
Civil Contingencies Bill 2020

Summary of Responses

Public Consultation



Cabinet Office

Oik Coonceil ny Shirveishee

November 2020

Civil Contingencies Bill 2020

We Asked

The purpose of this consultation was to gather views regarding the Council of Minister's proposal to introduce a Civil Contingencies Bill 2020 – this aims to develop new legislation to replace the Emergency Powers Act 1936, which was used during the Island's recent response to Covid-19.

You Said

36 responses were received to our survey. Cabinet Office welcomes this constructive engagement. These came from members of the public, Government Departments and members of Tynwald.

All responses received during the consultation have been considered and are assisting the further development of the legislation and operational policy before a final version of the Bill is arrived at.

We Did

We have carefully considered responses and compiled various amendments for political decision, after which, a final version of the Bill is aimed to be progressed for further consideration.

1. Background:

From 21 August to 02 October 2020, a Public Consultation was conducted by the Cabinet Office on the Consultation Hub on the draft Civil Contingencies Bill 2020.

The draft elicited a number of responses from the following:-

Respondent Category	Response Numbers
Members of the public	24
Tynwald Members	06
Government Departments / IOM Constabulary	02
Local Authorities	02
Anonymous	01
Academic	01
Total:	36

2. Recommendations

A number of themes were raised by way of feedback. For brevity, these are summarised below:

Clause	Summary	Consultation Views
1	Title of the Bill	Reference as to whether "Emergency Powers" could be included in the long title of the Bill for clarity.
2	Commencement	Several calls to substitute "Cabinet Office" for "Council of Ministers" – perceived as more appropriate for Council to oversee Emergency Powers rather than a Government Department.
3	Interpretation of this Act	<p>The scope, scale and definition of what constitutes an emergency was raised. Feedback considers the classifications as perhaps too broad, i.e. a situation which "may...cause illness or injury" – and scale, insofar as – is it an emergency if it risks one life? 100 lives? 1000 lives? And so forth.</p> <p>Further queries were raised in respect of including an event that "may...cause disruption to animal, marine or plant life"... "Facilities for transport..." and others – and whether it could be beneficial to communicate the intended scale reached constituting an emergency.</p> <p>The test/evidence for an emergency was considered weak by some respondents.</p>

4	Functions in relation to emergency planning	<p>Several responses request that the Council of Ministers take the role – rather than the Cabinet Office, or any one Department.</p> <p>Observations noted in respect of the concentration of such powers in any one Department – representations expressed a preference for the Council of Ministers to hold such.</p>
5	Exercise of functions by the Council of Ministers	<p>A majority of respondents raised concern in respect of power being “exercisable” by “any two” (or more) Ministers.</p> <p>Respondents in the main considered this number of Ministers as low.</p> <p>Other respondents expressed a preference that His Excellency the Lieutenant Governor exercise certain functions.</p> <p>Others suggest Tynwald ratification within 48 hours.</p> <p>Comments also query whether the meeting(s) of Council “must take place within 7 days” – noting it could be sooner and virtually.</p> <p>Comments query the form of a proclamation of emergency.</p> <p>Observation of contingency planning in the event of the majority of Ministers being deceased or incapacitated in an unforeseen emergency scenario.</p>
6	Interpretation for the purposes of this Part	<p>Calls for more clarity regarding who might exercise such “public functions”.</p>
7	Power to make emergency regulations	<p>Suggestions include that the Council of Ministers [in lieu of Cabinet Office] should only make regulations on the ‘advice’ of Tynwald.</p>
8	Conditions for making emergency regulations	<p>Rationale for provision queried.</p>
9	Scope of emergency regulations	<p>Comments re impingement on the workings or privileges of Tynwald.</p> <p>Concerns expressed about the powers mentioned in this part of the Bill, e.g. under what emergency would the power regarding: “requisition or confiscation of property (with or without compensation)” – be needed.</p>
10	Limitations of emergency regulations	<p>Query raised regarding “other industrial action” [per section (b)] – answered insofar as it includes a lockout and work stoppage/work to rule.</p> <p>No provision for ‘political demonstrations’ noted – concern this would “censor” political dissent.</p>

