



Counter-Terrorism and Other Legislation Amendment Bill 2016

Report No. 31, 55th Parliament
Legal Affairs and Community Safety Committee
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Legal Affairs and Community Safety Committee

Chair	Mr Mark Furner MP, Member for Ferny Grove
Deputy Chair	Mr Jon Krause MP, Member for Beaudesert (from 10 May to 25 May 2016) Mr Michael Crandon MP, Member for Coomera (from 25 May 2016)
Members	Mr Jon Krause MP, Member for Beaudesert Mr Don Brown MP, Member for Capalaba Ms Joan Pease MP, Member for Lytton Mrs Jann Stuckey MP, Member for Currumbin (from 10 May 2016) Mr Michael Crandon MP, Member for Coomera (from 10 May 2016) Mrs Tarnya Smith MP, Member for Mount Ommaney (to 10 May 2016) Miss Verity Barton MP, Member for Broadwater (to 10 May 2016)
Staff	Mr Stephen Finnimore, Research Director Ms Kate McGuckin, Research Director Mrs Kelli Longworth, Principal Research Officer Mr Gregory Thomson, Principal Research Officer Ms Lorraine Bowden, Executive Assistant Mrs Hazel Pauling, Executive Assistant
Technical Scrutiny Secretariat	Ms Renée Easten, Research Director Mr Michael Gorringe, Principal Research Officer Ms Kellie Moule, Principal Research Officer Ms Carla Campillo, Executive Assistant
Contact details	Legal Affairs and Community Safety Committee Parliament House George Street Brisbane Qld 4000
Telephone	+61 7 3553 6641
Fax	+61 7 3553 6699
Email	lacsc@parliament.qld.gov.au
Web	www.parliament.qld.gov.au/lacsc

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Abbreviations

BAQ	Bar Association of Queensland
the Bill	Counter-Terrorism and Other Legislation Amendment Bill 2016
the 2015 Bill	Counter-Terrorism and Other Legislation Amendment Bill 2015
CCIQ	Chamber of Commerce and Industry Queensland
CSA	<i>Corrective Services Act 2006</i>
FLPs	fundamental legislative principles
DJAG	Department of Justice and Attorney-General
LSA	<i>Legislative Standards Act 1992</i>
PDO	Preventative Detention Order
PCO	Prohibited Contact Order
PPRA	<i>Police Powers and Responsibilities Act 2000</i>
PSBA	Public Safety Business Agency
PSPA	<i>Public Safety Preservation Act 1986</i>
QCCL	Queensland Council for Civil Liberties
QNU	Queensland Nurses Union
QPS	Queensland Police Service
TPDA	<i>Terrorism (Prevention Detention) Act 2005</i>

Chair's foreword

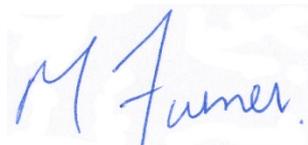
This report details the examination by the Legal Affairs and Community Safety Committee of the Counter-Terrorism and Other Legislation Amendment Bill 2016.

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 in accordance with section 4 of the *Legislative Standards Act 1991*.

On behalf of the committee, I thank those who lodged written submissions on this Bill. I also thank the Public Safety Business Agency, Queensland Police Service and Department of Justice and Attorney-General for the support they have provided the committee during this inquiry.

In particular, I thank all members of the committee for their efforts during this inquiry and committee office staff for the support they have provided us.

I commend this report to the House.



Mark Furner MP
Chair

Recommendations

Recommendation 1

3

The Committee recommends the Counter-Terrorism and Other Legislation Amendment Bill 2016 be passed.

1. Introduction

1.1 Role of the Committee

The Legal Affairs and Community Safety Committee (the 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
- Police Service
- Fire and Emergency Services
- Training and Skills.

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
- for subordinate legislation – its lawfulness.

1.2 Inquiry process

On 19 April 2016, the Hon Bill Byrne MP, the Minister for Police, Fire and Emergency Services and Minister for Corrective Services (the Minister), introduced the Counter-Terrorism and Other Legislation Amendment Bill 2016 (the Bill) into the House. In accordance with Standing Order 131 of the Standing Rules and Orders of the Legislative Assembly, the Bill was referred to the committee for detailed consideration. The committee was required to report to the Parliament by 12 July 2016.

The committee invited written submissions from the public and from identified stakeholders, to be received by 13 May 2016. Two submissions were received (see Appendix A for a list of submitters).²

The committee received a written briefing on the Bill and subsequent advice on issues raised in submissions from the Public Safety Business Agency (PSBA) on 9 June 2016. The PSBA, the Queensland Police Service (QPS), and the Department of Justice and Attorney-General (DJAG) also provided an oral briefing on the Bill on 11 May 2016.

1.3 Policy objectives of the Counter-Terrorism and Other Legislation Amendment Bill 2016

The Bill proposes to achieve its policy objectives by amending the following four Acts.

Public Safety Preservation Act 1986 and Terrorism (Preventative Detention) Act 2005

The primary objectives of the Bill are to amend the *Public Safety Preservation Act 1986* (PSPA) and *Terrorism (Preventative Detention) Act 2005* (TPDA) to enhance public safety through provision of counter-terrorism and emergency management powers that will enable police to rapidly and effectively respond to, manage and resolve, emergencies in Queensland.³

¹ *Parliament of Queensland Act 2001* (Qld), section 88 and Standing Order 194.

² View Submissions at:
<http://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/current-inquiries/17-CounterTerrorismAB16>

³ QPS, written brief, 3 May 2016, p. 2.

In introducing the Bill, the Minister advised the proposed amendments would, amongst other things:

- enable police to require any person or organisation to provide information during a declared emergency, under specified circumstances, and balanced by a range of safeguards
- create an offence for refusing to provide information sought by police or to give false or misleading information with penalties of up to 10 years imprisonment to apply
- extend a terrorist emergency in circumstances where it is necessary to protect life or health or protect critical infrastructure
- extend the power to search and seize vehicles as they leave or enter a declared area
- broaden the power for police to seize things from a person during a declared emergency to include things that a person may use to cause harm.⁴

Police Powers and Responsibilities Act 2000

The Bill proposes to amend the *Police Powers and Responsibilities Act 2000* (PPRA) to enable Commonwealth intelligence agencies to apply to the Supreme Court of Queensland, under the Commonwealth's assumed identity legislation (contained in Part IAC of the *Crimes Act 1914* (Cth)) for approval to create a birth certificate for an assumed identity.⁵

Corrective Services Act 2006

The Bill proposes amendments to the *Corrective Services Act 2006* (CSA) to support efficiencies in the operational practices relating to the delivery of health services to prisoners, the management of corrective services facilities (including prisoners), and the supervision of offenders in the community.⁶

1.4 Consultation on the bill

The Explanatory Notes list the community stakeholders that were consulted on the Bill, being:

- Australian Medical Association Queensland
- Aboriginal and Torres Strait Islander Legal Service
- Bar Association of Queensland (BAQ)
- Catholic Prison Ministry
- Chamber of Commerce and Industry Queensland (CCIQ)
- Legal Aid Queensland
- Prisoners Legal Service
- The Public Interest Monitor
- Queensland Council for Civil Liberties (QCCL)
- Queensland Law Society
- Queensland Nurses Union (QNU)
- Sisters Inside
- Women's Legal Service.⁷

⁴ Hansard transcript, 19 April 2016 (Explanatory speech) pp. 1025-1026.

⁵ Explanatory notes, pp.4-5.

⁶ Explanatory notes, p.4.

⁷ Explanatory notes, p 15.

The explanatory notes did not detail the results of the consultation process. However, the QPS provided a list of the issues raised and these are discussed in the next section of this report.⁸

1.5 Should the bill be passed?

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

Committee comment

After examination of the bill, including the policy objectives it seeks to achieve and consideration of the information provided by government agencies and stakeholders, the committee recommends that the bill be passed.

Recommendation 1

The Committee recommends the Counter-Terrorism and Other Legislation Amendment Bill 2016 be passed.

⁸ QPS, written brief, 3 May 2016, pp. 11-12.

2. Examination of the Counter-Terrorism and Other Legislation Amendment Bill 2016

2.1 Background to the Counter-Terrorism sections of the bill

2.1.1 Counter-Terrorism and Other Legislation Amendment Bill 2015

On 17 September 2015, the Hon Jo-Ann Miller, the then Minister for Police, Fire and Emergency Services and Minister for Corrective Services, introduced the Counter-Terrorism and Other Legislation Amendment Bill 2015 (2015 Bill) into the House. The 2015 Bill proposed to extend the ‘sunset’ provision of the TPDA, extend the extraterritorial application of the TPDA and the PSPA from three nautical miles to 200 nautical miles, and extend various emergency powers under these acts so that they could be exercised in other jurisdictions.

