

LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

# **Liberty response to the draft Civil Contingency Bill**

**August 2003**

*Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.*

## **Introduction**

1. Before we engage in a substantive consideration of the draft bill it is worth briefly considering historical emergency power legislation. Within days of the outbreak of the First World War parliament passed the Defence of the Realm Act 1914, giving the government power to make regulations for 'securing the public safety and defence of the realm'. As the Act lapsed at the end of the war the government introduced an Emergency Powers Act in 1920. This along with the 1964 Emergency Powers Act (and several amendments) have, along with civil defence acts in 1948 and 1986, formed the basis of emergency power legislation for over 80 years. The United Kingdom has in this time experienced the Second World War, the Cold War and many years of sectarian violence in Northern Ireland which has frequently involved attacks on mainland Britain.

2. We do not dispute that there may be grounds for updating civil contingency measures. Certainly earlier laws could not anticipate the problems arising out of a communications network breakdown for example. However, the main focus for change contained in the draft bill is to broaden the definition of emergency and an increase of powers available once an emergency has come into effect. We fear the Government using the current climate of fear and uncertainty about the future as a means to allow itself sweeping powers without an appropriate consideration of proportionality. The government is to be given powers which go beyond any that were considered appropriate for those times mentioned above when the nation arguably faced far greater threat.

3. It is tempting to view civil contingency laws in a more indulgent manner than other Acts of Parliament. They, unlike most other laws, will not operate on a day to day basis and will only come into effect when the government has declared there to be a national emergency. Any law which will suspend our fundamental rights and liberties should be subjected to intense scrutiny. We trust that parliamentarians will not allow themselves to be persuaded that the bill must be allowed to pass through unchallenged on the basis that to do otherwise would in some way pose a threat to national security.

4. The Consultation Paper sets out a number of questions. We have not answered all of these or answered them in order. Rather we have addressed those questions which we feel are relevant to us. We are focusing solely on Part 2 of the Bill, as it is the use of emergency powers which concerns us.

### **Overview**<sup>1</sup>

5. The proposed legislation could allow the Government by order of the Secretary of State<sup>2</sup>,

- to give oral directions<sup>3</sup> enabling (among other things) the destruction of a citizen's private property without compensation<sup>4</sup>;
- to create an imprisonable criminal offence for obstructing that destruction, triable only before Magistrates<sup>5</sup>;
- and all other issues concerning the destruction being decided by a tribunal specially created to try such crimes<sup>6</sup>;
- with accompanying suspension of any primary legislation<sup>7</sup>;
- and the only 'remedy' available to the citizen being a declaration of incompatibility with the Convention<sup>8</sup>;

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<sup>1</sup> References to sections are to those of the Bill and to the Convention are to The European Convention for the Protection of Human Rights and Fundamental Freedoms, save where indicated.

<sup>2</sup> cl. 19, 20(2)(b), (3)

<sup>3</sup> cl. 21(3)(a)(ii)

<sup>4</sup> cl. 21(3)(c)

<sup>5</sup> cl. 21(3)(i)(iii), 21(4)(d)(i), (iii)

<sup>6</sup> cl. 21(3)(l)

<sup>7</sup> cl. 21(3)(j)

<sup>8</sup> cl. 25

- merely because a situation is about to occur<sup>9</sup> which the Government alone considers may present a serious threat to the performance of any statutory activities (however minor)<sup>10</sup> and the Secretary of State thinks that such directions are necessary to mitigate a serious aspect of the threat<sup>11</sup> and believes existing legislation is inadequate or would cause serious delay<sup>12</sup>.

Parliament might not be convened for up to 5 days before considering the appropriateness of such directions<sup>13</sup>.

6. We imagine the armed conflict in Iraq would have constituted a security threat in the UK, which if the Secretary of State considered sufficiently serious, could trigger the Bill's sweeping emergency powers<sup>14</sup>, including a prohibition on peaceful protest<sup>15</sup>. If this 'seriousness assessment' were based on intelligence and raised national security issues, those emergency powers would effectively be immune from legal challenge<sup>16</sup>.