		Potentially remedied by engaging with authorities [e.g. police, public health] to safely conduct such.
11	Duration: general	Emergency regulations need to be provided to those enforcing them soonest.
12	First continuation approval	Comment suggests Tynwald "should be recalled at once" to endorse regulations.
13	Subsequent continuation approvals	Objections at 13(3b): "the President of Tynwald must"... several consider " <i>must</i> " an inappropriate term addressing the President.
14	Tynwald references	Clause 14 potentially considered unnecessary as it reiterates the situation as set out in section 5 of the Constitution Act 1990.
15	Tynwald scrutiny of emergency regulations	Several comments regarding the need for robust Tynwald oversight – and the primacy of elected members.
16	Effect of lapse	Functional clause.
17	Status of emergency regulations	Comments received suggesting Human Rights not considered/respected.
18	Repeal	Comments received expressing wish for the retention of the Emergency Powers Act (1936).

3. Themes:

Outside of the feedback received in relation to clauses, other themes were identified in responses. Summarised in the table below –

Themes
1. Flexibility: Representations regarding the retention of the right to amend Regulations as under the 1936 Emergency Powers Act / Tynwald oversight.
2. Independence: Representations regarding the benefit of restating that regulations may not impinge on the independence of the Chief Constable under s.3 of the Police Act 1993 – and the independent functions of the Director of Public Health under the s.1 of the Local Government Act 1985.
3. Information Sharing: Consideration as to how best to facilitate information use and exchange during an emergency, cognisant of Data Protection concerns and existing legislation.
4. Future-Proofing: Need to "future proof" the Bill as far as it can be.
5. Executive, Parliament and Emergency Proclamation: Consideration regarding the form, manner and practicality of the Emergency Proclamation and how this is made.

4. Next Steps

As stated, we have carefully considered responses and compiled various amendments for political decision, after which, a final version of the Bill is aimed to be progressed for further consideration.

5. Appendices

The following two responses indicated their consent for their responses to be published, and are reproduced below:

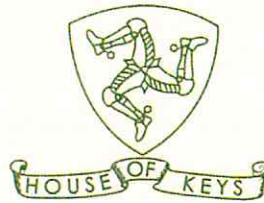
Appendix 1 – Response of the Hon. Juan Watterson BA (Hons) BFP FCA CMgr FCMI SHK
(Speaker of the House of Keys)

Appendix 2 – Miss T M August-Hanson BA (Hons), MA, MNIJ MLC
(Member of the Legislative Council)

Cabinet Office
November 2020

SPEAKER OF THE HOUSE OF KEYS

House of Keys
Legislative Buildings
Douglas
Isle of Man
IM1 3PW
British Isles



Y Chiare as Feed
Oikyn Slattyssagh
Doolish
Ellan Vannin
IM1 3PW
Ny Ellanyn Goaldagh

Mr Carlos Phillips
Cabinet Office
Central Government Offices
Bucks Road
Douglas

2nd September 2020

Dear Mr Phillips

Civil Contingencies Bill 2020


1. Thank you for the opportunity to contribute to the above Bill. I am pleased to contribute, and to have my response published.
2. I am very concerned that the Bill as proposed is a dilution of Tynwald's authority. Considering that the extant legislation was written in 1936 when the Governor was in effect the Chief Minister and President of Tynwald, and the Island was run under authoritarian rule, it afforded Tynwald greater input into emergency powers legislation than is being proposed by the present Government. There are four fundamental issues here:
 - a. the inability to amend regulations,
 - b. the ability of two ministers to invoke emergency powers,
 - c. the ability of a single Department to make regulations,
 - d. the ability of the act to interfere with parliamentary proceedings.
3. That such powers can be invoked by just two ministers in concert places an already precarious democratic balance between the Executive and Parliament in our Island. I notice that the proposed legislation is heavily influenced by (if not plain copied from) the UK's 2004 Act. I should point out that there is an additional 'sanity check' on the executive in that jurisdiction by members of the ruling party. This enhances the protections of the minority in relation to the majority in a way that the Manx system, largely absent of party politics, is unable to do. I am very concerned about this power, and do not support the provisions of clause 5 in this respect.
4. Leading on from the above, the Bill places legislative capacity for regulation making in the hands of the Cabinet Office. Given the importance of the scope and scale of the regulation making power, I believe it should be entrusted to the Council of Ministers. Council of Ministers has provisions for making decisions between meetings and collective responsibility is particularly important at a time of national emergency.