The committee reported on the 2015 Bill on 2 November 2015. It made recommendations that the bill be amended:

- to require that the Minister provide a stand-alone report to Parliament within six months of the use of the powers under the TPDA
- to require an independent review to occur within two years, and report within three years, of the Act’s commencement.

These recommendations were supported by the Government and the 2015 Bill was passed with amendment on 20 April 2016.

In introducing the 2016 Bill, the Minister advised that Queensland’s preventative detention laws and terrorist emergency powers have never had to be used.⁹

2.1.2 Reason for the introduction of further amendments in the 2016 bill

The QPS advised the committee that, since the 2015 amendments, terrorist related attacks had continued internationally - including the recent attacks in France and Belgium - and in the past 18 months, nationally, there has been a major escalation of terrorist related activity with three terrorist attacks resulting in fatalities.¹⁰

The explanatory notes state that due to the nature of terrorism, and even more so with the ever-increasing threat of low tech terrorism, police often need to intervene early to prevent a terrorist attack, or act on less information than would be the case in more traditional policing responses.¹¹

In introducing the 2016 Bill, the Minister advised the proposed amendments “will provide stronger safeguards to deal with and prevent acts of terrorism. Importantly, they will help keep Queenslanders safe.”¹² The Minister further advised:

*Threats to the community are not the sole domain of terrorism. There are natural disasters, criminal acts, such as mass murder, sabotage and the destruction of critical infrastructure that also have a devastating impact on our community. This bill will address the current legislative impediments which hinder a rapid a rapid policing response in times of crisis by providing police with the capacity to quickly acquire information that is critical to the effective management and resolution of any public emergency.*¹³

⁹ Hansard transcript, 19 April 2016 (explanatory speech) p. 1024.

¹⁰ QPS, written brief, 3 May 2016, p. 1.

¹¹ Explanatory notes, p 1.

¹² Hansard transcript, 19 April 2016 (explanatory speech) p. 1024.

¹³ Hansard transcript, 19 April 2016 (explanatory speech) p. 1024.

The explanatory notes state that the Bill makes a number of amendments designed to improve the management and resolution of emergencies by enabling the QPS to rapidly gather information, obtain authorisations, and exercise powers in an endeavour to mitigate or minimise the impacts of emergency situations – including natural disasters, accidents and criminal actions, terrorist emergencies and chemical, biological and radiological emergencies.¹⁴

Deputy QPS Commissioner Condon expanded on this background, informing the committee:

*Terrorism has become a global issue and Queensland is not exempt from this threat ... The exercise of powers used to disrupt and stop planned terrorist attacks and to prosecute offenders engaged in terrorist related activities, whether as a facilitator or assailant, is an integral part of the Queensland Police Service's multifaceted approach to counterterrorism and protecting the Queensland community.*¹⁵

He provided further context, advising of recent increases in the issue of adverse security assessments:

This financial year, ASIO has issued adverse security assessments recommending the cancellation or refusal of over 150 passports for Australians who are linked to extremist groups. This has increased from 93 adverse security assessments in 2014-15 and 45 adverse security assessments in 2013-14. Many have returned from conflict areas and are considered a security threat within this country, and attacks committed within Sydney and Melbourne have demonstrated the capability of lone actor extremists to invoke fear, injury and death within our communities.

*The legislative amendments within this bill are an essential component to enhance our strategic and operational capacity to face this growing global issue and defeat those who wish to cause us harm.*¹⁶

The QPS concluded its presentation at the public briefing with:

*Community safety is and should be a priority of any policing response to terrorism. The necessity for early disruption of attacks can sometimes come at the cost of securing sufficient evidence to prosecute people for their crimes. The amendments sought in accordance with this bill are aimed at protecting lives and property and providing police with sufficient powers to protect Queensland from those who wish to do harm through acts of terrorism.*¹⁷

The QPS advised the powers provided to police in Queensland to manage emergency situations within the terrorist environment are on par with those in other states:

*But where we struggle in Queensland, and this bill has highlighted it, is our ability to move quickly and to access that necessary information quickly when an incident is declared. I think that we would be criticised perhaps in an inquiry or coronial if it was found that red tape, for want of a better word, slowed our ability to protect our community.*¹⁸

The Bill provides a number of additional powers. The QPS noted that:

A number of safeguards are provided within the bill to balance these information requirement powers. Specifically, an information requirement can only be made during the period of a declared emergency; the relevant commander must be satisfied on reasonable grounds that the person is able to provide the information; the information is

¹⁴ Explanatory notes, p 3.

¹⁵ Hansard transcript, public briefing, 11 May 2016, p. 2.

¹⁶ Hansard transcript, public briefing, 11 May 2016, p. 2.

¹⁷ Hansard transcript, public briefing, 11 May 2016, p. 4.

¹⁸ Hansard transcript, public briefing, 11 May 2016, pp. 7-8.

*necessary for the resolution or effective management of the declared emergency; and it is not practical to obtain the information in any other way.*¹⁹

2.2 Public Safety Preservation Act 1986

2.2.1 Proposed amendments

The Bill proposes to amend the PSPA to:

- enable police, during a declared emergency situation, terrorist emergency or chemical, biological and radiological emergency, to require the provision of information which is necessary for the management or resolution of the emergency and creating offences for contravening the requirement, giving false or misleading information and disclosure offences
- clarify that the declaration of an area surrounding a moving activity for a terrorist emergency includes a stated area around a particular person
- enable the terrorist emergency to be extended beyond 14 days and up to 28 days by the Premier and the Minister for Police, Fire and Emergency Services and Minister for Corrective Services and thereafter only by regulation
- enable the appointment of a Terrorist Emergency Reception Centre Commander and declaration of a Terrorist Incident Reception Centre, the route or method of transportation and a place where persons self-evacuate to, as separate 'declared evacuation areas' for a terrorist emergency
- extend the power to stop and search, without warrant, a motor vehicle, other vehicle, ship, vessel, aircraft or railway rolling stock that is about to enter or is reasonably suspected of having just exited a 'declared area' for a terrorist emergency
- remove the requirement for consultation with a government agency prior to giving directions to officers of the agency, in urgent circumstances or for the safety of the officer given the direction or the safety of other persons
- amend the power to control movement of persons during a terrorist emergency to ensure that a direction given is withdrawn when compliance is no longer reasonably necessary
- amend the power to search persons and vehicles and the power to require a name and address during a terrorist emergency by replacing the words 'has just left' with 'has recently left' (to overcome possible legal argument as to what is meant by the word 'just')
- amend the power to seize things from a person during a terrorist emergency to ensure that police can seize anything that may be used to cause harm to any person
- amend the power to require a person's name and address to include their date of birth
- clarify a cross reference in the definition of 'Emergency situation' and ensure that the definition applies to intentional incidents in addition to accidents
- clarify that the protection of employment rights and compensation for use of, damage to, or destruction of property, apply to relevant directions given and exercise of powers under Part 2A (Terrorist emergency)
- ensure the protection from liability provision and the evidentiary provisions of the PSPA apply to terrorist emergencies.²⁰

¹⁹ Hansard transcript, public briefing, 11 May 2016, p. 2.

²⁰ Explanatory notes, pp. 6-7.

Regarding consistency with legislation in other jurisdictions, the explanatory notes state that in relation to clause 46, amendment to section 8Q (Power to direct officers of government agencies), terrorist emergency powers in New South Wales (NSW), Victoria, Western Australia (WA), Tasmania, Northern Territory and Australian Capital Territory, in their terrorist emergency powers, all provide police with the power to direct government agencies, without the need for consultation with the agency.²¹

2.2.2 Issues raised by stakeholders

Issues raised during consultation on the draft Bill

The QPS provided a list of the issues raised by stakeholders during consultation on the draft bill:²²

- The Australian Medical Association raised concerns about a penalty being included for not giving information during an emergency.
- The Queensland Council of Civil Liberties (QCCL) maintained the powers provided under the PPRA are adequate and raised issues with the following provisions of the Bill:
 - the ability to declare evacuation areas as declared areas, particularly to areas where people have self-evacuated
 - lack of safeguards in relation to powers of search and to control the movement of persons
 - a person should not be required to stay in a stated place for a declared area where the person does not pose a serious risk to the life or health of anyone
 - retention of information obtained under a specific emergency response
 - extension of terrorist emergency beyond 7 days.
- the Bar Association of Queensland (BAQ) raised issues with the following provisions:
 - provisions in relation to assumed identities should contain more safeguards
 - power to extend a terrorist emergency should be with the Supreme Court not the Premier and Minister
 - the need to include an aggravated offence carrying a 10 year maximum penalty
 - the inclusion of the grounds of knowledge or recklessness as grounds for liability in the offence provisions.²³

The QPS written brief dated 3 May 2016 did not provide any outcome of consultation or response to the issues raised above.

Issues raised in submissions to the committee

The submissions received by the committee raised a number of concerns with the proposed amendments to the PSPA, on the basis that they would override civil liberties and legal due process, and intrude on Queenslanders' right of privacy.²⁴ The specific issues raised by submitters are discussed below.