7. The Bill is the most powerful piece of peacetime legislation ever proposed, in seeking to grant the Government unprecedented and draconian powers to make emergency regulations unavailable under any existing legislation. This kind of legislation necessarily requires the closest scrutiny: it is in times of emergency that citizens' fundamental rights are most at risk.

8. A state of emergency is a last resort, is frequently invoked by undemocratic regimes to usurp the rule of law and generally causes political and economic instability.

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<sup>9</sup> cl. 19(1)(a)

<sup>10</sup> cls. 17(4)(b), 17(6)(a)

<sup>11</sup> cl. 21(1)(a)

<sup>12</sup> cl. 21(4)(e)

<sup>13</sup> cl. 24

<sup>14</sup> cls. 17(1)(d), (5)(a), (7)

<sup>15</sup> cls. 21(3)(f), (g) and (h)

<sup>16</sup> c.f. *Secretary of State for the Home Dept. v. Rehman* [2003] 1 AC 153, HL

## **Definition of ‘emergency’**

### **Modernisation of Emergency Powers Legislation**

Consultation Paper **Q1: Is the definition of emergency the right one? If not, in what ways should it be tightened or expanded to exclude certain classes of event or situation?**

Consultation Paper **Q12: Do you agree that the current emergency powers framework is outdated and needs to be replaced? If you do not think it should be replaced, please explain why.**

Consultation Paper **Q13: Do you agree that the circumstances in which special legislative measures may be taken should be widened from limited threats to public welfare to include threats to the environment, to the political, administrative and economic stability of the UK and to threats to its security resulting from war or terrorism? If not, how would you like to see the circumstances narrowed or extended?**

9. A state of emergency has been declared on 12 occasions since 1920, the last being in 1974 and only ever in times of industrial unrest<sup>17</sup>. The present Government has shown an increased willingness to declare an emergency: a ‘technical’ state of emergency was declared in 2001 following the September 11 attacks in the United States to enable the Government to derogate from article 5 of the European Convention on Human Rights (ECHR) by reliance on article 15 thereby permitting indefinite detention without trial under the Anti-Terrorism Crime and Security Act 2001<sup>18</sup>. None of the other 43 signatories to the Convention have felt the need to derogate.

10. Given the ECHR requirement for an article 15 derogation that there be “an exceptional situation of crisis or emergency which affects the whole population and

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<sup>17</sup> Chapter 5, §14 Consultation Document

<sup>18</sup> see *A and X v. Secretary of State for the Home Dept* [2003] 2 WLR 564 (currently on appeal to the House of Lords)

constitutes a threat to the organised life of the community of which the State is composed”<sup>19</sup>, it is difficult to see how the Government could avoid declaring a state of emergency under the new definition in the Bill if the 2001 Act is to survive in Strasbourg<sup>20</sup>.

11. In the Emergency Powers Act 1920, an emergency was defined as “*any action taken or immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated, by interfering with the supply and distribution of food, water, fuel or light or with means of locomotion, to deprive the community or any substantial portion of the community of the essentials of life*”. The 1920 Act was passed in the context of post-revolutionary Europe and was primarily directed at industrial action, prevalent in post-war Britain.

12. The Emergency Powers Act 1964 further widened the definition of an emergency to “*there have occurred or are about to occur events of such a nature as to be calculated, by interfering with the supply and distribution of food, water, fuel or light or with means of locomotion, to deprive the community or any substantial portion of the community of the essentials of life*”.

13. Although it could be argued that the definitions are outdated in their restrictive references to food, water, fuel, light and locomotion, at the core of an emergency is the disruption to the community of vital essentials. This should remain the touchstone of any modern definition.

14. The Government appears to concede that if the restrictive references were updated in the existing legislation, it would suffice to meet the exigencies of modern threats to society<sup>21</sup>.

