

STANDING COMMITTEE ON LEGISLATION

CRIMINAL INVESTIGATION AMENDMENT BILL 2009

**TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
TUESDAY, 2 FEBRUARY 2010**

Members

**Hon Michael Mischin (Chairman)
Hon Sally Talbot (Deputy Chair)
Hon Mia Davies
Hon Helen Morton
Hon Alison Xamon**

Hearing commenced at 12.42 pm

PENN, MR MALCOLM
Executive Manager, Legislative Services,
Legal and Legislative Services Directorate,
sworn and examined:

BUDGE, MR GARY
Superintendent,
WA Police Headquarters,
sworn and examined:

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

[Witnesses took the oath or affirmation.]

The CHAIRMAN: For your information, I will introduce the members of the committee. My name is Michael Mischin, and I am the chairman of the committee. To my right is Hon Helen Morton, who is one of the members of the committee. To her right is Hon Mia Davies. To my left, firstly, is Denise Wong, who is the advising officer to the committee. To her left is Hon Alison Xamon, who is a member of the committee. To her left is Hon Jock Ferguson, who is sitting in on this hearing but is not a member of the committee. He is entitled under the standing orders to participate in the hearings and to ask questions through the chair.

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

The Witnesses: Yes.

The CHAIRMAN: These proceedings are to be recorded by Hansard. A transcript of the evidence will be provided to you. To assist the committee and Hansard, would you please be careful to quote the full title of any document to which you refer during the course of the hearing so that it appears on the record. Please be aware that the microphones will need to be addressed directly—try to talk into them—ensure that you do not cover them with papers or make any disturbing noise near them that is too loud and may obscure the sound. Also try to be aware that you may have to speak in turn. We will do our best in that regard as well, so that we do not confuse the record.

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 and the committee will consider that request. If the committee agrees, the public and media in attendance will be excluded from the hearing. Please note also that until such time as the transcript of your public evidence is finalised, it should not be made public. It may be subject to correction, for example. I advise you that the publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and it may mean that any material published or disclosed is not subject to parliamentary privilege as it would be ordinarily.

We are dealing with the Criminal Investigation Amendment Bill 2009. It has been referred to this committee to consider not only the legislation but also the policy underlying the legislation. Would you like to make an opening statement to the committee concerning the legislation?

Mr Penn: Rather than a formal opening statement, I would like to make some comments to maybe clarify something for the committee. When this bill was introduced into the Legislative Assembly

and during the debate, it was said that the drivers for the legislation was to tackle the incidence of violence et cetera in Northbridge and other entertainment precincts. Certainly the legislation can cater for declaring those types of areas but it is not limited to that. I note that the committee will probably have some questions in relation to Northbridge, given that it has been raised previously. We will obviously endeavour to answer those questions but I just wanted to make it clear for the committee's mind that this is not legislation specifically targeting Northbridge and those types of entertainment precincts.

The CHAIRMAN: We have had the media here to take file footage of the preliminary remarks simply for news purposes—I hesitate to say “entertainment purposes”! They have now departed. We will get into the substance of the hearing.

You have been provided with a series of draft questions or preliminary questions. Have you had the opportunity to consider those and to do such research as may be necessary?

Mr Penn: Yes, we have.

The CHAIRMAN: We will get into those from time to time. What I would like to start off with, however, if you could outline the current legislation, what the current provisions are regarding stopping and searching, and then we will get into how this legislation changes it.

Mr Penn: The main provisions that police officers rely on are contained in the Criminal Investigation Act 2006. That contains a range of provisions that enable police officers to conduct searches of buildings, vehicles and people. It provides guidelines to police officers as to how they are to exercise those powers. Some of those powers are founded upon the need to have a search warrant in order to enter particular premises and the search warrant then would generally spell out the powers that a police officer can exercise. There are provisions in the Criminal Investigation Act also for police officers to be able to search people on reasonable suspicion that the person has been involved in the commission of an offence. There are also provisions in the Criminal Investigation Act for areas to be declared for security purposes, where searches can be conducted or people can be asked to consent to a search in order to enter a particular area, or can be asked to leave a particular area unless they consent to a search being done. The Criminal Investigation Act has quite clear guidelines in relation to the types of searches that police officers can conduct. They are categorised either as a basic search or a strip search. It provides quite detailed guidelines as to the procedures that police officers are to apply in relation to those searches, what those searches constitute in terms of exactly what powers a police officer can exercise, and what protections might be in place in relation to some of those searches that might be conducted on people.