Clause 28, Section 8AE – Making of information requirement

The Queensland Greens submitted that the proposed amendment requiring the provision of information to police during a declared emergency is inconsistent with the rights and liberties of individuals:

The bill does not provide for judicial oversight of the police case to infringe on an individual's rights, requiring merely that the police commander be "satisfied on reasonable grounds" that a person may be in possession of important information. Such a system is

²¹ Explanatory notes, p. 16.

²² QPS, written brief, 3 May 2016, pp. 11-12.

²³ QPS, written brief, 3 May 2016, pp. 11-12.

²⁴ See submission 1, p. 1 and submission 2, p. 1.

*quite clearly open to abuse, especially in the emotionally charged environment of an emergency.*²⁵

The explanatory notes argue that the proposed power is justified in the circumstances, particularly given the safeguards reflected in sections 8AE to 8AR whereby an information requirement can only be given during the period of the declared emergency situation, terrorist emergency or chemical, biological and radiological emergency and only if the commander is satisfied on reasonable grounds that a person may be able to give information and that the information is necessary to manage or resolve the declared emergency.²⁶

*In managing and resolving emergencies, police would not normally have the luxury of time which may be afforded during more traditional policing responses. This is particularly the case where police are trying to prevent an imminent terrorist attack. Due to the nature of terrorism, and even more so with regard to low-tech terrorist attacks, police will often need to intervene early to prevent the attack from occurring. This does come at the cost of not being able to fully identify the nature of the attack and identification of all persons involved.*²⁷

The explanatory notes state that in responding to emergencies, the rights of individuals are outweighed by the public interest in ensuring police can effectively and quickly manage and resolve declared emergencies thereby minimising or mitigating the endangerment of the health and safety of the community, destruction of property or pollution of the environment.²⁸

The PSBA responded to the concerns raised about clause 28 by outlining the safeguards provided in proposed sections 8AE to 8AR and concluding that:

*The provisions, in the context of an emergency situation, strike an appropriate balance between the rights of the individual and the community as a whole.*²⁹

The Queensland Greens also raised a concern about the potential for police to legally require professionals to provide privileged information gained through their professional relationship:

*We note that legal professionals are exempted from this requirement, but the bill does nothing to protect information obtained via doctor-patient, counsellor-client or journalist-source relationships. The assurance of confidentiality is crucial to all these relationships, and if confidentiality cannot be guaranteed, these professionals will no longer be able to carry out their work effectively.*³⁰

The QPS and the PSBA advised that:

- section 8AE(7) specifically prohibits an information requirement from being given to a person who is reasonably suspected of having committed an offence directly related to the declared emergency
- the information requirement provisions maintain the privilege against self-incrimination, penalty privilege and legal professional privilege.³¹

Clause 36 – Extension of terrorist emergency beyond 7 days to a maximum of 14 days

The Queensland Greens expressed concern that the proposed amendment to enable a terrorist emergency to be extended beyond 14 days and up to 28 days by the Premier and the Minister for

²⁵ Submission 2, p. 1.

²⁶ Explanatory notes, p. 10.

²⁷ Explanatory notes, p. 10.

²⁸ Explanatory notes, p. 10.

²⁹ PSBA, Response to issues raised in submissions, 9 Jun 2016, pp. 3-4.

³⁰ Submission 2, p. 1.

³¹ QPS, written brief, 3 May 2016, p. 3 and PSBA, Response to issues raised in submissions, 9 Jun 2016, p. 2.

Police, Fire and Emergency Services and Minister for Corrective Services can be extended further via regulation in 14-day increments:

There is no upper limit on how many times the terrorist emergency may be extended via regulation, leaving open the prospect of a future government having the power to extend a terrorist emergency indefinitely. In order to avoid this possibility, the Queensland Greens believe that any decision to extend the duration of a terrorist emergency must be subject to judicial oversight.³²

The explanatory notes justify the proposed power that will allow the extension of a terrorist emergency to be made by the Premier and Minister or by regulation on the following basis:

The power of the Premier and Minister is limited to extending the terrorist emergency for periods of up to seven days therefore requiring reassessments of the use of the terrorist emergency powers based on operational need.³³

The PSBA responded to the Queensland Greens' concerns thus:

- The power to extend a terrorist emergency to up to 28 days is required for situations where the State is subjected to multi-faceted and protracted terrorist attacks, and it is also beneficial in circumstances where the terrorist attack is imminent and the intended target of the attack is unknown.
- A terrorist emergency can be extended beyond 28 days only by regulation if the circumstances of the terrorist act or threats of further terrorist acts necessitates the continuation of the emergency, and each regulation can only extend a terrorist emergency by a maximum of 14 days
- The ability to extend is also subject to the requirement in section 81 of the PSPA for a relevant person to end the terrorist emergency if satisfied that it is no longer necessary for police officers to continue to exercise terrorist emergency powers to maintain public safety, protect life or health at serious risk, or to protect critical infrastructure.³⁴

Clauses 42 and 44 – Power to search a person and power to search a vehicle without a warrant

The Queensland Greens were of the view that Clause 42 was inconsistent with Article 17(2) of the Universal Declaration of Human Rights (No one shall be arbitrarily deprived of his property) and that:

Lowering the requirement for seizure from “the person intends to use the thing to cause harm” to “the person may use the thing to use harm” renders the legislation so vague that seizure of property becomes completely arbitrary, as practically any object can potentially be used to cause harm. We believe that terrorist emergency officers should be required to demonstrate reasonable grounds for any seizure of property.³⁵

The PSBA responded:

- The proposed amendment will ensure that police can seize anything that may be used to cause harm to any person.
- The power is limited to a person who is in, or about to enter or is reasonable suspected of having left the declared area of a terrorist emergency.

³² Submission 2, p. 1.

³³ Explanatory notes, p. 13.

³⁴ PSBA, Response to issues raised in submissions, 9 Jun 2016, pp. 4-5.

³⁵ Submission 2, p. 1.

- Police, in responding to an imminent terrorist act or a terrorist act that has just occurred, would most likely be initially acting on very limited information and the threshold of having to show that the person intends to use the thing to cause harm is far too high.
- The purpose of this power relates to the safety of persons and not evidence collection.³⁶

Mr Brynn Mathews expressed concern that the declaration of an emergency situation gives the emergency commander and officers under their control, wide-ranging powers to search people and vehicles within, entering, or leaving the designated area and to seize property without any warrants being required.³⁷

The PSBA responded that currently a terrorist emergency officer has the power to search a vehicle, without a warrant, within a declared area under section 8 of the Act, however there is no power to stop and search a vehicle that is about to enter, or is reasonably suspected of having just left a 'declared area'.³⁸ The PSBA further argued:

*The extension of this existing power to include a vehicle about to enter or a vehicle that has recently left a declared area is a sensible extension, necessary to ensure the safety of persons within and around the declared area of a terrorist emergency.*³⁹

The QPS advised:

*Vehicles are searched every day by our officers. We have a threshold that we must meet... there has to be some common sense in relation to the level of suspicion that we require when public safety is a priority. I think in general terms people would expect that police under certain circumstances, with all the necessary safeguards, would have the ability to make a search of a vehicle if they believed that the activities of the occupants of that vehicle could be impacting on public safety.*⁴⁰

In response to a question from the committee, the QPS clarified that the amendment changes the threshold and gives more flexibility when it is time critical and when safety is an absolute priority:

*The general searches that we see our police do from day-to-day are just the mundane business of policing our community, but where you have time against you – and make no mistake time is our enemy in the work of terrorism. We would traditionally work through the processes to develop the evidence, to prosecute and move to a resolution in court. Now we are in a disruptive mentality where we simply have to move with less evidence and sometimes with a threshold that may not meet the normal standards we would apply. This is all about public safety. It is not about breaching safeguards or person's rights. It is about the criticality of delivering a safer Queensland.*⁴¹

Clause 54 – Amendment of section 47(2) (Protection from liability)

Clause 54 of the Bill extends protection from liability, where anything done or omitted to be done was done in good faith and without negligence, to the terrorist emergency commander, terrorist emergency forward commander, terrorist emergency reception centre commander, commissioner, deputy commissioners, police officers operating on their instruction, and the stated person in relation to a terrorist emergency.

Queensland Greens argued that officers who have these powers should continue to be accountable under the law, and did not find the reasoning given in the explanatory notes to the bill adequate to

³⁶ PSBA, Response to issues raised in submissions, 9 Jun 2016, p. 5.

³⁷ Submission 1, p. 1.

³⁸ PSBA, Response to issues raised in submissions, 9 Jun 2016, p. 6.

³⁹ PSBA, Response to issues raised in submissions, 9 Jun 2016, p. 6.

⁴⁰ Hansard transcript, public briefing, 11 May 2016, p. 3.

