submission 4.

*such as photographs identifying an offender, the bill enables police to use the device to immediately electronically transfer the information.*¹²⁰

Clauses 35 and 37 – Fingerprinting - These clauses allow the electronic taking of a person's fingerprints and use of a biometric system to compare the person's biometric information with other biometric information in the police database.

The advice from the Police Commissioner was:

*The power to take and use a person's biometric information during a terrorist emergency serves two purposes. Firstly, the power enables digital photographs of persons to be taken and used in relation to the identification, reception and management of persons located in declared areas or who are about to enter or who have just left a declared area. This includes persons progressing through a terrorist emergency reception centre. ... The amendment also provides the power to take a person's fingerprints electronically to enable real-time comparison of the fingerprints against those in the national fingerprint database.*¹²¹

Committee comment

The committee notes the range of powers that potentially encroach on the liberties of individuals and the advice from the Police Commissioner regarding why such powers are considered a necessary addition to the existing range of police powers.

Clause 45

Clause 45 amends s 8 of the TPDA to replace the imminence test for the issue of a preventative detention order with a capability test. The current imminence test requires that a terrorist act will occur in the next 14 days. Law enforcement may be aware of persons who plan to commit a terrorist act and who have the ability to do so, but it is uncertain at what juncture the act is intended to be undertaken. The proposed capability test has a threshold that requires both the capability of a person to commit a terrorist act and that it *could* occur within the next 14 days, not that it will/would occur.

As noted by the Police Commissioner:

*This amendment replicates amendments made to the Commonwealth preventative detention order scheme in 2016 and ensures operational utility between the Commonwealth and Queensland preventative detention order schemes.*¹²²

The QLS expressed (tempered) concerns in its submission, noting:

Preventative detention powers are extraordinary in nature and must be restrained by appropriate safeguards. QLS remains concerned about the proposed replacement of the current 'imminence' test. The imminence test requires that the terrorist act would occur in the next 14 days. The proposed amendment would change the threshold test to allow the exercise of these powers to when a terrorist attack could occur within the next 14 days. This reduces the safeguards around the exercise of this power.

*However QLS acknowledges that some amendment may be required to improve the utility of preventative detention orders. This amendment is consistent with legislative changes to preventative detention powers at a Commonwealth level and QLS notes the importance of consistency in preventative detention legislation across jurisdictions. Considering this, QLS strongly supports the protection of current safeguards and oversight mechanisms, including judicial oversight and notification to the Public Interest Monitor.*¹²³

¹²⁰ Public briefing transcript, Brisbane, 18 July 2017, pp 2-3.

¹²¹ Public briefing transcript, Brisbane, 18 July 2017, p 3.

¹²² Public briefing transcript, Brisbane, 18 July 2017, p 4.

¹²³ Queensland Law Society, submission 2, p 2.

Potential FLP issue

With a lowering of the threshold test from ‘would’ occur to ‘could’ occur, there is a likelihood that a greater number of potential terror suspects may be ‘preventatively detained’ by police for questioning etc than would otherwise be the case.

Committee comment

The committee notes that with a lowering of the threshold test from ‘would’ occur to ‘could’ occur there is a likelihood that a greater number of potential terror suspects may be ‘preventatively detained’ by police for, for example, questioning, than would otherwise be the case. The committee acknowledges that this has implications for the rights and liberties of those individuals, while noting the gravity of the threat that these changes seek to address.

4.1.2 Clause 30

Section 4(3)(c) of LSA provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation allows the delegation of administrative power only in appropriate cases and to appropriate persons.

Clause 30 amends s 5 of the PSPA to replace the requirement that declaration of an emergency situation be done by a commissioned officer to the requirement that it be done by a ‘senior officer’. A senior officer is lower in rank and seniority than a commissioned officer.