The Hon. Juan Watterson BA(Hons) BFP FCA CMgr FCMI SHK
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5. The 1936, despite being from an authoritarian time, does allow Tynwald Members the opportunity to send the regulations being put to it. The reason for this is important, that Tynwald is able to pass regulations it has confidence in, and that there is a responsibility on all Members of Tynwald to ensure the regulations are as good as they can be. This is easily lost when regulations are 'take it or leave it'. It was also noticeable that in a fast moving situation, as we have seen in the recent emergency, mistakes were made and the parliamentary process allowed for legislators to assist in making better law. It should also be carefully considered that an approved set of amended regulations is better than losing a set of regulations altogether.
6. Clause 9(5) of the Bill permits the executive to interfere with the operation of parliament, which I believe sets a dangerous precedent. Whilst I appreciate that this is present in the UK Act, that hardly constitutes a "Manx solution to a Manx problem". During Covid, Regulations were passed which had the potential to interfere with the privileges of Members. For example, Members could have been prohibited from attending a sitting if a notice had been issued to them requiring them to self-isolate, or lock down. Whilst Tynwald found a virtual way of maintaining operations, it gave cause for concern. Rather than the provision at cl.9(5), I would prefer to see an extension of cl.10(3) to the extent that Emergency regulations may not impinge on the privileges of Members of Tynwald or the operations of its branches. However, it would be entirely reasonable to require the relevant presiding officer to have due regard to regulations, and to vary standing orders in light of the emergency if in their view that is necessary. This leaves the operation of parliament firmly in the hands of parliament and its presiding officers, and does not permit interference (or even the accusation of interference) by the executive.
7. In addition to the constitutional protection of parliament, I believe it would also be important constitutionally to state that regulations may not impinge on the independence of the Chief Constable under s.3 of the Police Act 1993. It may also wish to consider other independent functions such as the Director of Public Health as defined under s.1 of the Local Government Act 1985.
8. I believe that the Act would benefit from a requirement that the Council of Ministers issue a "proclamation of emergency" or similar instrument, rather than the first mention being in regulations made under the Act. The proclamation would provide the foundation for all future actions, and there should be a statutory requirement that it be advertised and issued to Members of Tynwald. This was very much a strength of the 1936 Act, in that it marked a very public delineation between normality and emergency. Such proclamation should be subject to the negative resolution procedure (s.32 Legislation Act 2015), which would permit Tynwald to annul it if such a motion were brought to the next sitting of Tynwald.
9. In s.3(2), I am concerned that the tests as currently worded are rather weak. On the basis that lives are lost and people are injured and become ill every day, it potentially allows for a low bar and sweeping provisions. It would be more robust if it referred to widespread loss of life, illness, injury etc., to differentiate it from routine circumstances. Likewise the term disruption in subsection 3(b) is a very low bar for such serious action.
10. In the Covid19 emergency, it was sometimes opaque what advice Ministers were relying on and from whom, "medics" was a good catch all. I believe there should be a requirement (perhaps in clause 7) that wherever practical when making regulations, the Council of Ministers should publish such expert advice as it has relied on in the making of those regulations. It should be wherever practical to guard against greater considerations such as national security (but should include publication of the advice of the Attorney General, if any). This will make clear to Tynwald where the dividing line is between expert advice and political decision. This was very hard to unpick during the Covid emergency.
11. I would welcome further explanation of clause 8, ss.5-8 as to what the rationale for including this is.

