

**LEGISLATIVE COUNCIL
STANDING COMMITTEE ON LEGISLATION**

**INQUIRY INTO THE CRIMINAL INVESTIGATION BILL 2005; THE
CRIMINAL INVESTIGATION (CONSEQUENTIAL PROVISIONS) BILL 2005;
AND THE CRIMINAL AND FOUND PROPERTY DISPOSAL BILL 2005**

FURTHER SUBMISSIONS ON BEHALF OF THE ATTORNEY GENERAL

Criminal Investigation Bill 2005

1. Clauses 3 and 9 *"officer" and "public officer"*
 - (a) As discussed at the hearing, the purpose of the inclusion of "public officers" in the Bill is to enable persons holding statutory offices to be provided with some or all of the powers available under the Bill to "public officers" for the purposes of investigating offences.
 - (b) An example of this can be seen in relation to wildlife officers appointed under the *Conservation and Land Management Act 1984*. Section 20 of the *Wildlife Conservation Act 1950* currently provides that wildlife officers are prescribed to be public officers under the *Criminal Investigation (Identifying People) Act 2004* and may use the powers under Part 3 of that Act to request a suspected offender's personal details.
 - (c) In the same way, future legislation could provide that wildlife officers shall have the power to arrest provided by clause 127 in relation to offences under the *Wildlife Conservation Act 1950*. That could be done by prescribing wildlife officers, either by an amendment to the *Wildlife Conservation Act 1950* or by the making of a regulation, to be public officers under this Bill and to prescribe that the power under clause 127 may be exercised.
 - (d) The purpose of this inclusion of "public officers" is to attempt to allow, over time, all investigative powers to be standardised and to reduce duplication in the Statute Book. Except in extraordinary cases, it is hard to see why any public officer who is not a police officer

would need investigative powers greater than or differing from those the Bill proposes generally for police officers.

- (e) The Hon George Cash expressed some concern about the potential for the definition of "public officers" to be wide enough to include officers who are not investigative officers.
- (f) In order to remove any doubt about the scope of that definition, the Government will move for an amendment to clause 9(1)(a) to clarify that offices to which people are appointed are those which include a function to investigate or prosecute offences.
- (g) In addition and in any event, the Government will move for an amendment to clause 9(1)(c) to delete the words "by virtue of regulations" and to insert the words "because it is prescribed". This is necessary to be consistent with clause 9(1) whereby prescriptions may be effected by Acts or regulations.

2. Clause 127 *Arrest Power*

- (a) There are two primary purposes to this clause. The first is to allow a arrest for an offence only if there is a relevant reasonable suspicion. The second is to limit that power in the case of non-serious offences to circumstances where it is reasonably necessary to exercise it.
- (b) If an offence does not carry a penalty of 5 years imprisonment or more, there will be no power to arrest unless one of the circumstances provided in clause 127(3)(b) exists. If the suspected offence does carry a penalty of 5 years or more, the proposed power in clause 127(2) is the same as the current power in section 564 of the *Criminal Code* to arrest persons suspected of committing an offence for which the penalty is imprisonment. Thus, in the case of non-serious offences, clause 127 is not an expansion of the presently existing power of arrest; it is a reduction.
- (c) The Committee expressed some concern with clause 127(1)(b) which provides that the term "serious offence" can be an offence prescribed by regulation. At this stage, no offences have been identified which will be prescribed under this clause. The purpose of the clause is to provide a convenient way to enable future prescription of an

unconditional arrest power should there be a perceived need to do so with respect to particular offences carrying less than 5 years imprisonment.

- (d) Clause 127(1)(b) is not critical to the effectiveness of this Bill. However, it provides a useful means to allow the Executive under Parliamentary control to adapt readily to changing circumstances.

3. Clauses 15(5) and 24 *Protection from liability*

- (a) The Committee questioned the interplay of these two clauses.
- (b) The two clauses relate to different scenarios. Under clause 15(5), a person assisting a person who is exercising a power under the Bill has the same protection afforded to the person exercising the power. That protection may vary depending on the legislation under which the person acts.
- (c) On the other hand, where a person uses reasonable force to prevent violence etc, clause 24 provides that the use of such force is lawful. The intention of this clause is to provide an authority for a person to use reasonable force in order to prevent violence etc. That authority will provide a defence to a prosecution or a civil claim in relation to that use of force. The person does not need to be assisting another person for the protection to arise.
- (d) However, it is apparent that the use of the words "It is lawful" in clause 24 is inconsistent with other clauses which provide authority to take actions. For example, clause 25, which provides an authority for a citizen's arrest, uses the words "Any person may arrest another person ..."
- (e) For consistency and clarity, the Government will move to amend clause 24 in order to remove the words "It is lawful for any person to use any force" and to insert the words "Any person may use any force" together with any necessary changes.