⁴¹ Hansard transcript, public briefing, 11 May 2016, pp. 5-6.

justify overturning this fundamental principle, “particularly given that this bill also enables the duration of the terrorist emergency to be extended indefinitely, and empowers the officers in question to commit fundamental breaches of human rights during this time”.⁴² They state:

*Indeed, we submit that this clause negates all the safeguards placed around the use of the information requirement and search and seizure provisions elsewhere in the bill. If officers cannot be held accountable for their actions during the period of the terrorist emergency, there is no incentive for them to abide by those safeguards.*⁴³

The explanatory notes state that this amendment will provide a consistent protection from liability for persons acting under the Act by ensuring officials acting under Part 2A (Terrorist emergency) of the Act are provided the same protections as officials already covered in section 47 of the Act and that:

*The extension of the protection of liability is considered justified due to the nature of terrorist emergencies. It is important for officials to be able to exercise powers and perform actions under the Act without fear of litigation, particularly given the urgent and high-pressure nature of terrorist emergencies. The protection only applies if the act is done or omission is made in good faith and without negligence.*⁴⁴

The PBSA response to issues raised in submissions reiterated that:

- the amendment is justified due to the nature of terrorist emergencies
- it is important for officials to be able to exercise and perform actions under the Act without fear of litigation, particularly given the urgent and high-pressure nature of terrorist emergencies
- the protection only applies if the act is done or omission is made in good faith and without negligence.⁴⁵

Clause 58 - Amendment of the definition of “emergency situation”

Mr Mathews also raised a concern about the proposed amendment of the definition of “emergency situation” to insert the word “incident” after “any other accident”:

The lack of definition of incident in this Bill is a cause of serious concern in light of the history of laws that have suppressed civil liberties in Queensland, including the unlawful assembly laws of the Joh era and the more recent VLAD laws. A police commander could quite readily use this law to declare a legitimate, and otherwise legal, protest, such as a rally at a construction site, CSG drill site, coal loading wharf, rail line or company board meeting, as an emergency situation on the basis that it “may cause... distress to any person”.⁴⁶

The PSBA responded that the words ‘may cause.... distress to any person’ are a part of the existing definition and broader context of the definition of ‘emergency situation’. The only change in the wording is to insert the word ‘incident’ so that intentional acts are covered by the definition as well as accidents.⁴⁷

⁴² Submission 2, p. 2.

⁴³ Submission 2, p. 2.

⁴⁴ Explanatory notes, p. 12.

⁴⁵ PSBA, Response to issues raised in submissions, 9 Jun 2016, p. 6.

⁴⁶ Submission 1, p. 1.

⁴⁷ PSBA, Response to issues raised in submissions, 9 Jun 2016, p. 7.

2.3 Terrorism (Preventative Detention) Act 2005

2.3.1 Proposed amendments

The Bill proposes to amend the TPDA to:

- enable a Preventative Detention Order (PDO) to be made in respect of a person whose real name is not known, provided the person is able to be identified as the subject of the PDO
- enable police to require a person, who is suspected on reasonable grounds of being the subject of a PDO, to state their name, address and date of birth
- enable the taking and use of identifying particulars to establish or confirm the identity of a person who is detained under a PDO
- extend the power for a police officer to make an application by phone or electronically (etc.) to include Prohibited Contact Orders (PCO) and remove the requirement for preparation of a written application prior to making an urgent application for an initial order for a PDO.⁴⁸

The QPS explained that the proposed amendments will allow for an initial or a final PDO to be made when a person's name is not known but there are sufficient identifying particulars available to identify the person - such as photographs, partial name, nickname, alias or physical description. It pointed to the example of the image and description of the Boston bombers which was available in the early stages of the investigation as one which under the amended legislation would be sufficient for an initial or final PDO.⁴⁹

The explanatory notes provided the following details about consistency with legislation in other jurisdictions in relation to the amendments proposed to the TPDA:

- In relation to clause 62, amendment to section 17 (Issuing authority may make initial order) – the Commonwealth preventative detention legislation similarly enables PDOs to be made where the name of the person is not known.
- In relation to clause 68, replacement of section 79 (Electronic application in particular circumstances) and insertion of new sections 79A (Oral applications for initial order in urgent circumstances), 79B (Recording of particular applications for initial order) and 79C (Additional procedure if electronic application) – equivalent legislation in both NSW and the Commonwealth permits PDO and PCO applications to be made without a written application having first been prepared.⁵⁰

2.4 Police Powers and Responsibilities Act 2000

2.4.1 Proposed amendments

The Bill proposes to amend the PPRA to enable Commonwealth intelligence agencies to apply to the Supreme Court of Queensland, (under the Commonwealth's assumed identity legislation contained in Part IAC of the *Crimes Act 1914* (Cth)) for approval to create a birth certificate for an assumed identity.⁵¹

The QPS explained that this amendment would assist in the conduct of covert operations in which police or intelligence operatives require an assumed identity to safely infiltrate or require information

⁴⁸ Explanatory notes, p. 7.

⁴⁹ Hansard transcript, public briefing, 11 May 2016, pp. 3-4.

⁵⁰ Explanatory notes, p. 16.

⁵¹ Explanatory notes, p. 6.

and intelligence in order to investigate a crime or safeguard the wellbeing of Australians and/or protect property and critical infrastructure.⁵²

In relation to consistency with legislation in other jurisdictions, the explanatory notes advise that the assumed identity legislation of NSW, WA and Tasmania enable the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service to obtain birth certificates as evidence of assumed identities.⁵³

2.5 Corrective Services Act 2006

2.5.1 Proposed amendments

The Bill proposes the following amendments to the CSA to support efficiencies in the operational practices relating to the delivery of health services to prisoners, the management of corrective services facilities (including prisoners) and the supervision of offenders in the community:

- allow registered nurses as an alternative to doctors to conduct, at the prescribed intervals, the examination of prisoners under safety orders, maximum security orders, criminal organisation segregation orders and separate confinement orders
- clarify that a corrective services officer may use a biometric identification system for the purpose of the identification of a prisoner
- clarify that a prisoner's or visitor's biometric information that is captured, including by the individual submitting to a biometric identification system (including any data created of such information) is information the chief executive of corrective services may keep and must destroy as provided in the CSA
- expand the offence for a prisoner to fail to obtain the written permission of the chief executive of corrective services before applying to change the person's name so that it applies to a name change application in any Australian jurisdiction, not just Queensland
- clarify the existing exception to a prisoner's right to request a reconsideration of a transfer decision that is an initial placement in a suitable facility also includes a transfer decision to move a remanded prisoner following sentence to another corrective services facility for the purpose of determining the most suitable facility for the prisoner's initial placement.⁵⁴

2.5.2 Issues raised by stakeholders

Issues raised during consultation on the draft Bill

The QPS provided a list of the issues raised by stakeholders in relation to the proposed CSA amendments during consultation on the draft bill:

- The BAQ sought further safeguards surrounding the collection of biometric data.
- The BAQ suggested section 27 of the CSA should provide that the chief executive's consent to a prisoner's name change application should not be unreasonably withheld.
- The BAQ had no problem with nurses conducting examination of prisoners under criminal segregation orders (COSO), however it did not support the COSO regime.
- The QNU supported the proposed CSA amendments on the proviso that registered nurses are (or have been) objectively assessed as competent to conduct the required examinations and also sought a commitment that nursing workloads will be monitored on a regular basis.

⁵² Hansard transcript, public briefing, 11 May 2016, p. 4.

⁵³ Explanatory notes, p. 16.

⁵⁴ Explanatory notes, p.5.

- The QCCL opposed the requirement for visitors to submit to biometric identification.
- The QCCL also questioned the need to retain biometric information after a prisoner has served their sentence.⁵⁵

The QPS brief did not provide any outcome of consultation or response to the issues raised above.

Issues raised in submissions to the committee

Clause 5 – Replacement of section 57 (Medical examination)

The Queensland Greens raised a concern with the proposed amendment which would enable registered nurses (as an alternative to doctors) to examine certain categories of prisoners as they believe that “prisoners in the State’s custody are entitled, like all citizens, to qualified medical diagnosis and treatment”.⁵⁶

The explanatory notes described the proposed amendments as supporting efficiencies in the operational practices relating to the delivery of health services to prisoners.⁵⁷ The Queensland Greens stated:

*While registered nurses are very competent and qualified in their field, having a qualified doctor’s assessment and diagnosis is paramount to ensure the medical needs, including mental and psychological health, of such prisoners in the State’s custody. The proposed changes to the Corrective Services Act 2006 may provide greater efficiencies but it will be at the cost of quality in the delivery of prisoner health services, and leave the State open to litigation in the event of incorrect or unqualified diagnosis and treatment.*⁵⁸

The DJAG responded to this concern with the following advice:

- While the amendments allow for this health services model to be applied to the examination of prisoners under the various types of segregation orders, provision for examination by a doctor is retained should this be necessary or appropriate in a particular circumstance.
- Visiting doctors attend all correctional centres and there will be a continued requirement under the CSA for the chief executive to appoint at least one doctor for each prison.
- Registered nurses have the relevant medical skills to examine a prisoner for any health concerns and clinical nurse coverage is already provided in most prison facilities 24 hours per day.
- The duties of nurses include conducting triage assessment of prisoners who present with medical concerns to determine whether or not the prisoners need to be progressed to a visiting medical officer, risk assessments of prisoners at periods of risk, and the distribution of medication.
- The QNU supported the amendments of the CSA that enable a registered nurse to examine prisoners under safety orders, maximum security orders, criminal organisation segregation orders and separate confinement orders, provided nurses have been assessed as competent to conduct the required examination.⁵⁹

⁵⁵ QPS, written brief, 3 May 2016, pp. 11-12.

