

**STANDING COMMITTEE ON LEGISLATION**

**CRIMINAL INVESTIGATION AMENDMENT BILL 2009**

**TRANSCRIPT OF EVIDENCE TAKEN  
AT PERTH  
TUESDAY, 9 FEBRUARY 2010**

**SESSION THREE**

**Members**

**Hon Michael Mischin (Chairman)**

**Hon Sally Talbot (Deputy Chair)**

**Hon Mia Davies**

**Hon Helen Morton**

**Hon Alison Xamon**

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**Hearing commenced at 3.31 pm**

**QUAIL, MR HYLTON**  
**President, Law Society of WA,**  
**examined:**

**The CHAIRMAN:** On behalf of the committee, I would like to welcome you to the meeting. Before we begin, I must ask you to take either the oath or affirmation.

[Witness took the affirmation.]

**The CHAIRMAN:** Thank you. So that you are aware of who comprises the committee, I am the chairman of the committee; to my right is Hon Helen Morton, MLC; to her right is Hon Mia Davies, MLC; to my left is Denise Wong, who is the legal adviser to the committee; to her left is Hon Alison Xamon, MLC, who is also a member of the committee; and to her left is Hon Kate Doust, MLC, who is appearing to ask questions in the committee, as is her right under the standing orders, but who is not a permanent member of the standing committee.

You have signed a document entitled "Information for Witnesses". Have you read and understood that document?

**Mr Quail:** Yes, I have, Mr Chairman.

**The CHAIRMAN:** These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard in recording these proceedings, please quote the full title of any document that you refer to during the course of the hearing for the record. Please be aware of the microphones and try to talk into them, and ensure that you do not cover them with papers or make any noise that will obscure the recording. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. The publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and also may mean that any material published or disclosed is not subject to parliamentary privilege.

You are representing the Law Society of Western Australia. We have received a submission from the Law Society, which has been made public. I think it appears on the internet now. It is some eight pages and it is dated January 2010. We have had the opportunity of reading that. We have prepared some questions, which we had hoped to get through this afternoon. However, we are conscious of the time and should apologise for the half-hour delay beyond the scheduled time to commence. We do not want to proceed too late. I know that you have been waiting for some time and have probably had a busy day also. We would like to provide you with a copy of the written questions and seek written responses to those questions. Members of the committee have certain issues that they would like to raise and discuss in a forensic interchange that may be of assistance to us. I know that you have not had the benefit of seeing the questions. If I told you that there were 16 questions, can you give us a rough idea of how long it would take the Law Society to provide some written responses? Would you need a fortnight?

[3.35 pm]

**Mr Quail:** Mr Chairman, the society is grateful for the opportunity to speak to the committee in relation to our submission. We would be more than happy to provide written answers to any other

questions, and, indeed, I am happy to take questions now. I did not intend today to simply read or repeat my submission. You have confirmed of course that you have read it, and it is now publicly available. I am happy to attempt to address some of the questions now or address any other issues that members of the committee might have. I will be the one having to respond and I am going to Canberra at the end of the week. I think by the end of next week I could certainly have a written response to the committee's questions.

**The CHAIRMAN:** We will set the tentative date of close of business 26 February. That is a Friday.

**Mr Quail:** Thank you, Mr Chairman.

**The CHAIRMAN:** If you require any further time, then contact the clerk of the committee. I cannot speak for the committee, but I, for my part, would not have a problem with an extension of time. We will see how we go. If you can deliver it by the close of business on 26 February, that would be of assistance.

Perhaps we could start off with whether you wish to make any opening statement summarising the Law Society's position or any other matters that have occurred to the Law Society since it has made its submission.