The CHAIRMAN: In this legislation we are dealing particularly with search without warrant and also where there is no suspicion of an offence having been committed. You mention that there are already powers to stop and search people in particular areas. Is this what is described as a “prescribed place” under section 69 of the current legislation?

Mr Penn: Yes; certainly section 69 of the Criminal Investigation Act does enable areas to be either prescribed in regulations or through a declaration by a police officer for that area to be declared for what they call security purposes. The provisions there either enable police officers to refuse a person entry to that area unless the person consents to being searched or, if that person is already in that area, the police officer can ask them to leave the area unless they consent to being searched. That is an overview of the powers that are provided for under section 69. There are ancillary powers there that if they do conduct a search, what they can do in terms of what items they can seize from the person.

[12.50 pm]

Hon ALISON XAMON: In terms of the way that that is being practised now, could you please give the most common areas in which that is currently being enacted?

Mr Penn: There certainly have not been any areas prescribed in regulations under section 69 of the act. I am not aware that any senior officer declarations have been made, either, for those purposes.

Hon ALISON XAMON: They could actually do that now if they wanted to.

Mr Penn: Yes, the power is available to them to make declarations for those areas and the powers that flow from that in terms of being able to search a person with the person's consent would then flow to people who seek to enter that area or people who are already in that area that is being declared or prescribed in regulations.

The CHAIRMAN: It is said that it is done for security purposes—is that the formula that is currently used under the Criminal Investigation Act?

Mr Penn: That is the title of section 69—"People and vehicles in public places, search of for security purposes", so it is defined that way.

The CHAIRMAN: Is there a definition of the term "security purposes"?

Mr Penn: No, but it does talk about declaring a place for the purposes of safeguarding people who may be in or entering that place. That is one of the issues in relation to a police officer who might seek to make a declaration. It probably gives some guidance in terms of the intent behind why an area would be declared for the purpose of protecting people in that area.

The CHAIRMAN: At the moment it has not been utilised?

Mr Penn: I am not aware of any senior officer declarations or police officer declarations, and certainly there has not been an area prescribed in regulations under the provisions of the act.

The CHAIRMAN: Is there any reason for that?

Mr Penn: I assume that there has not been cause to use that power.

Hon HELEN MORTON: With regard to the section dealing with the current power that police have around security purposes, does this new legislation offer what it offers for anything other than security purposes?

Mr Penn: The provisions in the bill do not define a particular purpose for why the search is to be conducted; it provides for an area to be declared, and police officers can then exercise a search power within that area. An area is not declared for security purposes or for a particular purpose; it just enables an area to be declared.

Hon HELEN MORTON: Is there any reason for it to be declared other than for the security of the people or property in the area? Is there any reason for it other than for security purposes?

Mr Penn: There could be a variety of reasons. Certainly the security and safety of people who might frequent the area would certainly be a factor that would be taken into account if an area were to be declared or prescribed in regulations. The other issue is about the propensity for violence, weapons or drug offences to have been committed in that area. Security is an issue that would probably be considered if an area were to be declared or prescribed in regulations. We would also look at recent crime patterns and a variety of other factors in deciding whether an area ought to be declared or prescribed.

Hon HELEN MORTON: Is that all under the category of general security?

Mr Penn: Not necessarily.

Hon ALISON XAMON: I am assuming that the current provisions would perhaps cover an event like the Big Day Out, for example—would that be a possibility?

Mr Penn: The existing provisions of section 69?

Hon ALISON XAMON: Yes, existing provisions.

Mr Penn: They could be applied for that purpose, yes.