⁵⁶ Submission 2, p. 2.

⁵⁷ Explanatory notes, p. 4.

⁵⁸ Submission 2, p. 2.

⁵⁹ DJAG, Response to issues raised in submissions, 9 Jun 2016, pp. 8-9.

3. Compliance with the *Legislative Standards Act 1992*

Section 4 of the *Legislative Standards Act 1992* (LSA) states that ‘fundamental legislative principles’ (FLPs) 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 individuals⁶⁰
- the institution of parliament.⁶¹

The committee has examined the application of FLPs to the Bill. The following section discusses potential breaches that were not discussed in the previous policy examination section of this report.

3.1 Rights and liberties of individuals

3.1.1 General observations

Section 4(2)(a) of the LSA requires legislation to have sufficient regard to the rights and liberties of individuals. The former Scrutiny of Legislation Committee (SLC) considered the reasonableness and fairness of the treatment of individuals as relevant in deciding whether legislation had sufficient regard to the rights and liberties of individuals.

Clause 41 – proposed replacement of section 8M of the PSPA (Power to control movement of persons)

Proposed section 8M of the PSPA applies to persons in a declared area or reasonably suspected of being about to enter a declared area. It provides that a terrorist emergency officer may direct the person to not enter the declared area or a stated place therein; or to go to, or stay at or in, a stated place in the declared area or a stated declared evacuation area (section 8M(2)).

Such a direction can only be given during the period of the terrorist emergency and only where the terrorist emergency officer is satisfied that giving a person the direction is necessary –

- (a) for the safety of the person or another person
- (b) to effectively manage the evacuation of the person to a declared evacuation area
- (c) to effectively receive, identify or assess the person
- (d) otherwise to effectively deal with the terrorist emergency (section 8L).

Potential FLP issues

In the case of the revised section 8M, the fact that the terrorist emergency officer can control the movements of persons in relation to a declared area or stated place therein impacts on the rights and liberties of free movement and passage commonly afforded to individuals in public places.

Committee consideration

The committee notes the limited circumstances in which the powers proposed in section 8M can be used, and is satisfied that the impact on rights and liberties of individuals is an acceptable concession given these safeguards.

Clause 45 – proposed new section 8PC of the PSPA (Power to control movement of persons)

Proposed new section 8PC of the PSPA would allow a terrorist emergency officer to direct a person who is in (or apparently about to enter) a declared evacuation area, not to enter the declared evacuation area or a stated place therein, to go to or stay at or in a stated place in the declared evacuation area, or to go to or stay at or in another stated declared evacuation area.

⁶⁰ *Legislative Standards Act 1992*, s 4(2)(a).

⁶¹ *Legislative Standards Act 1992*, s 4(2)(b).

Proposed new section 8PB limits the scope to use the section 8PC powers to only those situations in which a terrorist emergency officer is satisfied that giving a person a direction under that section is necessary –

- (a) for the safety of the person or another person
- (b) to effectively manage the evacuation of the person to a declared evacuation area
- (c) to effectively receive, identify or assess the person
- (d) otherwise to effectively deal with the terrorist emergency.

Potential FLP issues

The fact that the terrorist emergency officer can direct the movement of persons in relation to a declared evacuation area or stated place therein impacts on the rights and liberties of free movement and passage commonly afforded to individuals in public places.

Committee consideration

The committee notes the limited circumstances in which the powers proposed in section 8PC can be used, and is satisfied that the impact on rights and liberties of individuals is an acceptable concession given these safeguards.

Clause 55 – proposed new section 47B (Use of information obtained under Act)

Proposed new section 47B of the PSPA provides that any information obtained under that Act may be recorded, retained or used for the purpose of performing any function of the police service. This applies despite any provision of an Act that restricts the recording, retention or use of the information, unless that Act expressly overrides section 47B.

Potential FLP issues

The fact that information obtained under the PSPA may be recorded, retained or used for any function of the police service arguably has significant implications for the rights and liberties of individuals where that information is then used by the QPS for the purposes of furthering an investigation or prosecution.

The explanatory notes did not address this issue.

Committee consideration

The committee considered the issue and is satisfied that the power is justified on the grounds there will undoubtedly be circumstances when the capacity to record, retain and use information gathered under the PSPA will be an important tool for law enforcement in combating potential terrorist activities.

3.1.2 Administrative power

Clause 28 – proposed insertion of new part 2, division 3 (Power to require information)

Clause 28 proposes to insert a new section 8AP into the PSPA which applies when a relevant officer refuses, under section 8AM(5), a person's request to give a stated person a disclosure notice because the officer reasonably suspects that giving the disclosure notice might prejudice the effective management or resolution of the emergency situation.

As soon as reasonably practicable after making the decision, the relevant officer must inform the requester that the request is refused and make a written record of the particulars of the decision to refuse the request (section 8AP(2)).

No provision is made in the section for a review of the decision, although presumably judicial review would still be available after the fact under the *Judicial Review Act 1991*.

Potential FLP issues

Legislation should make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined. The OQPC Notebook states:

*Depending on the seriousness of a decision made in the exercise of administrative power and the consequences that follow, it is generally inappropriate to provide for administrative decision-making in legislation without providing criteria for making the decision.*⁶²

The former SLC took issue with provisions that did not sufficiently express the matters to which a decision-maker must have regard in exercising a statutory administrative power.⁶³

In addition, legislation should make rights and liberties, or obligations, dependent on administrative power only if subject to appropriate review. The OQPC Notebook states:

*Depending on the seriousness of a decision and its consequences, it is generally inappropriate to provide for administrative decision-making in legislation without providing for a review process. If individual rights and liberties are in jeopardy, a merits-based review is the most appropriate type of review.*⁶⁴

The SLC was opposed to clauses that removed the right of review, and took particular care to ensure the principle that there should be a review or appeal against the exercise of administrative power. Where ordinary rights of review were removed, thereby preventing individuals from having access to the courts or a comparable tribunal, the SLC paid particular attention to whether sufficient regard had been afforded to individual rights, noting that such a removal of rights may be justified by the overriding significance of the objectives of the legislation.⁶⁵

Committee consideration

The committee considered whether it would be likely that a person's right to seek legal counsel could be compromised if their request to give a stated person (for example, their lawyer) a disclosure notice is refused with no prospect of a contemporaneous review or reconsideration of that decision.

In this instance, the criteria for refusal (the officer reasonably suspects that giving the disclosure notice might prejudice the effective management or resolution of the emergency situation) although subjective, contains the inherent safeguard that the officer's view has to have been formed reasonably.

The absence of a statutory mechanism in the Bill to review a section 8AM(2) refusal decision may also be excused by the sense of urgency inherent in emergency situations as any delays that would be occasioned if the decision was subject to an internal review process could prejudice the effective management or resolution of the emergency situation.

For these reasons the committee considers that the absence of an internal review process for such decisions is justified by the overriding objectives of the legislation, being the expedient and effective resolution of terrorist emergency situations.

3.1.3 Onus of proof

Clause 28 – proposed insertion of new section 8AG – Offence to contravene information requirement

Clause 28 proposes to insert a new section 8AG(1) into the PSPA which requires a person of whom an information requirement is made to comply with that requirement unless the person has a reasonable excuse. Subsection (2) provides two key examples of what could be a reasonable excuse, being that,

⁶² OQPC, Fundamental Legislative Principles: The OQPC Notebook, p. 15.

⁶³ OQPC, Fundamental Legislative Principles: *The OQPC Notebook*, page 15; citing Scrutiny Committee Annual Report 1998-1999, para. 3.10.

⁶⁴ OQPC, Fundamental Legislative Principles: *The OQPC Notebook*, p. 18.

⁶⁵ OQPC, Fundamental Legislative Principles: *The OQPC Notebook*, p. 19.

for an individual, giving the information might tend to incriminate the individual or expose them to a penalty; or that the information is the subject of legal professional privilege.