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<sup>19</sup> *Lawless v. Ireland (No.3)* 1 EHRR 15 at [28]

<sup>20</sup> Although, according to Mr Blunkett, there was “no immediate intelligence pointing to a specific threat to the UK”.

<sup>21</sup> Chapter 5, §18 Consultation Document

15. The proposed definition of emergency is flawed in a number of serious respects. In particular, the ‘triple lock’<sup>22</sup> (seriousness, need and relevant geographical extent) is a slender safeguard against misuse of the emergency powers. The geographical extent is more of a limited feature than a ‘lock’ while the regulation maker (i.e. Queen on the advice of Ministers or Secretary of State) need only think regulations are necessary to prevent/control/mitigate a serious aspect/effect of the emergency to pass any regulations s/he thinks are necessary<sup>23</sup>. S/he is only prohibited from making the kind of regulations which s/he believes could be made by existing legislation unless s/he believes that that using existing legislation would be insufficient or cause serious delay<sup>24</sup>. Such a subjective trigger completely immunizes the regulations from any effective legal challenge.

16. The (subjective<sup>25</sup>) seriousness requirement is also an insufficient safeguard against misuse<sup>26</sup>. Although threats to the welfare of the population, the environment and political/administrative/economic stability are inclusively defined<sup>27</sup>, ‘seriousness’ is not. There is no requirement of an extensive effect on a substantial portion of the population, unlike the (pre-) existing legislation<sup>28</sup>. Moreover, the inclusive definitions of ‘threats’ in Clause 17 are drafted far too widely: for example, an event which may cause damage to property necessarily constitutes a threat to the welfare of the population<sup>29</sup>. If it is sufficiently serious it thereby constitutes an emergency, yet seriousness is not defined, even inclusively.

17. Moreover, the legislative intention in using ‘serious’ to describe the threat in Clause 17(1), rather than in relation to the examples of triggering events/situations in Clauses 17(2) to (5) is unclear. The statute reads as though the test is a ‘credible threat’

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<sup>22</sup> Chapter 5, §19 Consultation Document

<sup>23</sup> cls.21 (1)(a) and (b) resp.

<sup>24</sup> cl. 21 (4)(e)

<sup>25</sup> in both ss.18 (1) and 19(1)

<sup>26</sup> c.f. §41 Explanatory Notes and Chapter 5, §20 Consultation Document

<sup>27</sup> cl. 17 (2) to (5)

<sup>28</sup> “on so extensive a scale” (s.1 EPA 1920) and “substantial portion of the community” in s.1 EPA 1920 (as amended by EPA 1964)

<sup>29</sup> cl. 17 (2)(d)

rather than a ‘threat with serious consequences’ as seen in definition of ‘terrorism’ in S.1 Terrorism Act 2000. The 2000 Act requires a threat of action involving serious harm (not a serious threat of action involving harm).

18. Similarly, whilst events which may cause homelessness or disruption of food supply, communication systems, transport facilities or educational services are serious matters, they do not necessarily constitute a threat to public welfare<sup>30</sup>.

19. Events which may cause contamination of land, water or air with fuel oils or involve flooding or disruption of plant/animal life may not necessarily constitute an environmental threat if, for example, highly localized. The use of ‘may’ in Clauses 17(2) to (4) is too low a threshold.

20. There is no compelling justification for widening the definition of emergency to include threats to political, administrative or economic stability nor is any clear reason given. The inclusive definition of these threats is too wide and provides little guidance on how the powers would in fact be deployed in practice: Any disruption of Government activities, however trivial, necessarily amounts to a political/administrative threat<sup>31</sup>. Disruption of non-essential public functions<sup>32</sup> is also automatically a threat to political/administrative stability and events which may disrupt non-core financial institutions necessarily constitute an economic threat<sup>33</sup>. Although unlikely in this country, it is chilling that the Government could, in principle, declare a state of emergency and suspend all primary legislation<sup>34</sup> if faced with potential political instability. Political and economic instability is generally the consequence of declaring a state of emergency rather than the pre-conditions for one.