Hon ALISON XAMON: Would it perhaps be post an incident—if there had been a particular incident, perhaps? I know that there were similar provisions around terrorism. Could it perhaps be applied there?

Mr Penn: Certainly there is nothing in section 69 that would necessarily restrict it to that, so that could be a situation where powers under section 69 would be invoked.

Hon ALISON XAMON: Can you please explain whether there would be any scope to use the current provisions in Northbridge, for example, under particular circumstances as they currently exist? The reason I mention Northbridge, of course, is that it is the area that keeps getting brought up time and again as one of the reasons.

Mr Penn: Certainly section 69 of the act could be used in the Northbridge scenario mentioned by the member, but, as I mentioned earlier, there is a limitation on the powers that can be exercised. The person has to consent to the search taking place, so if the person might be in possession of weapons or drugs et cetera, unless the police officer has separately formed a reasonable suspicion to search that person, all that can theoretically happen is that the person could either leave the area or be refused entry. The person could still be in possession of the weapons, drugs or other dangerous implements, but there would be no grounds for search unless the police officer separately had a reasonable suspicion to search the person. Certainly, the powers under section 69 could be used in the Northbridge context—in the context of the limitations that are contained.

Hon ALISON XAMON: Perhaps, Mr Chair, we could talk about reasonable suspicion at some point.

Hon JOCK FERGUSON: If I could just go to the issue of the declaration of an area. I suppose, hypothetically, the state could be declared an area. If, for example, some bikies came from the eastern states on a bike run, what would be the designated area to stop and search them?

Mr Penn: Is the member referring to the proposed declaration powers under the bill, or the declaration powers under section 69 of the act?

Hon JOCK FERGUSON: The one that is proposed.

The CHAIRMAN: I do not want to stifle that, but I wonder whether we could wait until we get to the proposed legislation.

Hon JOCK FERGUSON: Under the present legislation, then.

Mr Penn: Under the present legislation, certainly an area could be prescribed under the regulations; a senior officer could declare an area. There is a limitation on a senior officer's declaration; it can last for only 48 hours. In the context that the member has suggested, it could only be declared for a 48-hour period, but there is nothing under section 69 that necessarily limits the size of the area that could be declared.

Hon ALISON XAMON: To wrap it up, I go back to why, to the best of your knowledge, it has not been employed to date. Can you think of any legislative reason or impediment for that particular provision not having been used to date?

Mr Penn: Not in terms of a legislative impediment. One of the reasons it has not may be that there is some concern that because a person still has to consent to a search, police feel reluctant about anywhere being prescribed or declared. I am only suggesting that that could be a reason in the minds of police officers for a declaration having not been made. Maybe they are concerned with the limitation on the powers that can be exercised.

The CHAIRMAN: If I understand this rightly, at the moment, under section 69 of the Criminal Investigation Act, there is already a power—albeit not yet utilised—to prescribe an area under regulations; is that right?

[1.00 pm]

Mr Penn: It can either be prescribed under regulations, yes —

The CHAIRMAN: Or by way of a written declaration by a senior police officer, or by way of reasonable suspicion, a power to stop and search people in public places.

Mr Penn: With their consent.

The CHAIRMAN: With their consent. And if they decline to consent then they are either moved on out of the area, failing which they presumably commit an offence; and, if they consent to a search, then the officer is able to seize any offensive material that was found—items, weapons, the like, drugs.

Mr Penn: That is correct; if they consent to the search, then the police officers have the power to seize various items.

The CHAIRMAN: Is there not a general power, in any event, to search, based on reasonable suspicion, or is that the only one?

Mr Penn: There is a general provision under section 68 of the Criminal Investigation Act, headed “Searching people for things relevant to offences”, that is colloquially known as the “reasonable suspicion test”. That is a general power that police officers have to search people in relation to offences. If they meet the threshold test in there, then the police officers will have the power to search anybody at any time for a thing relevant to an offence.

The CHAIRMAN: For anything relevant to an offence?

Mr Penn: That is correct.