**Mr Quail:** Briefly, the society's position is well known. We are gravely concerned at this proposal. We have yet to see any justification for what we would say would be a far-reaching increase in police powers—powers that would be so wide that they would fundamentally erode traditional common law civil liberties. We have not seen any justification by the government for the proposed increase in powers. Stop-and-search powers were substantially widened in this state anyway in 2006 with the implementation of the Criminal Investigation Act. Section 69 of that act dramatically widened the powers of police to conduct searches, removing the basis for reasonable suspicion that had previously been a requirement for almost all police searches. The new proposed section 70A goes wider than that. We do not know why section 69 is seen to be insufficient. As a Law Society, we are not aware of any instances of section 69 searches having proved to be inadequate in the past. The justification that we have heard for section 70A to be included in the Criminal Investigation Act appears to us to be flawed. The two justifications which have been advanced—namely, that prosecutions have failed because of inadequate police powers—we would say is completely wrong and false. There have been no instances that the society is aware of. There have been, rather, no instances that the society is aware of, of prosecutions having failed for inadequate police search powers. The second justification, that the law will introduce a safeguard—I think were the words of the Minister for Police—which would allow members of the public to return to Northbridge, the society would say is also demonstrably false. This bill, if it becomes law, will in fact remove many of the traditional safeguards that people who live in a western society hold dear. In fact we would think that this bill, if it were to become law, would kill stone-dead any area that were to be declared to be subject to this law for the purposes of stop and search.

**The CHAIRMAN:** Can you just expand on that—what do you mean “kill stone-dead”?

**Mr Quail:** The society thinks that what will occur, if for example Northbridge is declared to be an area where section 70A is to operate—the necessary consequence of that is that it will allow police within that precinct to stop and search people without the requirement of reasonable suspicion, but, most importantly, without the requirement of consent. What that would mean is that if you were in that area you would be subject to a mandatory search; a search which would be intrusive, perhaps require the removal of the outer garments of your clothing, and it would subject you to a frisk search. If you refused to participate or allow that search to take place, you would be charged with the offence of obstruction and you would be guilty of a crime punishable by a maximum of three years' imprisonment or, if dealt with summarily, 18 months' imprisonment and an \$18 000 fine. It seems to the society, with those sorts of sanctions hanging over your head, any person who is contemplating going out for an evening meal—particularly if they were going to be taking their grandmother out for her eightieth birthday or taking their children with them—would not choose to

go to an area that was subject to a declared area for the purposes of section 70A of the act. No-one is going to go out to Northbridge and stand in a queue, subject themselves to a mandatory, humiliating and intrusive personal search when they could go to a non-declared area. So the legislation, we would say, will be self-defeating. No-one, knowing what could happen if they go to Northbridge, is going to subject themselves to this regime, under which they cannot refuse to consent without making themselves liable to criminal sanction. No-one is going to choose to go to Northbridge. They will go to Leederville instead. If Leederville is a declared area, they will go to Fremantle. If Fremantle is a declared area, they will stay home and have a barbecue and bemoan the loss of their liberties.

**The CHAIRMAN:** I might develop that point from a couple of things you have said and then I will ask other members about whether they have any questions. You mentioned no anecdotal evidence through the Law Society from any of its members that the current powers under section 69 are not adequate.

**Mr Quail:** Yes; we are aware they have been exercised and we are not aware —

**The CHAIRMAN:** You are? I would like to hear about that.

**Mr Quail:** I do not know the specific instances but we have heard that they have been exercised. We are not aware of any inadequacy in the exercise of those powers or certainly any failures of prosecution.

**The CHAIRMAN:** Can you tell us about the circumstances, from what you know, about the exercise of the consent to search or remove powers under section 69?

**Mr Quail:** I have got no personal knowledge of it. What I would have to do is make some inquiries and refer to you, Mr Chairman, simply, as you say, what we have heard anecdotally from people who have been involved with police officers who understood that they exercised those powers. I do not know the circumstances at all. But importantly, what we have not heard is anyone from the government saying the powers under section 69 have proved to be inadequate for these reasons and in these circumstances.