The submission from the OIC expressed concerns with the devolution of power away from commissioned officers.¹²⁴

At the public briefing, the Police Commissioner advised the committee:

*A further improvement proposed by the bill relates to the fact that currently an emergency situation under part 2 of the Public Safety Preservation Act may only be declared or revoked by a commissioned officer. To facilitate rapid police response to critical incidents, the bill amends the emergency situation powers contained in part 2 of the Public Safety Preservation Act to allow the declaration to be made by senior sergeants who are approved by the commissioner as having the necessary skills and experience to declare an emergency situation. This does not prevent commissioned officers from performing the role or taking over the role of emergency commander upon their arrival at the incident. In regional Queensland particularly, senior sergeants are often the most senior and experienced police for hundreds of kilometres and locating a commissioned officer could be a time-wasting and unnecessary requirement to declaring an emergency situation.*¹²⁵

Potential FLP issue

Powers should only be delegated to appropriately qualified officers or employees. The OQPC Notebook provides that the appropriateness of a limitation on delegation depends on all the circumstances including the nature of the power, its consequences and whether its use appears to require particular expertise or experience.¹²⁶

Committee comment

Given the explanation provided by the Police Commissioner, and the practical difficulties of accessing a commissioned officer from a rural or regional centre, especially when a time-critical response is required, the committee considers that devolution to a ‘senior officer’ is appropriate.

¹²⁴ Office of the Information Commissioner, Submission 3.

¹²⁵ Public briefing transcript, Brisbane, 18 July 2017, p 4.

¹²⁶ Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, p 33.

4.1.3 Clause 26

Section 4(3)(d) of the LSA provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.

Clause 26 inserts a new s 724A (Evidentiary provision about explosives) into the PPRA to provide that '[a] certificate signed by the commissioner and stating that a stated police officer was, on a stated day, an approved officer, is evidence of what it states, unless the contrary is proved.'¹²⁷

Potential FLP issue

An evidentiary provision allows routine evidential matters to be presumed or accepted as stated, unless the contrary is proven. Their function is to simplify court proceedings in respect of routine matters by not putting the prosecution to proof on generally non-controversial aspects of evidence.

It can however be argued that by stating a thing to be sufficient evidence of a matter, or presuming a state of affairs to exist, evidential provisions (unfairly) assist the prosecution in the discharge of its legal or persuasive onus, by not 'putting the prosecution to proof' on all aspects of the case they are making against the defendant.

Committee comment

The committee notes it is fairly common for legislation to provide that a certificate signed by a person administering a law is evidence of a fact stated in the certificate. Such evidentiary aids enable an administering authority to put evidence before courts about a range of non-contentious matters without the need to call additional witnesses to verify matters that are not generally disputed by either side (eg. the fact of a police officer's particular rank). This is administratively expedient for the prosecuting authority and also prevents unnecessary imposts on the court's time.

In this instance, the matter covered by the evidentiary provision is (generally) non-contentious and the certificate is to be treated merely as evidence. This means that it is not deemed to be *conclusive* proof of the fact presumed, or as being determinative of the ultimate issue in question; and, should a defendant desire, they are free to challenge the veracity of the presumed fact by adducing evidence to the contrary to rebut the presumption.

The evidence provided by the s 724A certificate is likely to be non-contentious and, importantly, the committee notes it remains rebuttable should the defendant choose to challenge the presumed authority of a particular officer to have taken particular action.

4.1.4 Clause 46

Section 4(3)(e) of the LSA provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.

Clause 46 amends s 41 of the TPDA (Power to enter premises) to reduce the threshold for entry into the premises from 'believes' on reasonable grounds to 'suspects' on reasonable grounds that the person the subject of the PDO is on the premises. The clause also removes the restriction on entry of a dwelling between 9:00pm and 6:00am in order to take a person into custody under a PDO.

Potential FLP issues

Legislation should confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.¹²⁸ The OQPC handbook

¹²⁷ An 'approved officer' is defined in the amended schedule 6 dictionary to mean a police officer authorised under s.715A to destroy explosives.

¹²⁸ *Legislative Standards Act 1992*, s 4(3)(e).

provides that this principle supports a long established rule of common law that protects the property of citizens. Power to enter premises should generally be permitted only with the occupier's consent or under a warrant issued by a judge or magistrate.

Residential premises should not be entered except with consent or under a warrant or in the most exceptional circumstances.¹²⁹

The change from 'believes on reasonable grounds' to 'suspects on reasonable grounds' appears to be a lessening of the threshold required to justify entry. For an officer to 'believe' they must have formed (and hold) a belief based on their understanding of the situation. For a 'suspicion' that could be formed from anecdotal information from an informant, or from a 'guess' based on someone's usual habits etc.

The restriction on 'night' entry was traditionally used to stop the execution of warrants 'after-hours' because of its likelihood to inconvenience and distress, likely sleeping, residents of a house where a warrant was being executed or neighbouring properties.