The maximum penalty for breaching section 8AG(1) is 40 penalty units or 1 year imprisonment. However should the person commit an offence against subsection (1) with the intention of seriously endangering the health or safety of any person, causing serious damage to property or serious pollution of the environment, or seriously prejudicing the effective management or resolution of the emergency situation; or where they act knowing that, or being reckless as to whether their noncompliance with the information requirement is likely to result in those outcomes, they commit a crime attracting a maximum penalty of 10 years imprisonment (see section 8AG(6)).

Subsection (4) states that:

It is a defence to a prosecution for an offence against subsection (1) for the person to prove the person –

- (a) could not reasonably comply with the information requirement within the period stated in the requirement; and*
- (b) took reasonable steps to comply with the information requirement; and*
- (c) gave the information sought under the information requirement as soon as practicable after the period for compliance stated in the requirement.*

Potential FLP issues

Legislation should not reverse the onus of proof in criminal matters, and it should not provide that it is the responsibility of an alleged offender in court proceedings to prove innocence. In addition to commenting on provisions that expressly reversed the onus of proof, it was the practice of the former SLC to comment on any proposed provision that might place any burden on a defendant to prove something. Generally, the SLC opposed reversal of the onus of proof, noting “*For a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidential means and where the defendant would be particularly well positioned to disprove guilt*”.⁶⁶

In respect of section 8AG, the explanatory notes advise:

*The effect of section 8AG(4) is that the onus of proof is reversed and it is considered that there is adequate justification for this, as the factors for which the reversal applies are uniquely in the knowledge of the defendant and difficult for the Crown to prove otherwise. This section is also consistent with section 76 (Proof of negative etc.) of the Justices Act 1886 which provides, in relation to simple offences, that it is not necessary for the prosecution to prove the negative, but that the defendant shall be called upon to prove the affirmative thereof in the defendant’s defence.*⁶⁷

Committee consideration

The committee notes that the reversal of onus in subsection (4) is expressly limited to establishing a defence to a prosecution for an offence against subsection (1) - which attracts the lesser penalty of 40 penalty units or 1 year imprisonment. There is no reversal of onus in respect of a prosecution for an offence against subsection (6) - a crime that attracts a maximum penalty of 10 years imprisonment.

⁶⁶ OQPC, Fundamental Legislative Principles: *The OQPC Notebook*, p. 36.

⁶⁷ Explanatory notes, p. 13.

3.1.4 Power to enter premises

Clause 42 – proposed amendment of section 8N (Power to search a person without a warrant) and Clause 44 – proposed insertion of section 8P (Power to search vehicle without warrant)

Each of these proposed sections gives a terrorist emergency officer specified powers that may be exercised without a warrant where the person or vehicle is in, about to enter in, or has apparently recently left, a declared area for a terrorist emergency.

In respect of vehicles, new section 8P allows (without a warrant) the stopping of vehicles, the detention of both the vehicle and its occupants, and the searching of the vehicle and anything in it for anything relevant to the terrorist emergency. The terrorist emergency officer may also 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 a person may use the thing to cause harm to the person or someone else.

Similar powers exist for persons in section 8N - being that they may be (without a warrant) stopped, detained and searched for anything relevant to the terrorist emergency if they are in, about to enter, or have apparently recently left, a declared area for the terrorist emergency. The terrorist emergency officer may also 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 the person or someone else.

The changes from the current section 8N are:

- Clarification that search powers may be exercised in respect of a person without a warrant (although that intention is already indicated in the current section heading).
- A change of reference from (a person who has) 'just' left a declared area to 'recently' left.
- Providing a broader seizure power - which now applies to all or part of a thing where the terrorist emergency officer reasonably suspects the person *may use* the thing to cause harm to the person or someone else. (The current test focuses on things that the person *intends to use* to cause harm to the person or someone else).

Potential FLP issues

Legislation should confer power to enter premises⁶⁸, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.⁶⁹ The OQPC handbook 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. Strict adherence to the principle may not be required if the premises are business premises operating under a licence or premises of a public authority. The SLC's chief concern in this context was the range of additional powers that became exercisable after entry without a warrant or consent.⁷⁰

The OQPC Notebook states, "*FLPs are particularly important when powers of inspectors and similar officials are prescribed in legislation because these powers are very likely to interfere directly with the rights and liberties of individuals*".⁷¹

Committee consideration

With respect to (1) above, the current section 8N heading flags the intention that the power to search persons in declared areas under the section can be exercised without a warrant. The Bill clarifies that

⁶⁸ By analogy the same principles would extend to the searching of private vehicles.

⁶⁹ *Legislative Standards Act 1992, section 4(3)(e)*.

⁷⁰ Alert Digest 2004/5, p. 31, paras. 30-36; Alert Digest 2004/1, pp. 7-8, paras 49-54; Alert Digest 2003/11, pp. 20-21, paras 14-19; Alert Digest 2003/9, p. 4, para. 23 and p. 31, paras 21-24; Alert Digest 2003/7, p. 34-35, paras 24-27; cited in OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p. 45.

⁷¹ OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p. 45.

intention by adding the term ‘without a warrant’ to the body of the section itself. Given that the detention and search of a person is arguably the ultimate infringement of that person’s rights and liberties, and that such search powers already exist in section 8N, the creation of a mirror provision (section 8P) that allows the search of vehicles under the same circumstances is considered a lesser infringement of a person’s rights and liberties.

With respect to (2) above, it is arguable that the term “recently left” (a declared area) as proposed in the Bill is as ambiguous and open to differing interpretations as the current terminology “just left”, although “recently” may arguably be considered broader in that it could justify stopping persons or vehicles that had exited the declared area at an earlier point in time than those that had “just left”.

With respect to (3) above, the seizure power is arguably much wider under the terms of the Bill than currently applies as it allows the seizure of a thing or part thereof if there is a reasonable suspicion that the person with the thing may use it to cause harm.

The current test centres on things that the person *intends to use* to cause harm. Unless the person evinces that intention by actually using the thing (or attempting to use it) to cause harm, it is very difficult to establish that they have that nefarious intention, especially when the object is an ordinary object with other common benign uses. It is possible that the inherent difficulty of proving intention is the reason for the revised wording under the Bill.

It is unclear from the section exactly how widely the revised seizure power could be interpreted in practice, because realistically almost any object could be used (or be refashioned to be used) for malicious purposes. Thus if the emphasis is given to *may use* the thing to cause harm then conceivably almost any object could be seized. If however emphasis is given to *the person* then it would appear that there would have to be some conduct or suspicious behaviour on the part of the person in possession of an object that would suggest that they may be capable of using, or be likely to use, that object to cause harm. It may be the case that a person’s inclusion on a terror watch list could be sufficient to ground a reasonable suspicion that they may use an object in their possession to cause harm, even in the absence of any overtly suspicious behaviour by them at the relevant time.

3.1.5 Protection against self-incrimination

Clause 28 – proposed insertion of section 8AM - Obligation to give, or to refuse to give, disclosure notice

Clause 28 proposes to insert new section 8AM to the PSPA which applies where a request has been made under section 8AL to a relevant officer to give a stated person a disclosure notice. The relevant officer must give the stated person a disclosure notice unless the officer reasonably suspects that giving the notice might prejudice the effective management or resolution of the emergency situation (section 8AM(2)).

Under subsection (4), the giving of the disclosure notice does not affect the time by which the person of whom the information requirement is made must comply with the information requirement. The example given for subsection (4) is:

An information requirement is made of a person and, under section 8AE(5)(a)(i), requires the person to give the information immediately. The person asks for a disclosure notice to be given to the person’s lawyer to seek legal advice in relation to the information requirement. The obligation under subsection (2) for the relevant officer to give the person’s lawyer a disclosure notice does not affect the person’s obligation under section 8AG to comply with the information requirement by giving the information immediately.

The penalty for failing to comply where an information requirement has been made, unless the person has a reasonable excuse, is up to 40 penalty units or 1 year imprisonment.

One of the reasonable excuses for non-compliance available under section 8AG(2) is that the information is the subject of legal professional privilege. Most people would need to seek legal advice as to whether non-compliance could be justified on the grounds of legal professional privilege. As

noted in the example for section 8AM(4), a person can ask for a disclosure notice to be given to their lawyer so that they can seek legal advice in relation to their duty to comply with the information requirement. In that example, the giving of that disclosure notice does not affect the person's section 8AG obligation to comply with the information requirement by giving the information immediately.

Potential FLP issues

Legislation should provide appropriate protection against self-incrimination.⁷² 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*".⁷³ The former SLC commented that denial of the protection afforded by the self-incrimination rule is only potentially justifiable if –

- (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 fulfill any conditions (such as formally claiming a right).⁷⁴

Another excuse for non-compliance available under section 8AG(2) is that of "self-incrimination" in that giving the information might tend to incriminate the individual giving it, or expose them to a penalty.