**The CHAIRMAN:** You have mentioned the adverse effects the imposition of this sort of regime of arbitrary search, let us say, may have on an entertainment area. There has been some publicity—whether it is substantiated or not I will not get into—suggesting that broadly the public were in favour of some legislation to this effect that may increase the level of safety because they know that if they go into an entertainment area, the police are able to stop and arbitrarily search others and there may be a deterrent, let us say, towards those that may be inclined to carry drugs, weapons and the like into those areas, that would render it safer for law-abiding citizens to go into them. That was the summary effect of a poll in the newspaper. You say, however, that this will result in no-one going to Northbridge. I take it that is a little bit of hyperbole?

**Mr Quail:** That is a little bit of hyperbole; not no-one. But why would you choose to go somewhere where you would be subjected to this intrusive and embarrassing regime when you could go somewhere else and not be subjected to it?

[3.45 pm]

**The CHAIRMAN:** If I could just pose a scenario that you can comment on: I as a law-abiding citizen want to go out to Northbridge. I am a bit concerned because I have not been there for a while but I understand that there are all sorts of troubles up there: people get drunk, they may be carrying concealed weapons and the like. I know that I am a pretty good sort and the police will have no cause to stop me; I am not going to attract their attention. I go up there and I am more inclined to go there because I know that the police are out on the beat and anyone that even vaguely looks like a troublemaker is liable to a search; and I know that because the police have these powers the troublemakers who are carrying concealed weapons, drugs et cetera are likely to avoid that area so as to make it safer for me to wander about and do my stuff. That is a scenario. Does that appear to

be an unreasonable possibility? The only people who are going to avoid going there are those that think that they might attract the heat.

**Mr Quail:** Mr Chair, the obvious answer to that scenario is that those people are simply going to go somewhere else and make it unsafe for someone else somewhere else. So it is hardly addressing the problem. The second —

**The CHAIRMAN:** All right. Hang on, we are getting to the problem of deterrence and people not going to an area or being less inclined to go to an area, who are up to good things rather than bad things.

**Mr Quail:** The other thing that we would say is that practically speaking the only way that it could be properly policed would be to put a fence around Northbridge and search every single person going in and out in order to provide that level of safety, which you say is desirable. And obviously that is impractical and would not occur and it would only reinforce what we would say. What we would say is that nobody would go into a fenced-off entertainment precinct which required every single person entering to be searched in the way that the act contemplates, because that is the only way that you could ultimately ensure a level of security of which you speak. And we also would not say that a newspaper poll is a proper basis upon which a government should pass a law of the type that is being contemplated, which so grossly erodes what are fundamental liberties.

**The CHAIRMAN:** I do not think that it is suggested that the poll was the cause of the legislation; it is just something that has come up recently.

**Mr Quail:** What was the source of the idea?

**Hon KATE DOUST:** That is what we would like to know too.

**The CHAIRMAN:** That has been the subject of other evidence. Are there any suggestions that you have, just in a nutshell, that could improve this legislation in a way that would make it less unpalatable or more palatable, and achieve what you understand to be its policy objective, which is to reduce the risk of violence in targeted areas?

**Mr Quail:** Regrettably, Mr Chair, there are none. The society has said, and I would regard this as a considerable concession by the society, that we would not oppose the amendment of section 69. At the time that section 69 became law, the society was opposed even to the extension of powers to that degree in terms of the requirement of the removal of reasonable suspicion. That was a big concession for the society to make because, again, it eroded a fundamental common law liberty that we all have to be free of arbitrary search. Notwithstanding that, it is water under the bridge from the society's perspective. And we accept that for section 69 to work in the way it contemplated to address some of the issues which you have raised by way of scenario with me, it is not practical or perhaps even required that it be done by way of regulations. And so we have accepted that the amendment proposed to section 69 could proceed. Section 70A and section 70B could not in the society's view be amended in any way to make them palatable.

**The CHAIRMAN:** Not even by the prescription of requirements that people be informed of their rights and liabilities, considerable advertising, requirements for monitoring of the number of stops and searches and such, and records of a search?

**Mr Quail:** A record of every search that is conducted. That is, I understand, what occurs in the United Kingdom and that would improve the regime, but it would not remove the fundamental objection that the society has in terms of those matters that I have already referred to and which are referred to in our submission. To be fair, that would improve it, but our fundamental objection would remain.