The CHAIRMAN: Section 68 is a general power based on reasonable suspicion that that may person may have on them, or be in possession of, anything that is relevant to an offence, and that can be done without consent at any time, anywhere.

Mr Penn: Yes.

The CHAIRMAN: You have the ability to prescribe an area where you can effectively search people either with suspicion or with their consent.

Mr Penn: Yes.

The CHAIRMAN: And move them on if they do not allow it.

Mr Penn: Yes.

The CHAIRMAN: What does this legislation propose—sorry, no, before we get on to that; does Hon Helen Morton have a question?

Hon ALISON XAMON: I have a question, too.

Hon HELEN MORTON: If a person in a designated area, under the existing legislation, was asked for their consent to a search and they refused, and they also refused to be moved on, would that constitute —

Hon ALISON XAMON: Hon Helen Morton asked the same question I had: what would be the offence?

Hon HELEN MORTON: Yes, would that likely be suspicion that there might be some reason why this person is not wanting to be searched, and therefore you sort of flick into that next one whereby you have got reasonable suspicion?

Mr Penn: Maybe Superintendent Budge can answer that.

Mr Budge: It is a very subjective test, and some of the difficulty is in determining each and every individual officer’s state of mind at the time. Some officers may consider that that gives them reasonable suspicion, although in most circumstances I would say that probably does not reach the level of reasonable suspicion because there may be very many people who just have an opinion

about submitting themselves to a search. I do not think that, in those circumstances, it would reach the level, in my mind, of a reasonable suspicion.

The CHAIRMAN: There has to be a reasonable suspicion that they are in possession of something that is relevant to an offence.

Mr Budge: Yes.

The CHAIRMAN: So you would have to identify, presumably, some kind of offence that they may have committed or been involved in, or have something on their person to commit some kind of offence.

Mr Budge: Yes, exactly; that is correct.

The CHAIRMAN: Reasonable based on reasonable grounds, albeit that depends very much on the circumstances that you are faced with.

Hon ALISON XAMON: Which is a subjective test.

Mr Budge: That is correct.

The CHAIRMAN: The nature of the search that you would be able to conduct in respect of the section 68 power is what?

Mr Penn: The section 68 power?

The CHAIRMAN: Yes; the general power to search someone for something based on reasonable suspicion.

Hon ALISON XAMON: As it currently stands.

Mr Penn: Under section 68, the officer has the option to either conduct a basic search or a strip search. Section 68(1)(a) of the act provides that they can do a basic or a strip search of a person.

The CHAIRMAN: As far as section 69 powers as they currently stand, what sort of searches are available there?

Mr Penn: I do not think there is a particular limitation on the type of search that can be conducted.

The CHAIRMAN: Is it a basic search of a vehicle?

Mr Penn: It may be that—section 69(6) says —

If a person who is about to enter or is in a public place consents to undergoing a basic search by a police officer ...

They can do a basic search.

The CHAIRMAN: And subsection (4) states that the powers may be exercised in a public place—yes, that is informing that that may happen. Subsection (6) is a basic search.

Hon ALISON XAMON: I just want to get on the record then what a basic search is, because there seems to have been some confusion about that. My understanding is that a basic search involves not only having a metal detector that can potentially go up and down a body, but also being able to physically touch the body through a pat down. Can I please get an idea of what parameters there are at the moment in terms of how a basic search is conducted?

Mr Penn: Firstly, section 63 of the Criminal Investigation Act actually outlines what constitutes a basic search. It can involve scanning the person with an electronic or mechanical device, whether handheld or not, so that would be your metal detectors. It can require the person to —

(b) remove the person's headwear, gloves, footwear or outer clothing ... but not his or her inner clothing or underwear ...

There would be a frisk search of a person, and then the officers could search any article that they happen to remove from the person. That spells out exactly what a basic search is.

There are some further provisions also in the Criminal Investigation Act. Section 71 also has some additional rules for conducting a basic search, and also section 70 has general rules for conducting basic searches or strip searches. Police officers have to follow those in terms of how they are allowed to conduct the search and the rules that would apply to a basic search.

