

**Submission by the
Office of the Information Commissioner**

Legal Affairs and Community Safety Committee

COUNTER-TERRORISM AND OTHER LEGISLATION AMENDMENT BILL 2017

July 2017

The Queensland Office of the Information Commissioner (OIC) is an independent statutory authority. This submission does not represent the views or opinions of the Queensland Government.

The statutory functions of the Information Commissioner under *the Information Privacy Act 2009* (Qld) (**IP Act**) include commenting on issues relating to the administration of privacy in the Queensland public sector environment.

OIC notes that the Explanatory Notes state that the primary objective of the Counter-Terrorism and Other Legislation Amendment Bill 2017 (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 critical incidents which pose a serious risk to life'.¹

OIC notes that the Bill provides for a significant expansion of search and seizure powers exercisable by police in either a declared terrorist emergency under Part 2A of the PSPA or a declared emergency situation under Part 2 of the PSPA. These expanded powers include the power to collect and use biometric information, require passwords and access information to search an electronic device and copy information found on electronic devices. OIC further notes there is a significant devolution of power from 'commissioned officer' to 'senior officer' in the ability to declare an emergency situation under s5 of the PSPA.

OIC notes that the search and seizure powers are exercisable without a warrant and 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 also lack of a sufficient nexus between use of the expanded powers and the commission of an offence. As outlined in the explanatory notes witnesses could potentially be compelled to provide access information to enable the conduct of a search of their electronic device.²

These 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. The recent WikiLeaks release highlights increasing community concern about the continued erosion of an individual's privacy through the use

¹ Counter-Terrorism and Other Legislation Amendment Bill 2017, Explanatory notes p1

² See above, p2

of sophisticated tools and techniques by law enforcement agencies to access smartphones, computers and internet-connected televisions.

‘Privacy is a fundamental human right recognised in the UN Declaration of Human Rights, the International Covenant on Civil and Political Rights and in many other international and regional treaties. Privacy underpins human dignity and other key values such as freedom of association and freedom of speech’.³

While the right to privacy is not absolute and must be balanced with other rights including public safety, ‘any instance of interference must be subject to a careful and critical assessment of its necessity, legitimacy and proportionality’.⁴ For example, the current state of law enforcement exemptions in jurisdictions such as the UK and US have been highlighted by many commentators and the need to avoid mass surveillance without appropriate judicial or other oversight is an internationally recognised issue.

The IP Act plays a key role in safeguarding the rights of community members’ personal information and provides clear principles and rules to guide appropriate behaviour by public sector agencies. These include the Information Privacy Principles (IPPs), the National Privacy Principles (NPPs) which apply only to health agencies, the transfer out of Australia rules and the obligations when contracting with a service provider.

A raft of recent counter-terrorism laws has been introduced both at a federal level and in Queensland in response to the threat of terrorism leading to gradual erosion of the privacy rights of individuals. OIC notes that the amendments to the PSPA contained in the Bill provide for the expansion of search and seizure powers not limited to a declared terrorist emergency. Given the exceptional nature of these powers, it is 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

³ Global Internet Liberty Campaign, Privacy and Human Rights, An International Survey of Privacy Laws and Practice viewed at <http://gilc.org/privacy/survey/intro.html>

⁴ United Nations Human Rights, Office of the High Commissioner viewed at <http://www.ohchr.org/EN/Issues/DigitalAge/Pages/DigitalAgeIndex.aspx>

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 areas is required.

OIC notes that previous incidents have demonstrated that 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. This may significantly disadvantage youth and other marginalised members of society who are more likely to come into contact with law enforcement agencies and the criminal justice system.

Mobile phone data can contain a large amount of personal information of the mobile phone user and other persons. As noted by a legal officer at Privacy International 'the bigger issue is whether traditional search practices, where no warrant is required, should be applied to mobile phones, which can contain a massive amount of highly personal data. Thus, searching a mobile phone cannot accurately be compared to a search of the home, let alone a physical search. It is far more exhaustive. They have immense storage capacity, can hold thousands of pictures, videos and apps, all of which can reveal so much about your, and potentially your contacts', political, sexual and religious identity.'⁵

As such, some of the measures in the Bill which interfere with an individual's privacy may not be considered necessary or proportionate to ensure public safety. Comments on specific provisions are outlined below:

Comments on Specific Provisions:

Amendment of the *Public Safety Preservation Act 1986*

a) Declaration of emergency situation

OIC notes that the effect of amendments to **s5 (Declaration of emergency situation)** is a significant

⁵ Cited in 'Police should need warrants to search mobile phones, says campaigners viewed at <https://www.theguardian.com/uk-news/2017/jan/13/police-warrant-search-mobile-phones-campaigners-privacy-international>

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.

b) Enhanced search and seizure powers including the power to require access information for a person in the declared area for either an emergency or terrorist emergency.

As noted previously, the Bill inserts new Division 4 (Extraordinary emergency powers) into Part 2 (Emergency situation) of the PSPA to provide police with the expanded powers during an emergency situation. This includes the power to:

- stop, detain and search any person in the authorisation area, and anything in their possession such as a laptop or mobile phone, without a warrant, for anything relevant to the emergency situation (s8AZB)
- require name, address and date of birth (s8AZC)
- take and use a person's biometric information to establish or confirm the identity of the person who is in the authorisation area (s8AZD)
- require a person to provide access codes or assistance to operate the storage device to facilitate the search of a storage device under s8AZB. It also includes the power to require a person to provide an encryption key to access information that has been encrypted (s8AZE).
- Seize a storage device if a person fails to comply with the requirement to provide access information (s8AZE(6))
- Search information stored on the device or accessible from the device (s8AZF). The Explanatory Notes provide the following examples: messages sent from a messaging application or photographs accessible from the device but stored on a remote server.⁶

Amended s8N and new sections 8PAA-8PAC provide mirror the search and seizure powers in the declared area for a terrorist emergency.

OIC considers that the privacy impacts of the above amendments could be reduced if the legislation:

- A mechanism for post event scrutiny of search and seizure powers should be explored.

⁶ Counter-Terrorism and Other Legislation Amendment Bill 2017, Explanatory Notes, p38

- Could require, to the greatest extent practicable, a defined threshold test or requirement to be met to enable a police officer to exercise the power to require a person to give an officer access information i.e. greater nexus between the commission of an offence and the exercise of search and seizure powers. For example, s8AZB(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.
- defined the period in which a seized storage device can be held by QPS before it must be returned to the individual except in circumstances where QPS successfully argues before a Court that evidence obtained from a seized storage device needs to be retained.
- gave individuals a right to be present during a search of their storage device.
- imposed greater controls as to how QPS may use a storage device to send information stored on the device to another person, for example, that all usage must be logged. OIC notes that other jurisdictions, such as the Department of Immigration and Border Protection have received allegations about misuse of confiscated device
- subject 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.

OIC is available to provide any further information or assistance as required to assist the Committee.