**The CHAIRMAN:** On the basis of the balance between civil liberties as against the necessity for this?

**Mr Quail:** Yes.

**The CHAIRMAN:** And its wider efficacy?

**Mr Quail:** Yes.

**The CHAIRMAN:** I will hand over to other members of the committee.

**Hon ALISON XAMON:** Mr Chair, I was going to ask a different line of questions, so perhaps another member might want to continue.

**The CHAIRMAN:** All right, if members want to pursue that line.

**Hon HELEN MORTON:** One of the areas of evidence that we have heard is that the police fail in terms of prosecution often, I suppose, is what I am saying—I do not know how often that is—because they do not meet the criteria for having reasonable suspicion and that this somehow or other will fix that or help to fix that. Are you aware of the extent to which the reasonable suspicion criterion is not met during court proceedings?

**Mr Quail:** I did refer to this obliquely earlier. It was something that the Minister for Police, I think, mentioned back in *Hansard* on 11 November after some pressing—I think the government were asked whether they were aware of any instances of a prosecution having failed, and there was reference to one instance of a prosecution having failed because evidence relating to a search was rejected by a court because the reasonable suspicion threshold had not been met. I understand that decision was quickly overturned on appeal. Now for myself, when I went to search for it, I could not find it. In fact I had to go back to 1997 to find a single example of a matter going before the Supreme Court to do with the issue of reasonable suspicion. I think perhaps the best way, though, to answer your question is this: as Mr Mischin would know, we having crossed swords many times in the past in his former life, all I do is criminal law. I am a criminal lawyer by choice and I have never in the 15 years of my daily practice in the criminal courts of Western Australia taken a point where I have argued for the proposition that a police officer did not have a reasonable suspicion, and I have never seen it argued. I have never seen a court in this state, and I have never even seen a lawyer in this state, despite the Minister for Police's assertions to the contrary in Parliament, argue to have evidence excluded on the basis that a police officer did not have a reasonable suspicion. As Mr Porter properly said in Parliament at the time, even in those very rare instances where it might be said that a police officer did not have a reasonable suspicion at the time that he conducted a search, the law is that evidence obtained as a consequence of what is therefore an illegal search can nevertheless be properly admitted in a court; and that is as a consequence of a decision in a case called *Bunning and Cross*. So in fact this notion that the law needs to be amended to get around the requirement of reasonable suspicion is really a man of straw; it is a problem that simply is not there. What the requirement for reasonable suspicion really does is make it necessary to focus the search on a particular individual. It is the removal of the requirement of reasonable suspicion in this case which is going to allow mass searching. It is going to allow the police to say, "Stand in that queue. All of you are going to be searched before you can enter the area." So it is not in our view really about reasonable suspicion because it is pretty easy in fact for a police officer to have a reasonable suspicion and search someone; but the removal of reasonable suspicion is what is going to allow mass searching. And that is what is repugnant.

**Hon HELEN MORTON:** Can I just ask you then about two possible scenarios of mass searching that might not be as repugnant as what you are suggesting. One is, for example, if there was a major function coming up—I will use the Big Day Out, but it could be any of those sorts of places—and people who wanted to enter were being told that you enter through a metal detector-type screening process. You go in, that is fine; if you do not want to go through the metal detector screening thing, go somewhere else. Is that something that you would suggest might make that venue safer for young people there?

**Mr Quail:** The thing is the law already allows that to happen.

**Hon HELEN MORTON:** Okay; I just wanted to hear you say that.

**Mr Quail:** That section 69 allows that to happen. And in fact even if section 69 were not there, anyone who controls a private premise can control the entry to that premise on whatever conditions they want, and the Liquor Control Act allows even further. But there is no need for a new law.