12. In clause 9, the test for significant interference in private life (including confiscation of property) is only that it is "appropriate", whereas I would suggest further thought be given to whether in invoking such widespread powers, the executive should be challenged to think that they are "necessary".
13. I note that in clause 9, there is provision for enabling confiscation of property (and other infringements of liberties) without compensation. This is significant, and I am surprised that this is considered human rights compliant. I believe a framework should be put into law to ensure protection against unnecessary or inappropriate interference. It would not be fair to require an individual to take a Doleance out against Government for compensation where loss has been unreasonably sustained.
14. In 9(3)(i), just to clarify that I am sure that the intention would not be binary (borders open / closed), but to close them to classes of persons or to generally close the borders and have a power to authorise exceptions. This should be explicitly provided for.
15. In clause 11, as a matter of good legislation, the President of Tynwald should be informed no later than the day on which regulations are made to ensure that there is at least a 7 day window open to him in order to arrange a sitting. It would be wholly unfair for him to be advised a day or two later, and therefore have less time to summon Tynwald.
16. Clause 14 to me seems wholly unnecessary, as it merely reiterates the situation as set out in section 5 of the Constitution Act 1990.
17. I am unsure where vires would come from in terms of cross border collaboration with any neighbouring jurisdiction?
18. I presume that in considering the information requirements in the UK Bill, the Council of Ministers has assumed that the provisions of the Government Departments Act 1987 are sufficient for this purpose?
19. Likewise, I am not sure that the GDA1987 provides the same level of monitoring power as section 9 of the UK 2004 Act, in terms of requiring explanations for things done or not done.
20. The enforcement provisions in the UK Act permit High Court Action over certain bodies who do not comply with regulations. It would appear that there is no such "big stick" in the Isle of Man beyond those set out at clause 10(4). An ability to direct a local authority may be available under the Local Government Acts, and there is an ability for CoMin to issue a direction to a Statutory Board under the Statutory Boards Act. I presume that the assumption is that these powers are broadly equivalent to the UK powers, and that this has been assessed?
21. I should point out that the significant issues I have raised above mean that as presently drafted I would not support this Bill.

Yours sincerely



Civil Contingencies Bill 2020:

Concerns put by Tanya August-Hanson MLC

First: I thank Government for the opportunity to respond to public consultation on this legislation – I am happy to do so – and content for my words to be shared publically.

There is a more pressing concern to speak of before looking at this Bill line-by-line:

Where did this Bill come from?

The answer appears to be ‘not from the Council of Ministers’: I’ll explain: The *Courts, Tribunals and Local Authority Procedures, and Miscellaneous Provisions Bill 2020* and this Bill appear to have derived draft principles and drafting instructions from ad hoc CoMin minutes, and drafters have solidified their interpretation of such weak policy in the Attorney General’s Chambers, the drafts were then produced in Chambers, approved by CoMin, and sent out for public consultation.

My issue with the above method is that policy in these Bills appears to have been decided upon by the drafter without political interference at any stage, aside from some inference that Ministers may/might/could want this/that. It isn’t good practice, and it’s anti-democratic.

The powers in this legislation are vast. Of course, we all remember that the UK Government chose not to use the statutory document for COVID-19 upon which this Bill is based. How did that debate bear out in constructing the Bill? Has it been considered?

What were the strengths and weaknesses of the legislation in practice? How do we learn from UK error in building our own Bill? Do we need UK legislation? Perhaps we need to build on the strengths of the Emergency Powers Act 1936, and rid ourselves of its weaknesses, or adapt them into opportunities?

There are significant differences between the two parliaments, Sirs. Significant differences. This Bill must reflect those differences to protect the people’s democratic rights.

Why Civil Contingencies?

Between 1936 and 2020, there were no Emergency Powers needed for pandemic planning – so why is it that when I, and others in Keys, suggested use of an amended Public Health Act, we were told it couldn’t be done? However, there were pandemic plans, weren’t there... Have they been factored into this draft Bill (which doesn’t seem to be overly concerned with any other form of emergency)?

This Bill appears to be the continuation of an approach that was designed to quickly deal with a pandemic that required swift response – not one that considers the strengths, weaknesses, opportunities, and threats, along with a PESTLE analysis that properly assesses an updated approach.