21. The legislative need for a threat to security specifically to constitute an emergency is not clear. In particular, war and armed conflict outside the UK necessarily constitute a

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<sup>30</sup> cls. 17(c) and (e)-(h)

<sup>31</sup> cl. 17 (4)(a)

<sup>32</sup> public functions include any function conferred by any enactment however, minor: cl. 17 (4)(b)

<sup>33</sup> cl. 17 (4)(c)

<sup>34</sup> cl. 21 (3)(j)

security threat within the UK under Clauses 17(5)(a) which clearly may not be the case. Just as an emergency depends on seriousness of the threat, a threat to security depends on the nature of the underlying event and its nexus to the UK.

22. Similarly, terrorist acts outside the UK may not necessarily constitute security threats within the UK<sup>35</sup>. The seriousness of a security threat can rarely be independently scrutinized (by Parliament or the courts) for reasons of national security. Thus, provided any terrorist act abroad is subjectively ‘serious’, an unchallengeable state of emergency would necessarily follow. The seriousness of security threats is often based on intelligence reports, whose questionable reliability was highlighted by the recent controversy surrounding the Iraq dossier.

23. The possibility of emergency regulations because an emergency *is about to occur*<sup>36</sup>, based on an event which *may*<sup>37</sup> cause a particular threat, is worryingly twice removed from an immediate risk.

### **Territorial extent**

Consultation Paper **Q14: Do you agree that the use of special legislative measures should be possible on a sub-UK basis? If not, please explain.**

24 Although, sensibly, a sub-UK area can be designated as in emergency, there is no statutory requirement that the area specified is minimized only to that strictly necessary to control the emergency. The smallest possible area to which an emergency can apply is a ‘region’<sup>38</sup> as defined by Schedule 1 of the Regional Development Agencies Act 1998 (typically a whole county). A larger than necessary emergency area would be a disproportionate use of the proposed powers and would accordingly breach human rights.

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<sup>35</sup> c.f. ss.17 (5)(b), (7)

<sup>36</sup> cl.18 (1) and 19(1)

<sup>37</sup> cl. 17 (2), (3) and (4)

<sup>38</sup> cl. 17 (1), 18(2)(b), 19(2)(b)

25. Similarly, the fixed 30 day period for a Clause 18(1)/19(1) proclamation/order is too inflexible to satisfy proportionality<sup>39</sup>. The possibility of indefinite renewal of the proclamation or regulations under Clause 23(3)-(4), albeit subject to Parliamentary scrutiny, is also disproportionate. If an extended period of emergency exists (i.e. in excess of 30 days) there is necessarily time to debate and pass (temporary) primary legislation<sup>40</sup>. This is more democratic than repeated monthly renewals.

### **The process for using emergency powers**

Consultation Paper **Q15: Do you agree that authority to declare that special legislative measures are necessary should remain with The Queen as Head of State, acting on the advice of Ministers? If not, who should it sit with?**

26. The United Kingdom is a constitutional monarchy and as such we see no particular purpose in discussing whether the Queens' role as Head of State is one that should be retained for the purposes of the bill. It is a safe presumption that the phrase 'acting on advice of Ministers' will effectively mean 'acting according to the wishes of Ministers'. The real issue is the accountability of the Executive to Parliament (see below).

Consultation Paper **Q16: Do you agree that in the event the process of making a Royal Proclamation would cause a delay which might result in significant damage or harm, a Secretary of State should be able to make the declaration in place of The Queen as Head of State, acting on the advice of Ministers? If not, is delay acceptable or is there another alternative mechanism?**

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<sup>39</sup> cls. 23 (1), (2)

<sup>40</sup> e.g. Prevention of Terrorism (Temporary Provisions) Act 1974 which was passed in 48 hours.