**Hon HELEN MORTON:** Okay. Can I give you a second scenario and you can suggest the same thing if you can?

**Mr Quail:** Yes.

**Hon HELEN MORTON:** That might be, for example, my 16-year-old granddaughter going to leavers at Dunsborough. I have offered her a trip to Paris if she will just not go. But she is not taking up my offer; she is going to Dunsborough.

**Hon ALISON XAMON:** I wish you were my grandma!

**Hon HELEN MORTON:** I mean I am petrified about her going to Dunsborough for the week or so at the end of school leavers. If I thought that everybody going there was going to be subjected to random search, I think to myself: would that make safer; would it possibly mean that parents might feel a bit easier about their kids being down there?

**Mr Quail:** But in that second scenario is it going to be that a particular function in Dunsborough —

**Hon HELEN MORTON:** No, it would be the whole of Dunsborough for a period of two weeks, just say.

**Mr Quail:** But is it really going to make you feel safer? You are still going to think that there will be no problems now with them driving down there and that there are not going to be any problems with them drinking alcohol down there because there are a few police officers around who might search them. Is it really going to make you feel better?

**The CHAIRMAN:** It might in the sense that it will, hopefully, deter some troublemakers from going down because they know they may be pinged by police and stopped —

**Hon HELEN MORTON:** Mainly for drugs and weapons.

**Mr Quail:** But the other response that I would have to that is that over the last couple of years, since the controls have been put in place in Dunsborough that have been put in place, there has not been a problem down there. So using the existing laws, there have not been the problems that we saw five years ago. So why do we need new laws? Why should the whole of Dunsborough be gazetted? Why should all of the people in Dunsborough who are not down there for leavers—who live there—suddenly be subject to completely arbitrary and random searches because a police officer might mistakenly think that they are somehow involved with leavers, because in each case it is going to be an individual police officer making the decision once an area has been declared or gazetted? So you could be walking your dog and a police officer might think that you look like a fellow who he spotted the night before and he will walk up to you and you will be subject to this search regime when you have done absolutely nothing wrong, but because reasonable suspicion has gone it does not matter and you will be subject to this intrusive regime of searching. And if you say, “No, police, you can’t search me. I’m just going to turn around and walk home with my dog,” you will be charged with obstruction, and suddenly an innocent law-abiding citizen has become a criminal because it is a crime punishable by three years’ imprisonment—obstructing a police officer in that scenario.

**Hon ALISON XAMON:** Mr Quail, the Law Society represents both prosecutors and defence lawyers; is that correct?

**Mr Quail:** The Law Society is a voluntary organisation. We have a membership of 3 000 lawyers in Western Australia. Yes, in answer to your question, the majority of lawyers in Western Australia are members, and we have everybody in our membership from commercial lawyers to prosecutors and defence lawyers.

**Hon ALISON XAMON:** The question I would like to ask then—I did want to clarify that you actually had a broad membership—is: are there any sections of your membership to the best of your knowledge who have been pushing for the changes to these laws?

**Mr Quail:** There is no-one in our membership who has contacted me and voiced support for the stop and search legislation or opposed what the Law Society has said about stop and search. We actually had one member who contacted me and voiced opposition to what the society was saying about mandatory sentencing, but no-one has contacted us about stop and search.

**Hon ALISON XAMON:** You mentioned the Liquor Control Act. Could you just briefly outline to me what provisions are currently available under that Liquor Control Act?

**Mr Quail:** I can certainly write to you in response.

**Hon ALISON XAMON:** Very roughly.

**Mr Quail:** The licensee has an obligation in charge of premises to ensure no disorderly behaviour on those premises. It empowers the licensee to search people on entry to the premises and it empowers the licensee to remove people from premises, without justification even in certain circumstances, which gives them the power to keep orderly premises.

**Hon ALISON XAMON:** So can I just clarify then that—again we are going back to talking about Northbridge—under the current laws we are not even utilising section 69; there is the possibility to effectively search anyone who chooses to enter licensed premises?

[4.00 pm]

**Mr Quail:** I have not been to a nightclub in a long time, but I would be staggered if nightclubs did not already have metal detectors at their doors; there would be nothing stopping them from doing that. If one wants to go in, one goes through; if one does not want to go through, one goes home.