As noted in the above example, the giving of a disclosure notice to a person's lawyer does not affect the person's section 8AG obligation to comply with the information requirement by giving the requested information immediately (if an immediate response is required by section 8AE). If a person felt (or was) compelled to comply with an information requirement prior to receiving legal advice that a claim of 'privilege against self-incrimination' or 'legal professional privilege' could be relied upon to support non-compliance, then arguably their right to obtain legal advice (to prevent a situation where they might unwittingly incriminate themselves) is compromised.

Committee consideration

In the event that a person is prosecuted for the section 8AG(1) offence of failing to comply with an information requirement without reasonable excuse, a defence is available under subsection (4), being that the person could not reasonably comply with the information requirement within the period stated in the requirement, and that they took reasonable steps to comply, and gave the information sought as soon as practicable after the period for compliance stated in the information requirement.

Given the advice in the section 8AM(4) example - *The obligation under subsection (2) for the relevant officer to give the person's lawyer a disclosure notice does not affect the person's obligation under section 8AG to comply with the information requirement by giving the information immediately*; it is questionable whether a person could successfully use as a reasonable excuse the fact that they could not comply in the required time period because they were awaiting legal advice as to (a) whether they were obligated to comply or (b) whether they could instead claim legal professional privilege or privilege against self-incrimination as a justification for non-compliance.

The committee noted that this appears to compromise a person's capacity to obtain legal advice before potentially incriminating themselves and sought further advice from the relevant agency on this issue.

In its response, the QPS firstly noted that the power to make an information requirement is limited:

⁷² *Legislative Standards Act 1992*, section 4(3)(f).

⁷³ OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, page 52.

⁷⁴ Alert Digest 2000/1, page 7, para 57; Alert Digest 1999/31; and Alert Digest 1999/4, page 9, para. 1.60.

- *during the operation of a declared emergency*
- *if the commander is satisfied on reasonable grounds the person may be able to give the information and that the information is necessary for the management or resolution of the declared emergency, and*
- *if it is not practicable, in the circumstances, to obtain the information from the person, other than through the use of the information requirement power.*

Additionally, subsection 8AE(5)(a) restricts when a person can be required to provide information immediately to situations when it would be reasonable in the circumstances to require the person to give the information immediately. Moreover, subsection 8AE(7) restricts an information requirement being made of a person who is reasonably suspected of having committed or to be committing an indictable offence that is directly related to the declared emergency.

After noting the above considerations, the QPS stated that *it is difficult to envisage circumstances where the issue of privilege would arise*. The QPS submitted that the possibility is further minimised in light of judicial authority that the privilege does not extend to communications made in furtherance of a crime or fraud.⁷⁵

The QPS stated more broadly:

When considered in its entirety, clause 28 of the Bill achieves an appropriate balance between protecting the rights and liberties of the individual with the protection of the broader community. Delays caused by having to wait for legal advice to be obtained, which may be considerable, prior to the provision of the information would have dire consequence on the ability for police to respond effectively to declared emergencies and counteract the intention of the legislation. It would be feasible that persons who sympathise or share a common ideology with the offenders, may enable the offenders to achieve their criminal endeavours by delaying the giving of information through seeking legal advice.

In managing and resolving declared emergencies, police would not normally have the luxury of time which may be afforded during more traditional policing responses. The ability to rapidly acquire necessary information is critical especially where lives are at risk, for example, during a hostage situation or in circumstances where police are trying to prevent an imminent terrorist attack from occurring.

The QPS also submitted:

Furthermore, there is nothing contained in the Bill which would limit a court's ability to exclude evidence in circumstance where the court considered the evidence would be unfair to the accused, contrary to public policy and / or that the prejudicial effect of the evidence outweighs its probative value.

The committee has considered this response. Noting the circumstances in which any adverse impact on the privilege against self-incrimination would likely arise in practice, and balancing that against the overall intent of the Bill, the committee is satisfied on this issue.

3.1.6 Immunity from proceedings

Clause 28 – proposed insertion of section 8AQ – Protection from liability for giving information

Clause 28 proposes to insert new section 8AQ which applies to a person who, acting honestly and without negligence:

- gives information under an information requirement that is made of the person

⁷⁵ R v Cox and Railton (1884) 14 QBD 153

- gives information to a person of whom an information requirement is made to help the person comply with the requirement
- gives information to a disclosure recipient to assist the disclosure recipient in helping another person of whom an information requirement has been made.

Provided the person is an authorised person for the information matter under section 8AQ(2)(b), or the person to whom the information is given has been given a section 8AK notice, the person is not liable civilly, criminally or under an administrative process, for giving the information (section 8AQ(3)). Also, merely because the person gives the information, the person cannot be held to have breached any code of professional etiquette or ethics, or departed from acceptable standards of professional conduct (section 8AQ(4)). Further, in a proceeding for defamation, the person has a defence of absolute privilege for publishing the information, and if the person would otherwise be required to maintain confidentiality about the information under an Act, oath, or rule of law or practice, the person does not contravene the Act, oath, or rule of law or practice by giving the information, and is not liable to disciplinary action for so giving the information (section 8AQ(5)).

Potential FLP issues

Legislation should not confer immunity from proceeding or prosecution without adequate justification.⁷⁶ The OQPC Notebook states:

*A person who commits a wrong when acting without authority should not be granted immunity. Generally a provision attempting to protect an entity from liability should not extend to liability for dishonesty or negligence. The entity should remain liable for damage caused by the dishonesty or negligence of itself, its officers and employees. The preferred provision provides immunity for action done honestly and without negligence ... and if liability is removed it is usually shifted to the State.*⁷⁷

The SLC recognised one of the fundamental principles of law was that everyone is equal before the law, and each person should therefore be fully liable for their acts or omissions. Notwithstanding that position, the SLC also recognised that conferral of immunity could be appropriate in certain situations.⁷⁸

Committee consideration

The committee considered this issue and is satisfied that providing immunity to persons required to provide the information is appropriate in the circumstances, given the safeguards that apply (that is, the person disclosing the information has to be acting under the compulsion of an information requirement, and has to have acted honestly and without negligence).

Clause 54 – proposed amendment of section 47 (Protection from liability)

Clause 54 proposes to amend section 47(2) of the PSPA to expand the definition of *official* to include a terrorist emergency commander/forward commander, a TERC commander, the Commissioner or Deputy Commissioner to the extent that they are exercising the powers of a terrorist emergency commander, a terrorist emergency forward commander or a TERC commander, or a police officer acting on the instructions of one of those persons.

By extending the range of persons who come within the definition of an *official* in section 47(2), the amendment expands the range of persons who are protected from liability for acts or omissions done under the Act in good faith and without negligence.

⁷⁶ *Legislative Standards Act 1992*, section 4(3)(h).

⁷⁷ OQPC, Fundamental Legislative Principles: *The OQPC Notebook*, page 64.

⁷⁸ OQPC, Fundamental Legislative Principles: *The OQPC Notebook*, page 64; Alert Digest 1998/1, page 5.

Potential FLP issues

Legislation should not confer immunity from proceeding or prosecution without adequate justification.⁷⁹ The OQPC Notebook states:

A person who commits a wrong when acting without authority should not be granted immunity. Generally a provision attempting to protect an entity from liability should not extend to liability for dishonesty or negligence. The entity should remain liable for damage caused by the dishonesty or negligence of itself, its officers and employees. The preferred provision provides immunity for action done honestly and without negligence ... and if liability is removed it is usually shifted to the State.”⁸⁰

The SLC recognised as one of the fundamental principles of law - that everyone is equal before the law, and each person should therefore be fully liable for their acts or omissions. Notwithstanding that position, the SLC also recognised that conferral of immunity could be appropriate in certain situations.⁸¹

Committee consideration

By expanding the list of persons who may be classed as an *official*, the amendment expands the range of persons who are protected from liability for acts or omissions done under the Act in good faith and without negligence.

Providing statutory immunity for public officials who commit acts or make omissions in good faith and without negligence is fairly typical and serves to reassure public officials that they can make decisions in the course of their duties without fear of being held liable.

Typically however these provisions move liability for acts and omissions to the State to ensure that aggrieved persons retain the capacity to seek legal redress and have a party (the State) to take action against. That does not occur with respect to this Act as section 47(1) currently provides (and will continue to provide) that liability does not attach to the State.

The committee noted that what the amendments to section 47 do is to protect a wider group of persons from liability for actions taken in their official capacity under the Act. In light of the fact that the immunity is limited to a specified class of officials, acting or exercising their discretion during periods of terrorism related activity, the committee is satisfied that the clause 54 expansion of liability is appropriate for the circumstances.

3.2 Institution of Parliament

3.2.1 Amendment of an Act by another Act

Clause 36 – proposed replacement of section 8H (Extension of terrorist emergency beyond 7 days to a maximum of 14 days)

Clause 36 proposes to replace section 8H and insert section 8HA to permit the extension of terrorist emergency periods.