29. Although Parliament must approve any regulations within 7 days<sup>41</sup> and if Parliament is prorogued for more than 5 days it must meet within that time, there remains the possibility of draconian emergency regulations being in force, and Parliament unable to debate the matter for 4 days. This is unacceptably long when the country may be in a state of national emergency and when regulations, which include powers to destroy private property without paying compensation, may already be in force. *Parliament should be required to be immediately reconvened for an emergency session.*

30. At the very least, if a Royal Proclamation would cause serious delay (which should be defined as a delay *likely* to result in serious damage otherwise preventable by the regulations) *and Parliament cannot be convened without causing serious delay* then the Government should be able to make necessary declaration under s.19. Reliance on collective Cabinet responsibility for a decision by a single Minister is unacceptable: the secrecy protecting the Cabinet decision-making process removes transparency and inhibits accountability. Moreover, it is too dangerous to have the power vesting in one Minister alone. The suggestion in §27 in the Consultation Paper that regulations might be approved solely by Order in Council would effectively (since Privy Council approval is a formality) permit a decision by two Cabinet Ministers (who are automatically Privy Councillors) and does not address the above concerns.

31. Clauses 24(1) and (2) should require immediate notification – the Lord Chancellor and Speaker of the House of Commons are always available. Clause 24(6) should require the Secretary of State to lay the regulations before Parliament *by the time it meets* – especially since oral directions under the regulations are permissible<sup>42</sup>.

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<sup>41</sup> cl. 24 (7)

<sup>42</sup> under cl.21 (3)(a)(ii)

## **Human Rights**

### **Scope of regulation making powers**

Consultation Paper Q17: **Do you agree that emergency regulations should be treated as primary legislation for the purposes of the Human Rights Act? If not please explain why.**

32. The stated justification for treating emergency regulations as primary legislation is in order to prevent any effective Human Rights Act challenge<sup>43</sup>, leaving the only ‘remedy’ for regulations which breach the Convention as a declaration of incompatibility<sup>44</sup>. This is a startling device to avoid the true ambit of the Human Rights Act in circumstances when the citizen’s fundamental human rights are most likely to be under threat. The rationale for declarations of incompatibility was to preserve Parliamentary Sovereignty – where Parliament had *debated* and passed primary legislation which could not be read compatibly with the Convention<sup>45</sup>, the courts should be empowered to say so but not to overrule Parliament’s clear legislative intention. The situation is qualitatively different for secondary legislation, whose precise terms and scope have not been considered in Parliament. It is a truly remarkable proposal that a Secretary of State’s utterances could legally become statutes. The purported justification is that, unless treated as primary legislation, injunctions against regulations allegedly breaching the Convention would interfere unduly with the Government’s emergency powers. This is wholly unrealistic given that the ‘balance of convenience’ test applied when granting injunctions against emergency regulations would weigh heavily in the Government’s favour, especially during security threats (in which the courts traditionally defer to the legislature<sup>46</sup>). The proposals are a disproportionate response to a misconceived fear.

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<sup>43</sup> Chapter 5, §30-36 Consultation Document and Cl.25

<sup>44</sup> s.4 Human Rights Act

<sup>45</sup> using s.3 Human Rights Act

<sup>46</sup> c.f. *Secretary of State for the Home Dept. v. Rehman* [2003] 1 AC 153, HL

33. The fact that the regulations will need to be approved by Parliament and will only be temporary still fails to justify sufficiently the radical re-classification proposed. Firstly, the power to renew the state of emergency indefinitely may result in semi-permanent regulations<sup>47</sup> and Parliament can (and should) pass primary legislation extremely quickly if necessary<sup>48</sup> (which can be Convention incompatible). *This is particularly so given that the proposed powers permit emergency regulations creating criminal offences or disappling any enactment*<sup>49</sup>.

34. Even if treated as primary legislation, legal proceedings requiring those carrying out the regulations to act Convention compatibly could still be brought<sup>50</sup>, even if the regulations themselves were effectively immune from challenge.