Committee comment

Given the nature of the crimes that PDOs are designed to combat (terrorism related activities or activities preparatory to terrorism) the committee is of the view that the removal of the restriction on 'night' entry is justified by the time-critical circumstances.

4.1.5 Clauses 35, 37 and 40

Section 4(3)(f) of the LSA provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation provides appropriate protection against self-incrimination.

Two access information clauses remove the usual protection against self-incrimination.

Clause 35, inserts s 8AZE into the PSPA which provides that, if during a search and/or seizure an emergency situation officer requires a person to give the officer access information for information stored on a device, the officer must inform the person that they are obliged to comply with the requirement even though complying might tend to incriminate them or expose them to a penalty. The person is required to comply unless they have a reasonable excuse for non-compliance. Under subsection (5) it is stated that it is not a reasonable excuse to fail to comply because complying might incriminate the person or expose them to a penalty. Failure to comply attracts a maximum penalty of 40 penalty units or one year's imprisonment. Failure to comply with an access information requirement during a search of the device is also grounds for its seizure under subsection (6).

A mirror provision exists in clause 37, inserting s 8PAB into the PSPA in respect of powers given to terrorist emergency officers.

Potential FLP issues

Legislation should provide appropriate protection against self-incrimination.¹³⁰ The OQPC Notebook states, 'this principle has as its source the long established and strong principle of common law that an individual accused of a criminal offence should not be obliged to incriminate himself or herself'.¹³¹ The former Scrutiny of Legislation Committee (SLC) commented that denial of the protection of the self-incrimination rule is only potentially justifiable if –

¹²⁹ Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, p 46.

¹³⁰ *Legislative Standards Act 1992*, s 4(3)(f).

¹³¹ Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, p 52.

- (a) The questions posed concern matters that are peculiarly within the knowledge of the persons to whom they are directed and that would be difficult or impossible to establish by any alternative evidential means; and
- (b) The legislation prohibits use of the information obtained in prosecutions against the person; and
- (c) In order to secure this restriction on the use of the information obtained, the person should not be required to fulfil any conditions (such as formally claiming a right).¹³²

The SLC generally referred to Parliament for consideration (without express objection) provisions that denied the privilege against self-incrimination if use immunity and derivative use immunity was provided.¹³³

The Bill provides a limited derivative use immunity in respect of particular ('prescribed') information stored on a storage device that was accessible or readable only by using access information supplied by a person who was compelled to provide it (in compliance with a requirement from an officer under s 8AZE or s 8PAB).

Clause 40 inserts new s 47C into the PSPA to provide that, in that circumstance, where a criminal proceeding is started in relation to the person (unrelated to a declared emergency situation or terrorist emergency), the prescribed information is not admissible in evidence against the person in the criminal proceeding, unless the proceeding relates to an indictable offence for which the maximum penalty is at least seven years imprisonment, or an offence against s 218B of the Criminal Code (Grooming children under 16 years).

The submission from the QCCL objected to cl 40 stating '[t]here is in our view no justification for permitting information obtained under a compulsory process for specific purposes, to be used for any other.'¹³⁴

The position of the QCCL may be that such evidence should be inadmissible because it had been uncovered during an unrelated, terrorism-related search and that, but for that search, the police would likely not have ever had that evidence. Effectively the person has been compelled to handover their phone or laptop and compelled to provide access to it, even though in doing so they have been denied the opportunity to claim privilege against self-incrimination and, in providing the access information, have incriminated themselves.

Committee comment

The committee notes the QCCL's objection, however, recognises that the range of indictable offences (as well as the 'grooming' offence) are those for which the maximum penalty is at least seven years imprisonment, which is at the more serious end of offending behaviour.

Given the information would be information accessed from a search of a mobile phone or a laptop computer, the type of evidence that might typically be expected to be encountered (that could support a non-terrorism related indictable offence charge) could be obscene images or child pornography, or, conversely, evidence of drug dealing/trafficking.

¹³² Alert Digest 2000/1, p 7, para 57; Alert Digest 1999/31; and Alert Digest 1999/4, p 9, para 1.60.

¹³³ Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, p 53.

¹³⁴ Queensland Council for Civil Liberties, submission 4.