It’s a validation of government’s parental past: earlier this year during the first wave of COVID here, not a view to an improved, appropriate and empowering future, which has been – in part only - copy-pasted in to a draft Bill from a UK Act that Westminster didn’t actually make any use of!

I would like to turn the reader's attention to Jersey's strategy, here hyperlinked: [COVID19](#) – which speaks to a higher level public health policy regarding any further approach to resurgence of the pandemic there. Do we have something as significant and detailed as this document? Are we only to supply the public with legislation they may not read, instead of communicating clear policies to manage expectations? Should something more comprehensive than what's gone before be developed, I hope those working on policy in Cabinet Office (though, I can see a gargantuan gap in resource here) will take note of the Jersey approach.

Where is the integrated borders policy framework? So many questions, and yet still no answers. Just a piece of legislation out to public consultation that isn't finished, we don't know where the principles came from, and it links to an equally unfinished Misc Prov Bill with no apparent parentage, but adoption (as are so many things) by Cabinet Office.

So, what's going on?

When I began looking into this, I contacted the 'drafter' – who was not the drafter of the Bill, he, himself, had fostered the Bill: HC was the original drafter, and not much had changed when the new drafter (PB) was given responsibility for it. He didn't know much about the Bill at the time. I have done my best in scrutinising it with limited understanding as to how it came about:

1. We live in a Parliamentary Democracy that values human rights. Scrutiny protects those rights, and that environment. As proposed, this piece of legislation looks to dim the authority of parliament by lowering its ability to amend regulations in a timely fashion, interfering in parliamentary proceedings – giving great sweeping powers to two Ministers (who could in effect be Ministers in the Cabinet Office, and hand over those powers to the civil service in one department so that it may make regulations whenever, and wherever it chooses. This is an affront to democracy.

The Chief Minister need not hold this much power alongside the Policy and Reform Minister to run a temporary dictatorship from CabO.

Parliamentarians on the backbenches – including myself – worked hard on checking and improving regulations over the course of the first wave. The Bill doesn't give us time to debate regulations, and doesn't, thereby, pay due deference to parliament.

In such a scenario, Parliament is already stripped of democratic balance between the executive and parliament. So, laying only? A take it or leave it approach? Why?

2. Why is this **named** a *Civil Contingencies Bill*? It doesn't scream 'EMERGENCY' to me.
3. S. 3 (2) needs improving – the test/evidential for an emergency here is weak. People's lives are lost, and illness and injury, homelessness, etc., happens every single day of the week in this Island. What is meant here? You've removed people's democratic rights – so explain why it's imperative you do so, and when you intend to return them.
4. In s. 5 – scrutiny is different between Westminster and Tynwald – we have many independent members, the present UK Government has a party to refer to as a check and balance before decisions are made, so subsection 1 doesn't work on Island, and subsection 3; seven days? Tynwald – and her president – can apply scrutiny quickly. We are more nimble than we have ever been before. Please consider fewer days (3?). Please consult privately with our presiding officers on these matters before placing them into primary draft law.

5. Where is there a proclamation of emergency? By CoMin – to Tynwald? Recognising that the *Emergency Powers Act 1936* does make reference to a ‘State of Emergency’ (and that Tynwald wasn’t required to declare it): where is this concept in the Bill?
6. In Division 2, and for the remainder of this legislation – why are we handing power to one department? Where it reads ‘Cabinet Office’ and ‘department’, it should read ‘CoMin’ or ‘Council of Ministers’, and other necessary connected amendments are needed. The civil service is not responsible for political decision-making. Make it reflective of our landscape. It doesn’t diminish the power of the Chief Secretary to ‘make’ the regulations re: Interpretation Act 2015 s. 74 (1).
7. The balance between ‘expert advice’ in any capacity needs to be balanced with political decision-making (Tynwald). Over the course of the first wave – we were very often told this or that ‘was a clinical decision’. This is as satisfactory as it is transparent to the public: both Parliament and the public were puzzled by where the evidence-base behind decision-making was coming from: the word ‘opaque’ was used a number of times.