35. If the Government's real intention in an emergency is to seek to enact regulations which are Convention incompatible, this should be overtly done rather than forcing the citizen to bring urgent legal proceedings during an emergency to protect his fundamental rights. There is an established, rapid mechanism for derogation from the Convention under article 15<sup>51</sup>. This was invoked following the September 11 attacks on the United States to pass the indefinite detention without trial provisions contained in Anti-Terrorism Crime and Security Act 2001<sup>52</sup>.

36. Clause 21 contains extraordinarily wide and unfettered powers which might easily have the potential to breach fundamental human rights, including:

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<sup>47</sup> c.f. a national state of emergency existed for 8 months in 1926

<sup>48</sup> e.g. Prevention of Terrorism (Temporary Provisions) Act 1974 passed in 48 hours.

<sup>49</sup> cl. 21 (3)(i) and 21(3)(j)

<sup>50</sup> §53 Explanatory Notes. Subject to ss.3 (2)(c), 4(3), (4) and 6(2)(b) Human Rights Act

<sup>51</sup> "In time of war or other public emergency affecting the life of the nation any High Contracting Party make take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided such obligations are not inconsistent with its obligations under international law"

<sup>52</sup> see §§5-6 above.

- the power to establish a ‘special regulations tribunal’ with apparently unlimited jurisdiction – (article 6 breached, for example, if not independent/impartial and determining civil rights)
- the power to allow *any* specified person to give *any* oral directions, which, if disobeyed or obstructed, can result in an imprisonable criminal offence (article 7 breached if offence too vague);
- although criminal offences for breaches of the regulations are triable only before the Magistrates’/Crown Court (not before the ‘special regulations tribunal’), the provision safeguarding existing criminal procedure in Section 2(3) EPA 1920 is not preserved (which may breach article 6);
- destruction or confiscation of private property, animal or plant life without compensation (article 8 breached if there is a disproportionate interference);
- prohibition of any specified assembly, including peaceful ones (article 11 will be breached if there is disproportionate interference);
- prohibition of *any* specified activity;
- requiring a person to act in performance of any function (whether conferred by the regulations or not);

37. The Clauses 21(3)(j) power is possibly the most remarkable – emergency regulations may “disapply or modify any enactment or a provision made under or by virtue of an enactment”. In principle, this could even include a power to disapply any part of the Human Rights Act or the Section 24 HRA requirement for Parliamentary approval of the regulations in the Bill itself (!) In its present unrestricted ambit, s.21(3)(j) is not Convention compatible.

38. In its 15<sup>th</sup> Report of Session 2002-2003 the Joint Committee on Human Rights said of Clause 25,

*'We strongly disapprove of any attempt to extend the range of instruments which have to be treated as primary legislation so as to make them exempt from the need to comply with Convention rights. It provides a way of allowing the executive to legislate, before seeking parliamentary approval, in ways which are known or believed to be incompatible with Convention rights, while denying victims of violations the right to obtain an effective remedy from a court or tribunal. In our view, regardless of the context, the effect of this legislative technique is objectionable on human rights grounds.'*

We echo this assessment.

## **Conclusion**

39. The Bill is legislative overkill, responding to heightened concerns since September 11 2001. The proposed new definition of emergency, whilst updating the new 'essentials' upon which society is now reliant, is far too broad. The 'triple lock', including the 'seriousness assessment', is entirely subjective and provides slender safeguards against misuse. There is no compelling justification for the highly controversial inclusion of threats to political, administrative or economic stability. The scope of emergency regulations is extraordinarily wide, has a high potential to breach human rights and includes the startling power to disapply any primary legislation. The proposal that emergency regulations be treated as primary legislation is ill thought-out and undermines the whole rationale underpinning the Human Rights Act. The Government's increased willingness to declare an emergency highlights the need for anxious scrutiny of widened emergency powers and the motives for expanding them. Fundamental rights are most at risk in times of emergency.

**Drafted for Liberty by Alex Bailin**

**Matrix Chambers 2003**