4. Clause 31(6) *Judicial officers' names on warrants*

- (a) The Committee asked about the discretion to include the names of judicial officers on search warrants. The intention of the clause is to

provide a power not to include such names. The use of the word "may" provides a discretion to include the name, but the clause is unclear as to who holds that discretion.

- (b) Rather than providing a discretion to include a judicial officer's name on a warrant provided to the person whose premises are the subject of the warrant, it would be simpler and less problematic in a practical sense if the discretion were removed. Thus, officers would not have to consider whether a judicial officer wished to have his or her name on the copies of the warrant and there would be less likelihood of error.
- (c) The Government will therefore move for an amendment to this clause to require that the copy of a warrant given under subsection (2)(c) or 3(b) or left under subsection 5(b) omit the name of the judicial officer who issued it.

5. Clauses 76 and 112 *Penalty for misuse of forensic information*

- (a) The Committee expressed a concern about the potential misuse of forensic information without penalty, and I agreed that there did not appear to be any policy-based reason why there should not be a sanction. I maintain that position and do not disagree with the Committee that an offence-creating provision may be appropriate.
- (b) However, as foreshadowed, there are difficulties in the drafting of a suitable offence. For example, the concepts of "use" and "misuse" of information are somewhat elastic. Discussions with Parliamentary Counsel on how to overcome those difficulties is ongoing. It presently appears that the scope of any prohibition might best be limited to the improper publication of photographs obtained under Parts 8 and 9.
- (c) Assuming that those difficulties can be overcome, the Government will move an amendment to provide an offence as suggested.

6. Clauses 90(5) and 100(4) *The Public Advocate*

- (a) The Public Advocate has made written submissions expressing concerns about the reference to her in these clauses. These clauses

provide that a magistrate dealing with FP warrants with respect to incapable persons may call on the Public Advocate for information or submissions. The Public Advocate's concerns relate to the fact that the *Guardianship and Administration Act 1990* does not provide for the functions described in these clauses.

- (b) The intention of these clauses is to expand the Public Advocate's functions to enable her to provide a magistrate with her input relevant to an incapable person the subject of an application for a FP warrant. There is no requirement that those functions be specified in one Act rather than another. That conclusion accords with the advice from this office to which the Public Advocate refers.
- (c) The Public Advocate also notes that her functions under the *Guardianship and Administration Act 1990* relate to adults and that she has no statutory responsibility under that Act for minors. Again, the intention of these clauses is to expand that responsibility to include, for the limited purposes in this Bill, the welfare of incapable people who are minors. The reason for this is an understanding that the circumstances of incapable people tend to be similar, irrespective of age. The Public Advocate's experience with, and sensitivity to, the needs of incapable persons put her in a favourable position to provide the relevant input to a magistrate.
- (d) As the Public Advocate notes, a similar provision already exists in the *Criminal Investigation (Identifying People) Act 2002*. That statute is due to be reviewed in 2007. Should that review raise the need to reconsider that provision, reconsideration can also occur with respect to these clauses.

7. Clause 112(3) *Coroner's power to destroy forensic information*

- (a) As discussed, I can see no reason why the State Coroner should not have the power to destroy forensic information that was obtained under his authorisation. In addition, there is no reason why that power should extend to forensic information relevant to the investigation of the death of a person in order to ensure so far as possible that a coroner's ability to investigate the death of a person is not

compromised by the loss of evidence. I have consulted with the State Coroner's office and understand that he agrees with this.

- (b) The Government will move for an amendment to require the State Coroner's authorisation to destroy any forensic information obtained under Part 8 and Part 9 from a deceased person or in relation to an investigation into the death of a person.

8. Clause 13 *Rights of detained people*

- (a) The Committee raised the issue of the rights of detained people by comparison with the rights of arrested people. I had initially thought that there might have been an anomaly in the Bill as rights were provided under clauses 136 and 137 to arrested people, whereas no rights are provided to people who are detained without being arrested. However, it was brought to my attention that people detained under the Bill would usually first be arrested, thus giving rise to the rights under those clauses.
- (b) Clauses which allow for detention without a prior arrest are
 - (i) clause 44(2)(g)(iii) – a power to detain a person who is in a place where a search warrant is being executed if the officer reasonably suspects it is necessary to do so to protect the safety of any person; and
 - (ii) clause 65(2)(a) – a power to detain for a reasonable period in order to do a basic or strip search of a person if authorised under the Bill: see clauses 43(8)(b)(ii), 44(2)(g)(iv), 68(1)(d), 69(6)(a) and 134(5)(a).
- (c) In each of those cases, the period for which a person might be detained would necessarily be short.
- (d) In these circumstances, there is no reasonable need for people detained without prior arrest to be provided with the rights afforded to people under arrest.