**Hon ALISON XAMON:** Thank you. I also want to ask you, as a representative of the Law Society, about the discussion around the fact that we already submit to searches at places like the airport and all those sorts of things. What are your thoughts about that? Some people see it as just a logical extension of what we currently have in a number of areas.

**Mr Quail:** Two things: there is still an element of consent there. If one does not want to go through the metal detector at the airport, one does not go through it; sure, one might not be able to catch the aeroplane, but one still has a choice to make. If proposed section 70A goes through, one will not have the ability to make a choice, and that is the fundamental difference between section 69 and proposed section 70A—the removal of consent. If a police officer says that one is going to be searched, one cannot say, “Oh, hang on; I’ll leave Northbridge. I don’t want to be searched, I’ll leave.” Once the requirement has been placed upon one to be searched, one has to cooperate with that search or one will be committing the criminal offence of obstruction. That is the first point. The second point I would make is that section 70A will authorise a basic search to be conducted on any person. That is a far wider and more intrusive search than a metal detector search at an airport. A basic search will allow a police officer to do not only the scanning or wandling entailed in an airport search, but also require a person to remove the outer layers of his clothing and subject himself to a frisk search as well.

**Hon KATE DOUST:** This could all be done on the main street, in public?

**Mr Quail:** No doubt the Commissioner of Police—I do not wish to be critical of the commissioner—would have guidelines. Frisk searches are in place at the moment and would only be conducted by same-sex police officers. I doubt, given that what is being contemplated is mass searching, that it will be a private system where people are taken off to a room, because that simply would not be practical. The reality, one would think, is that it would be—the law would allow this—a public search, yes. One would pass through the metal detector or wand that might be set up; if the wand goes off, one removes one’s outer layers of clothing and is subjected to a frisk search.

The only way that could be done efficiently, if the police wanted to get through a lot of people in Northbridge, would be for it to be on the side of the road. Otherwise, the police would have to pay for enormous vans through which people would have to walk so that there is some level of privacy while they are searched.

**The CHAIRMAN:** There may be other ways of effecting the policy behind the legislation if the bill is passed in its current form; it does not mean that one is interdicting the whole area and stopping everyone from entering into it, but it allows the facility to stop people entering and searching them. It does not necessarily mean that there will be a queue, but that an officer might, on a basis that is not sufficient to raise a reasonable suspicion, nevertheless have a suspicion, to stop and search someone or a group of people; likewise, if the police are in the area on patrol and feel that someone is out of place, they might and stop and search him.

**Mr Quail:** Mr Chairman, no doubt you are right and no doubt, as a matter of funding reality, that is how the majority of these searches would occur if this were to become law, but the point is that the scenario I have been discussing is a possible one under the law, one that would be allowed by the law and one that is contemplated by the law.

**The CHAIRMAN:** What about an area, for example, that is not anywhere as large as Northbridge. Let us say that the cultural centre attracts troublemakers from time to time, and the police have declared the area of Northbridge and around it as one of the areas under the proposed legislation in which anyone can be stopped and searched. Police officers generally are not bothering with it, but they suddenly get word that something is going to happen in the cultural centre square outside the art gallery, so they go over there and sure enough, there are people milling about. You say that what is offensive is the idea of a mass search, but is there not some justification for the police, in trying to maintain order, being able to say, "All right, we've got a feeling that trouble is brewing and we want to just check out what you're doing".

**Mr Quail:** Mr Chairman, I agree with you completely that in those circumstances the police should be able to search the people that are milling around, and upon whom they have cogent intelligence that they are looking for trouble. That search can be conducted under the existing law, because under the existing law the police officers in that scenario have a reasonable suspicion that an offence is about to be committed. They do not require section 70A to search those people; that is the whole point. The existing law will allow the search in those circumstances; there is a reasonable suspicion.

**The CHAIRMAN:** We say cogent intelligence, but often policing is not based on that but on intuition and a sense of trouble.