In s. 7: why not tidy this up by publishing advice from ‘experts’ and more importantly – a shared resource – publishing advice from the Crown’s AG?

8. S. 8 needs consolidating, in parts: it makes no sense. It warrants simplification.
9. S. 9: Remove ‘Cabinet Office’ and exchange for ‘executive/ Council Of Ministers’. Two words: HUMAN RIGHTS? Further thought and a cross-comparison between this section and the *Human Rights Act 2001* needed here. Was this passed by anyone for compliance? What is ‘appropriate’? As for s.9 (2) (k) – this was brave! Surely that’s a matter for Mr President and Tynwald members. This isn’t a dictatorship.
10. S.9 (3) (a) (i) and (ii): ‘written or oral’ – oral? Why? Human Rights check needed in subsection (3) in its entirety. There must be a counter-balance: an indication of intent in this Bill that the landscape won’t sit like this forever. You may be a decent Chief Minister/Minister – who will follow you?
11. S. 9 (5) – First, this doesn’t protect Tynwald from EPRs. Why is the executive able to interfere in parliamentary procedure here? Does this set a precedent for other references to follow? If it were to be improved – I suggest that instead: A person making emergency regulations must ensure that the regulations do not infringe on Tynwald member’s privilege regarding proceedings in either the House of Keys, or Legislative Council. The President must be given due respect.

As Professor Peter Edge has made clear – the **‘absence of protection for Tynwald from the reach of Emergency Regulations exercisable, as the Bill is currently drafted, by a single Minister is a flaw.’**

Here, he suggests that we ‘exclude legislation defining the composition and powers of Tynwald from the reach of emergency regulations by adding further legislation to the list under clause 10 (5)’. I find this a sensible route forward.

12. I’d add that as soon as possible, the regulations be made available to him, so that he might coordinate ‘sittings’ virtually or otherwise, and send on the regulations to Tynwald

members. However, again, I must state that the operations and procedures in Tynwald must remain in the hands of our presiding officers and members.

13. Therefore, in s.11 and s.12, I say this: you are government: do not seek to control parliament.
14. 'Must' isn't a word that need be used by government to our President.
15. Seven days is too LONG – please shorten this, we need to see and debate regs sooner.
16. And, what is s. 14 for, exactly?

The most important concern is that emergency powers are not confused with regular powers. They are a temporary version of 'business as usual', not 'business as usual itself'. That demarcation became an important matter for parliament in changing conversation to asking government to 'let go' of its parental hold over our community at the end of the emergency period.

That's why I feel it incredibly important that we maintain the EPA concept of a 'formal declaration' of those powers, so that the people, and their parliament can see a beginning, a middle, and an end.

Why not have five Ministers declare the emergency, with later approval needed by Tynwald? It would surely have the right level of gravitas, and would pave the way for quick response.

This pandemic has seen significant scrutiny by members of Tynwald – some of which has been most helpful to government, and drafters. Some of the EPRs were incomprehensible, some were pulled, and others amended. We were there to help, but were not given enough time to review these instruments before they were debated, understanding that Ministers weren't given sufficient time either. Mr President had some wise words to impart on this. I hope they've been noted. Seven days is too much time, and provides too little scrutiny.

The *Public Health Act 1990* amendment legislation can't come along quickly enough, in my opinion. I've been making mention of it since the EPA amendments were made this year. The drafter responsible for this Bill expressed his appreciation for altering the PHA to include fixed penalty notices to all members in a briefing last week; something I was categorically told could not be done. As the AG expressed to the Public Accounts Committee during the first wave – I'm sure a lot could be done to amend the PHA ahead of any anticipated second wave with a 'reason for emergency'.

I agree wholeheartedly with Professor Edge's assertion that: **'omitting clause 11 (1) (a) would allow the Emergency Regulation itself to state when it came into effect'** – for the sake of the people having to make heads or tails of this, please do so.

Perhaps now is the time to reflect, and prune practises where they can be improved.

As drafted – I will not support this Bill in my branch.

Warm regards,

Tanya August-Hanson MLC