The CHAIRMAN: In terms of the basic search, how is a basic search conducted in the case of, say, a female or a child?

Mr Penn: Maybe Superintendent Budge can provide some comment on that. One of the requirements under section 71(2) of the act is that —

The searcher must, if practicable, be a person of the same gender as the person being searched, unless the searcher is a doctor or a nurse.

So there are some additional rules in relation to, as much as practicable, the gender of the person conducting the search being the same as the person who is being searched, subject to issues of practicality.

Hon HELEN MORTON: If you were in a situation where you had two police officers in an area where there was some reason for wanting to do that search and the search was directed at women, would you call in someone or would you therefore go and do it?

Mr Penn: It comes down to issues of practicality, one being how readily we might be able to get hold of a female police officer. If there is a need to have that search conducted expeditiously and we cannot get hold of a female officer for, say, a period of time, then it might not be practical to wait until that female officer attends in order to conduct a search. In terms of how those searches are conducted —

Mr Budge: And the scenario that Mr Penn has just put is unlikely in the metropolitan area, or close to the metropolitan area. That section about where it is practicable, because of the geographic area that Western Australia is, is particularly put into legislation to allow for those practicalities that occur in remote Western Australia. However, as far as a basic search goes from a police perspective, it really is the removing of the outer garments, including the hat, and the patting down of the person's clothing that they are wearing, the patting down of the pockets, down the trouser legs, and down to the shoes and the removal of the shoes.

The CHAIRMAN: When you say "outer garments", I take it that means, say, coats, jackets, jumpers—I do not know if anyone wears cardigans any more—cardigans, that sort of thing.

Mr Budge: And gloves; that is correct.

The CHAIRMAN: Not taking off shirts or anything of that nature.

Mr Budge: No.

The CHAIRMAN: You are leaving a layer of clothing at the very least.

Mr Budge: That is correct.

The CHAIRMAN: Are there any differences in the manner of the search in respect of children; or are there any guidelines or restrictions?

Mr Budge: I do not believe there are any legislative restrictions or any differences in regard to children in regard to the searches.

The CHAIRMAN: That is currently as the law stands and how they are conducted.

[1.10 pm]

Hon ALISON XAMON: Are there any guidelines in relation to religious headwear or is it basically all treated the same?

Mr Budge: We all receive training in regard to culturally and significantly challenging issues. That would be a challenge for us, but part of our training is to ensure that the person is afforded some respect in regard to their particular religious beliefs. If there was a need to remove headwear, be it a burqa or hijab, we would certainly move them to an area where they were afforded some privacy before that happened.

Hon ALISON XAMON: Of course, the current provisions would actually require either reasonable suspicion or the opportunity to leave if you did not consent to search anyway.

Mr Penn: Under section 69, yes.

The CHAIRMAN: Or under section 68 if there was a reasonable suspicion that the person was in possession of something that was relevant to an offence, then the question of consent does not arise; you would be able to do it anyway.

Mr Penn: Exactly.

The CHAIRMAN: We still have an interest as to the level of force or contact, let us say in a pat-down-type search. Are you able to expand on that or even, if you are willing to do so—I do not want to put you in a position of having to, because I can understand why you may not—but are you able to demonstrate, show us or explain to us. I do not want to put you in an embarrassing position, but however you can describe it —

Hon ALISON XAMON: Maybe demonstrate on yourself?

Mr Budge: I think it depends a lot on the time, place and circumstances that are in place at that time as well. The pat search may differ on some occasions depending on that time, place and circumstance. If I were searching a male person, depending on the circumstances, the most I would do is that I may run my hands through their hair, check the collar, pat down the chest and back and the sleeves, and then I would pat their pockets on the outside. I can reach into the pockets to see if there is anything in the pockets. I would pat down the back of the person. It does not include the genitals of a person, so you would do from the thigh down to the feet in a pat sort of search and frisk-type search.

The CHAIRMAN: Presumably you could, depending on the circumstances, whether it is practical or whatever, ask them to turn out their pockets, reveal what they are carrying, and that sort of thing.