**Mr Quail:** You and I know that that constitutes reasonable suspicion, Mr Mischin.

**The CHAIRMAN:** It can do. The only option under section 69 at the moment is that a senior enough officer can say, "All right, this area's out of bounds anyway," and people either submit to a search or sling their hook. Then those people say, "All right, we'll move," and they go off to a park down the road.

**Mr Quail:** That is the beauty of the law that we have had for not quite centuries; that is the beauty of section 68, which enshrines the common law search powers. Section 68 is what the police officer relies on to search the people in that situation; there is nothing preventing section 68 being used for five, 10, 20 or 30 people if they are part of a group who look like troublemakers, are behaving like potential troublemakers and whom the police reasonably suspect are going to engage in a fracas later in the night. There is absolutely nothing preventing the police using their existing powers under section 68 to search those people, and if they find weapons, not one of those prosecutions will be kicked out in a magistrate's court in this state. Every single one of those prosecutions will be able to proceed on the basis that it was a lawful and reasonable search conducted by the police officers under the existing law. There is no need for a new law to allow that search to occur.

**Hon ALISON XAMON:** There has been plenty of reference made to the fact that virtually no prosecutions have failed, except the one that was overturned on appeal on the grounds that there was not reasonable suspicion. There seems to be a fair bit of confusion about reasonable suspicion, and that seems to be some of the concern. Police perhaps feel that it is simply too high a test to have to address in order to effectively deal with crime. I am interested in your comment on that. Perhaps you are not in a position to answer this, but I am also trying to get an idea of whether there is actually a systemic problem with the test being too high. My question is a little all over the place.

**Mr Quail:** I heard the Minister for Police say that the threshold for reasonable suspicion is too high. I have not heard police officers say that; I have not heard a police officer say that he has difficulty overcoming reasonable suspicion, because every police officer with any experience knows that reasonable suspicion is a very low hurdle to jump over. I have heard the Minister for Police say it; I have not heard him back it up with any evidence at all, so the Law Society would completely reject that. The second thing we would say in terms of the second limb of the member's question about whether the threshold for reasonable suspicion is too high, is no—it is a very low threshold. I come back to the scenario that Mr Mischin put a moment ago, which gives an indication of how low the threshold in fact is.

**Hon ALISON XAMON:** Mr Quail, could you give me an idea of how low the threshold is, in your legal opinion, so that we can get an idea of how far it would need to go as the current law stands, in order to be able to conduct a search, with or without consent?

**Mr Quail:** We are stepping back now beyond section 69 and looking at section 68. Reasonable suspicion has to be assessed in light of any particular factual scenarios. It is impossible, really, for me to say that this is what reasonable suspicion is. We have to do it in the context of the scenarios Mr Mischin in fact properly did. It is a suspicion that a reasonable police officer would have when faced with that particular factual scenario. It still comes back to the suspicion of the police officer, which is why I say it is a low threshold. As long as it is a reasonable suspicion that would be held by a reasonable police officer, we are over the threshold.

**Hon ALISON XAMON:** So it is a subjective test?

**Mr Quail:** “Reasonable” imports to the degree of objectivity; the objectivity of reasonable police officers. That incorporates their intuition based upon their experience and their assessment of the way a person is walking down the street. In another scenario, a police officer is walking down the road in Northbridge. He looks down an alley and sees two people who appear, based upon his judgement, to be acting furtively in the shadows. He sees one person's hand go out to another person, and they are looking around furtively. One of them then scurries down to the other end of the alleyway because he has seen that the police officer is looking down the alley. That is sufficient for those police officers to have a reasonable suspicion that a drug deal has taken place and it gives them the authority to chase, apprehend and search those people. If they find drugs or weapons, the charge would go to court and there would not be a magistrate in the state who would exclude the evidence on the basis that there was an illegal search and that the police officers could not have had a reasonable suspicion.