4.2 Proposed new or amended offence provisions

Clause	Offence	Proposed maximum penalty
35	<p>Amendment of <i>Public Safety Preservation Act 1986</i></p> <p>Insertion of 8AZE Power to require access information</p> <p>(1) This section applies if—</p> <ul style="list-style-type: none"> (a) under section 8AZB, a storage device is being searched or has been seized; and (b) information stored on the storage device is accessible, or can be read, only by using access information; and (c) an emergency situation officer reasonably suspects that a person knows, has or is able to provide the access information. <p>(2) An emergency situation officer may require the person to give the officer—</p> <ul style="list-style-type: none"> (a) the access information; and (b) any other information or help that is necessary to access or read information stored on the storage device. <p>(3) When making the requirement, the emergency situation officer must inform the person that the person must comply with the requirement even though complying might tend to incriminate the person or expose the person to a penalty.</p> <p>(4) The person must comply with the requirement unless the person has a reasonable excuse.</p> <p>(5) It is not a reasonable excuse to fail to comply with the requirement that complying might tend to incriminate the person or expose the person to a penalty.</p> <p>(6) If the storage device is being searched under section 8AZB(2) and the person does not comply with the requirement, an emergency situation officer may seize the storage device.</p> <p>(7) The <i>Police Powers and Responsibilities Act 2000</i>, chapter 20 applies as if anything done under subsection (6) were done under that Act.</p> <p>(8) Nothing done under subsection (6) is an enforcement act under the <i>Police Powers and Responsibilities Act 2000</i>.</p>	<p>40 penalty units or 1 year's imprisonment</p>
37	<p>Insertion of 8PAB Power to require access information</p> <p>(1) This section applies if—</p> <ul style="list-style-type: none"> (a) under section 8N or 8P, a storage device is being searched or has been seized; and (b) information stored on the storage device is accessible, or can be read, only by using access information; and 	

	<p>(c) a terrorist emergency officer reasonably suspects that a person knows, has or is able to provide the access information.</p> <p>(2) A terrorist emergency officer may require the person to give the officer—</p> <p>(a) the access information; and</p> <p>(b) any other information or help that is necessary to access or read information stored on the storage device.</p> <p>(3) When making the requirement, the terrorist emergency officer must inform the person that the person must comply with the requirement even though complying might tend to incriminate the person or expose the person to a penalty.</p> <p>(4) The person must comply with the requirement unless the person has a reasonable excuse.</p> <p>(5) It is not a reasonable excuse to fail to comply with the requirement that complying might tend to incriminate the person or expose the person to a penalty.</p> <p>(6) If the storage device is being searched under section 8N(2) or 8P(1)(c) and the person does not comply with the requirement, a terrorist emergency officer may seize the device.</p> <p>(7) The <i>Police Powers and Responsibilities Act 2000</i>, chapter 20 applies as if anything done under subsection (6) were done under that Act.</p> <p>(8) Nothing done under subsection (6) is an enforcement act under the <i>Police Powers and Responsibilities Act 2000</i>.</p>	40 penalty units or 1 year's imprisonment
40	<p>Insertion of new s 47C Use of particular evidence in proceedings</p> <p>(1) This section applies if—</p> <p>(a) a person complied with a requirement under section 8AZE or 8PAB to provide access information in relation to information stored on a storage device; and</p> <p>(b) particular information (the <i>prescribed information</i>) stored on the storage device was accessible, or could be read, only by using the access information; and</p> <p>(c) a criminal proceeding is started in relation to the person; and</p> <p>(d) the criminal proceeding does not relate to—</p> <p>(i) an emergency situation that, under section 5, was declared to exist; or</p> <p>(ii) a terrorist emergency.</p> <p>(2) The prescribed information is not admissible in evidence against the person in the criminal proceeding, unless the proceeding relates to—</p> <p>(a) an indictable offence for which the maximum penalty is at least 7 years imprisonment, or</p> <p>(b) an offence against the Criminal Code, section 218B.</p> <p>(3) This section applies despite section 47B.</p>	

4.3 Explanatory notes

Part 4 of the LSA relates to explanatory notes. It requires that an explanatory note be circulated when a bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

Appendix A – List of submitters

Sub #	Submitter
001	Crime and Corruption Commission
002	Queensland Law Society
003	Office of the Information Commissioner
004	Queensland Council for Civil Liberties

Appendix B – List of witnesses at public briefing

Queensland Police Service

- Commissioner Ian Stewart
- Superintendent Bill Graham, Commander, Security and Counter-Terrorism Group
- Mr Paul Friedman, Director, Legislation Branch
- Acting Inspector Bob Utz, Legislation Branch