Mr Budge: That is usually the first question that a police officer would ask them: are they carrying anything they should not have, and ask them to turn out their pockets.

The CHAIRMAN: It might be useful for us and quite informative, because there seem to be a number of theories that have been advanced as to how police go about their business—everything from throwing people against walls, patting down grandmothers in that fashion, to all sorts of speculation. Can you give us just a couple of practical scenarios to describe how the searches conducted by a police officer who may be on the beat and, let us say, has a reasonable suspicion to stop and search someone?

Mr Budge: Yes. Do you want me to explain from the start of the conversation?

The CHAIRMAN: Yes, please.

Mr Budge: They would certainly identify themselves to the person to start with. They would explain to them the reason for the search and why they needed to conduct the search. They would ask the person to consent. If the person did not consent, they would explain to them that if they did not consent, they may be committing an offence. If they did consent, depending on the practicalities of it and the location they were in, they would conduct a search there if it was practicable. They would conduct a search in accordance with my explanation to the last question.

The CHAIRMAN: Let us say that you are dealing with someone who is intoxicated or uncooperative; how would it be done? If somebody objects to the reason you have advanced for the search, how would you deal with it?

Mr Budge: In all instances it comes down to communication between the police officer and the person involved. I like to think that we would take some time to explain to the person the reasons why we are conducting a search, but at the end of the day the search will be conducted currently if there is reasonable suspicion whether the person consents or not. Of course, we take some time to try to get their consent to undertake that, but there are certainly times when people will not submit to a search even though we have a reasonable suspicion and a reason to conduct the search.

The CHAIRMAN: What happens then?

Mr Budge: There are times when the search will be done with force and the person may be charged with obstructing police.

The CHAIRMAN: Can you develop the issue of force and how that is dealt with as a scenario?

Mr Budge: It is certainly a matter of time, place and circumstances. There may be times when a person becomes violent, as opposed to a person just being non-compliant. So the circumstances are different. In the case of non-compliance, the police would certainly attempt to conduct the search. If they became non-compliant and obstructive to the police officers undertaking their duty, they certainly would be liable to be charged with obstructing police.

The CHAIRMAN: Let us say that they get non-compliant and object. Can you give an outline of how one would be restrained and what would be involved in the search then when, say, someone definitely says, "I am not going to let you touch me" and becomes abusive and obstructive and starts to struggle?

Mr Budge: After some communication with the person, an explanation would be made that the search was going to be conducted, and if they became violent towards the police, then the police would use reasonable force to effect the arrest and conduct the search.

The CHAIRMAN: And that may involve restraint by another officer?

Mr Budge: Certainly.

The CHAIRMAN: Handcuffing if necessary?

Mr Budge: We usually use handcuffing, yes.

The CHAIRMAN: And any other forms of restraint or force?

Mr Budge: No, not generally, and the handcuffs are to protect the police and the person themselves from injury.

Hon ALISON XAMON: In relation to the proposed laws, this issue of consent is obviously an issue that has been raised with a fair bit of concern. I would really appreciate it if you could explain to me a little bit more that point at which under the current legislation we shift from being able to search with consent to being able to search without consent, because you are explaining to me that you can do it now anyway. You can search people without consent now, subject to reasonable suspicion. Once you have given someone the option to leave an area and they refuse to, where is that line between an officer deciding that they are going to search anyway? Is it purely about being present?

Mr Penn: Are we talking about section 69?

Hon ALISON XAMON: I am actually wanting to know in all instances as it is in the current legislation where police officers can proceed with searching without consent anyway.

Mr Budge: When we have formed a reasonable suspicion in regard to the legislation that is currently before us, we can conduct a search with or without consent, using such force as is necessary to conduct the search.

Hon ALISON XAMON: Going back to the earlier testimony, my understanding is that what was being said was that the problem—I use that term loosely—with the existing legislation is that people can choose not to be searched and then move on. But then I am also being told, “We can still search without consent anyway.” So there seems to be a line.

Mr Penn: There is a bit of confusion there.