**The CHAIRMAN:** Can I just see if we can articulate the law behind it; correct me if you take a different view. We are looking at a state of mind, which is the suspicion that might arise in a variety of ways. We are looking at whether or not there are reasonable grounds based on all circumstances, and those circumstances are open ended. The reason for there being a test such as reasonable suspicion is simply so that there be some focus on having a reason to stop a particular person and search him, rather than stopping him because he was in court recently and gave the officer a hard time in evidence. It is that sort of test; there has to be a reason, and it is not simply random bloody mindedness.

**Mr Quail:** With respect, I agree completely with you, Mr Chair—you have summarised it better than I could in that sense. That is why it comes back to what I said about the removal of reasonable suspicion enabling mass searching.

**The CHAIRMAN:** I will have to bring you back more often, if you give evidence like that! You mentioned the composition of the Law Society. It has about 3 000-odd members across all disciplines.

**Mr Quail:** Yes. We have 42 voluntary committees in every specialist area of law.

**The CHAIRMAN:** How many of those lawyers practice either exclusively or predominantly in the criminal sphere, to your knowledge, as opposed to conveyancing, commercial litigation or family law?

**Mr Quail:** I can certainly get the exact figure for the committee, but I would think it would be 150 or thereabouts; possibly 200. There is the Criminal Lawyers Association of Western Australia, which is a voluntary association that is more focused in its membership, as the name would suggest. I am a former president of that association. That association traditionally has more of a defence bent, but in recent years it has also had a number of members who are prosecutors.

**The CHAIRMAN:** And on the committee.

**Mr Quail:** Mr Mischin, I think you may have been on the committee at some stage! I do not know whether it has made a submission to this committee.

**The CHAIRMAN:** To what extent has the Law Society liaised with the Criminal Lawyers Association regarding this submission?

**Mr Quail:** This submission is entirely independent. I am not sure whether the Criminal Lawyers Association has made one. The current president would, I am sure, agree with our views; I am not sure whether the committee would. I cannot speak for that committee.

**Hon KATE DOUST:** You are probably aware that Victoria has recently enacted changes to its Control of Weapons Act. This enables members of the Victorian police to have the power to search people for weapons in public places and temporarily designated areas. The law that is now in operation contains, as I understand it, a number of checks and balances that are not contained in the proposed Western Australian legislation. Would you be prepared to examine those laws with a view to providing a supplementary submission to this committee on what elements of that legislation you believe should be incorporated into the Western Australian legislation, should it proceed?

[4.15 pm]

**Mr Quail:** I have not looked at them for those purposes. I would be prepared to and I would be happy to incorporate that into a supplementary submission, as Mr Mischin asked, by the end of next week. I can say that I very much doubt—in fact I am certain—that it would not change the society's fundamental views about section 70A. It might ameliorate the effect but we would object in principle.

**The CHAIRMAN:** If we could have your comments on whether you think the incorporation by Victoria is a better alternative or should also be rejected, that would be appreciated.

**Mr Quail:** We would certainly look at that for the committee.

**Hon KATE DOUST:** I was just wondering, Mr Chairman: prior to this legislation being presented to the Parliament, was the Law Society consulted in any way about any aspect of the proposed bill?

**Mr Quail:** I do not want to find myself in the same position as the Commissioner of Police but I am confident we were not.

**The CHAIRMAN:** Thank you very much for your assistance, Mr Quail. We will have sent out to you the series of questions that we have. We will make it the scenario that you could provide

written responses. They do not have to be theses but simply something that will adequately and succinctly answer questions by, say, close of business on 26 February. If you require any extension of time, then please contact the clerk of the committee. Thank you very much for your assistance. We may call you back if it becomes necessary to do so, but I would not have thought so. We will see how other evidence goes and what the answers are.

**Mr Quail:** Could I just say finally that I did have the opportunity of reading the submission from the Commissioner for Children and Young People and also the private submissions sent in from Mr Kitto, and much of what they say the society would endorse as well.

**The CHAIRMAN:** Yes, we thought that might be the case. Thank you.

**Mr Quail:** Thank you again.

**Hearing concluded at 4.16 pm**