Currently under section 8G(9), a terrorist emergency declaration ends 7 days after the declaration is made unless the terrorist emergency forward commander, the Minister or the Premier ends the declaration sooner, or unless the Minister and the Premier extend the period of the declaration under section 8H.

Section 8H allows extensions by one or more periods of not more than 7 days each where it is necessary for terrorist emergency powers to be exercised beyond the current period of the terrorist emergency to protect life or health at serious risk, or critical infrastructure. The extension decision has to be made

⁷⁹ *Legislative Standards Act 1992*, section 4(3)(h).

⁸⁰ OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p. 64.

⁸¹ OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p. 64; *Alert Digest 1998/1*, p. 5.

by the Premier and the Minister but extensions cannot be made under section 8H if the total period of the terrorist emergency, including the extension and each other extension already made under sections 8H or 8HA would be more than 28 days.

Section 8HA allows a regulation to be made to extend, or further extend, the period of a terrorist emergency, by a stated period of not more than 14 days.

Potential FLP issues

A Bill should only authorise the amendment of an Act by another Act.⁸² A clause in an Act, which enables the Act to be expressly or impliedly amended by subordinate legislation or executive action is defined as a Henry VIII clause. The SLC's approach to Henry VIII clauses was that if an Act was purported to be amended by a statutory instrument (other than an Act) in circumstances that were not justified, the SLC would voice its opposition by requesting that Parliament disallow the part of the instrument that breached the FLP requiring legislation to have sufficient regard for the institution of Parliament.⁸³ The SLC considered the possible use of Henry VIII clauses in the following limited circumstances:

- to facilitate immediate executive action;
- to facilitate the effective application of innovative legislation;
- to facilitate transitional arrangements;
- to facilitate the application of national scheme legislation.⁸⁴

The OQPC Notebook explains that the existence of these circumstances did not automatically justify the use of Henry VIII clauses, and, if the Henry VIII clause did not fall within any of the above situations, the SLC classified the clause as 'generally objectionable'.⁸⁵

Committee consideration

Currently the maximum period for a terrorist emergency declaration to be operative is set at 7 days by section 8G(9), although that section contemplates that the Minister and Premier can, under section 8H, extend the period of the declaration by one or more periods of not more than 7 days each (to a maximum total period for the emergency of 28 days). In addition, new section 8HA permits the terrorist emergency to be further extended by regulation, with each regulation only able to extend the terrorist emergency by a maximum 14 days.

Given section 8HA allows regulations to be made to extend a terrorist emergency period beyond the 7 day maximum set by section 8G(9) of the Act, clause 36/section 8HA is a Henry VIII clause. In this instance it is arguably necessary to facilitate immediate executive action during emergency circumstances. As the regulations made under section 8HA are for a limited purpose (to extend the duration of a terrorist emergency period) and for a limited duration themselves (no more than the extended period, being no more than 14 days), the committee considers that permitting such regulations to be made is arguably an appropriate way to manage exigent circumstances.

⁸² *Legislative Standards Act 1992*, section 4(4)(c).

⁸³ OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p. 159.

⁸⁴ OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p. 159.

⁸⁵ OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p. 159; Alert Digest 2006/10, p. 6, paras 21-24; Alert Digest 2001/8, p. 28, para 31.

3.3 Proposed new offence provisions

Clause	Offence	Proposed maximum penalty
28	<p><u>Inserting section 8AG(1) PSPA</u></p> <p>Failure to comply with an information requirement without reasonable excuse.</p>	40 penalty units or 1 year imprisonment
28	<p><u>Inserting section 8AG(6) PSPA</u></p> <p>A person commits a crime if the person commits an offence against subsection (1) in circumstances where the person—</p> <p>(a) intends to—</p> <ul style="list-style-type: none"> (i) seriously endanger the health or safety of any person; or (ii) cause serious damage to property; or (iii) cause serious pollution of the environment; or (iv) seriously prejudice the effective management or resolution of the emergency situation; or <p>(b) knows that, or is reckless as to whether, the person’s noncompliance with the information requirement is likely to—</p> <ul style="list-style-type: none"> (i) seriously endanger the health or safety of any person; or (ii) cause serious damage to property; or (iii) cause serious pollution of the environment; or (iv) seriously prejudice the effective management or resolution of the emergency situation. 	10 years imprisonment
28	<p><u>Inserting section 8AH(1) PSBA</u></p> <p>Giving, in response to an information requirement, information the person knows is false or misleading in a material particular.</p>	40 penalty units or 1 year imprisonment
28	<p><u>Inserting section 8AH(3) PSPA</u></p> <p>A person commits a crime if the person commits an offence against subsection (1) in circumstances where the person—</p> <p>(a) intends to—</p> <ul style="list-style-type: none"> (i) seriously endanger the health or safety of any person; or (ii) cause serious damage to property; or (iii) cause serious pollution of the environment; or (iv) seriously prejudice the effective management or resolution of the emergency situation; or <p>(b) knows that, or is reckless as to whether, giving the false or misleading information is likely to—</p> <ul style="list-style-type: none"> (i) seriously endanger the health or safety of any person; or (ii) cause serious damage to property; or (iii) cause serious pollution of the environment; or (iv) seriously prejudice the effective management or resolution of the emergency situation. 	10 years imprisonment

28	<p><u>Inserting section 8AI(1) PSPA</u></p> <p>During the period of an emergency situation, a person of whom an information requirement has been made must not, without reasonable excuse, disclose an information matter to an unauthorised person for the information matter.</p>	40 penalty units or 1 year imprisonment
28	<p><u>Inserting section 8AI(3) PSBA</u></p> <p>A person commits a crime if the person commits an offence against subsection (1) in circumstances where the person—</p> <p>(a) intends to—</p> <ul style="list-style-type: none"> (i) seriously endanger the health or safety of any person; or (ii) cause serious damage to property; or (iii) cause serious pollution of the environment; or (iv) seriously prejudice the effective management or resolution of the emergency situation; or <p>(b) knows that, or is reckless as to whether, the disclosure of the information matter is likely to—</p> <ul style="list-style-type: none"> (i) seriously endanger the health or safety of any person; or (ii) cause serious damage to property; or (iii) cause serious pollution of the environment; or (iv) seriously prejudice the effective management or resolution of the emergency situation. 	10 years imprisonment
28	<p><u>Inserting section 8AJ(1) PSPA</u></p> <p>During the period of an emergency situation, a disclosure recipient must not, without reasonable excuse—</p> <p>(a) if the disclosure recipient is an authorised person for an information matter—disclose the information matter to an unauthorised person for the information matter; or</p> <p>(b) if the disclosure recipient is an unauthorised person for an information matter—disclose the information matter to another unauthorised person for the information matter, knowing that, or being reckless as to whether, the person to whom the disclosure is made is an unauthorised person.</p>	40 penalty units or 1 year imprisonment
28	<p><u>Inserting section 8AJ(4) PSPA</u></p> <p>A disclosure recipient commits a crime if the disclosure recipient commits an offence against subsection (1) where the disclosure recipient—</p> <p>(a) intends to—</p> <ul style="list-style-type: none"> (i) seriously endanger the health or safety of any person; or (ii) cause serious damage to property; or (iii) cause serious pollution of the environment; or (iv) seriously prejudice the effective management or resolution of the emergency situation; or <p>(b) knows that, or is reckless as to whether, the disclosure of the information matter is likely to—</p> <ul style="list-style-type: none"> (i) seriously endanger the health or safety of any person; or (ii) cause serious damage to property; or (iii) cause serious pollution of the environment; or (iv) seriously prejudice the effective management or resolution of the emergency situation. 	10 years imprisonment

3.4 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 upon the introduction of the Bill. The notes generally 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. The explanatory notes also comprehensively identify a significant number of potential FLP issues.

Section 23(1)(g) of the *Legislative Standards Act* requires explanatory notes to contain 'a brief statement of the extent to which consultation was carried out in relation to the Bill'. As noted at page 3, the explanatory notes listed the stakeholders that were consulted on the Bill but did not include the results of the consultation process.

Appendix A – List of Submissions

Sub	Submitter
1	Mr Brynn Mathews
2	The Greens, Queensland

Appendix B – List of Witnesses**Public Briefing – Brisbane, 11 May 2016***Department of Justice and Attorney-General*

Ms Leanne Robertson, Acting Assistant Director-General, Strategic Policy and Legal Services

Mr Tom Humphreys, Director, Operational Police and Performance, Queensland Corrective Services

Ms Julie Rylko, Acting Director, Strategic Policy and Legal Services

Queensland Police Service

Mr Michael Condon, Acting Deputy Commissioner, Specialist Operations

Ms Tracy Linford, Assistant Commissioner, Intelligence, Counter-Terrorism and Major Events Command

Mr Bill Graham, Superintendent, Intelligence, Counter-Terrorism and Major Events Command

Public Safety Business Agency

Ms Cecilia Vine, Acting Director, Legislation Branch

Mr David Flynn, Acting Inspector, Legislation Branch