9. Clauses 88(3)(d) and 96(3)(d) *Arrest and detention of an involved person*

- (a) The Hon George Cash questioned whether this clause was intended to mean that a person must first be arrested under clause 88(3)(c) before

the person could be detained given that there was no "and" after that subclause. I indicated that it was the intention of the Bill that a person must first be arrested before he or she could be detained and that the "and" after this subclause so indicated. While I maintain that to be correct, it would be preferable if all room for uncertainty were removed.

- (b) The Government will therefore move to amend this clause to clarify that an officer may arrest an involved person under this clause and that, having arrested the person, the officer may detain the involved person in the circumstances already provided.

10. Clause 132 *Power to search an arrested person's premises*

- (a) The Hon Sally Talbot asked whether a response was received from the Law Reform Commission given that the Bill does not fully reflect the Law Reform Commission's recommendation to repeal section 68 of the *Police Act 1892*.
- (b) Attached is a copy of that response.

Criminal and Found Property Disposal Bill 2005

11. Clause 10 Penalty for dealing with seized property

- (a) The Committee queried whether the fine of \$5,000 was sufficient to deter an officer acting corruptly. I explained that the clause was intended to apply to circumstances where a person dealt with property under an embargo notice imposed under clause 146 of the *Criminal Investigation Bill 2005* rather than where an officer was acting corruptly. I noted that the fine amount was an increase from the \$2,000 fine currently available under the *Police Act 1892* for a similar offence.
- (b) On reflection following the Committee's query, it does appear that the fine of \$5,000 is still insufficient. It would be preferable if the amount were consistent with other, more modern provisions. For example, section 132 of the *Criminal Code* provides for a penalty of 7 years for the destruction of evidence and section 150 of the *Criminal Code*

provides a summary penalty of 12 months or \$12,000 for the crime of removing property under a lawful seizure.

- (c) The Government will therefore move for an amendment of this clause to increase the penalty to 12 months imprisonment or a fine of \$12,000.

12. Clause 14 *Receipts and records for found property*

- (a) The Committee queried why this clause provided for an entitlement to a receipt rather than for a receipt per se. I explained that practicalities would arise if a receipt were required in every occasion, including when a person handed found property to a police officer in the street.
- (b) The Hon George Cash also suggested that a provision that required a record to be made may provide a clear indication of the way the law is meant to operate.
- (c) There appears to be no practical reason why there should not be a requirement for records to be made of found property when handed in. However, in order to apply to the circumstances where property is handed to an officer in the street, that requirement would need to be qualified by the words "as soon as reasonably practicable".
- (d) Thus, the way in which the requirements would operate in a practical context would be that a person who took property to a police station or other prescribed agency would be told of the entitlement to a receipt and a record of the found property would be made immediately. If the person took the property to an officer in the street, the officer would tell the person of the entitlement to a receipt and that if one was desired, the person would have to attend a police station in order to hand in the property there. If the person did not require a receipt, the officer could receive the property and would be required to make a record of it at the first practical opportunity.
- (e) In order to effect this scheme, the Government will move to amend this clause to insert a requirement for an officer who receives found property to make a record of it as soon as reasonably practicable.

Barry King

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LAW REFORM COMMISSION
of
WESTERN AUSTRALIA

OUR REF :051121HKbk
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Dear Mr King,

CRIMINAL INVESTIGATION BILL 2005 AND OTHERS

I refer to a letter from Mr Ray Warnes, Acting Director, Court Services, Department of Justice, dated 26 October 2005, inviting the Commission to comment on the final instalments of the Criminal Law Reform Package.

Unfortunately, owing to the time constraints, the Commission has not been able to give thorough consideration to the various Bills that make up the Criminal Law Reform Package.

Generally it is not the Commission's role to scrutinise draft legislation, however, we note that Section 132 of the proposed *Criminal Investigation Bill 2005* does not reflect Recommendation 17 made by the Commission in our *Report on Police Act Offences, Project 85, 1992*. Our position on this issue remains as stated in our report.

Thank you for the opportunity to consider the matter.

Yours sincerely

A. G. Braddock SC
Chair
Law Reform Commission