Mr Budge: Maybe if I can clarify, there are the provisions under section 69 of the act where an area is either prescribed or declared, and that requires a person to consent to a search if they want to enter the area, or we can say, “You are only going to stay in this area if you consent to being searched.” If that person says, “Okay, I am not going to consent to being searched”, they are refused entry to the area or they are removed from the area.

Hon ALISON XAMON: If I may interrupt, if a police officer still believes at that point that they have a reasonable suspicion that that person may have on their body something that means they are committing a crime, they can still search without consent.

Mr Budge: That is when the ordinary provisions that would apply for reasonable suspicion that a person has something relevant to an offence would kick in. So the first test in one of those declared areas is that first of all you would say, “If you want to come into this area, do you consent to being searched?” If the person says no, the policeman says, “Okay, you are not coming in here.” If then the police officer, by the person’s demeanour et cetera, thinks that they might have something on them that is relevant to an offence, the police officer would then utilise their powers under section 68 of the act to conduct a search based on reasonable suspicion.

Hon ALISON XAMON: What I am trying to grapple with is: why would a police officer ever want to search someone if there is no reasonable suspicion that they are committing a crime anyway? Why would they want to do that?

The CHAIRMAN: That is one of the nubs of it.

Hon ALISON XAMON: Yes, it is.

The CHAIRMAN: I think we are about to get onto that once we get into the current legislation and the policy behind it, if we could wait a moment. Does anyone have any further questions or interest in —

Hon ALISON XAMON: I am actually really concerned about the time. That seems more than the nub of it.

The CHAIRMAN: So am I. Take as much time as you need. Is there anything that anyone wants to ask on that?

[1.20 pm]

Hon HELEN MORTON: I just want to clarify one last thing. You gave a great description of a search with consent and how that can change into the use of force without consent. I want to be clear in my mind that under the new legislation, if a person is apprehended by the police for that form of search, without any suspicion, and without any reason for that person to be searched—it is just that that person has been chosen by the police to be searched on that particular day—and the person resists that search, that can then lead into a search with force?

Mr Budge: That is correct.

The CHAIRMAN: The previous questions relate to the current law. Can you now outline for us the changes that are proposed under the new legislation, and tell us the reasons for those changes and how they will improve the current situation?

Mr Penn: Okay. I will briefly go through the provisions in the bill. Firstly there is a minor amendment to section 69 of the Criminal Investigation Act. As previously mentioned, section 69 provides for an area to be prescribed in regulations, for a senior officer to make a declaration, or for a general police officer, if he has a reasonable suspicion, to effectively have an area declared. The provisions under section 69 for an area to be prescribed in regulations are proposed to be removed by the bill. The reasoning behind that is that we feel that if proposed new sections 70A and 70B were to be enacted, there would be no need for us to ever seek to have regulations prescribed under section 69. So we do not feel that that power under section 69(1) would be required if these other proposed provisions in the bill were to be enacted. That is the reason that amendment has been proposed.

The bill proposes to insert two new sections into the Criminal Investigation Act. The first is proposed section 70A. That provides a general overview of the powers that the police can conduct and goes into some detail about how an area can be prescribed in regulations. Those regulations can be in force for a period of up to 12 months. Those regulations can be framed in such a way that an area can be declared, but it would operate for only certain hours on certain days. So if an area of Northbridge were to be declared, it might be a declared area on only a Friday night or a Saturday night between certain hours. So for the rest of the week, that declaration would not have any force, and the police would have to rely on their general powers if they wanted to conduct a search of a person outside of those times. If an area were to be declared, then the general provisions that would ordinarily apply under the act, whereby a police officer would need to seek the consent of the person, or would need to have a reasonable suspicion in order to carry out a search, would not apply.

The CHAIRMAN: Can I just stop you there. You have mentioned the proposed repeal of section 69(1)(a), under which an area can currently be declared only via regulation. Under proposed section 70A, that will also need to be done via regulation. Therefore, in what respect will that proposed new section be different from what is currently available under section 69(1)(a)?

Mr Penn: It is different in the context that we do not feel there is a need to prescribe an area for the purpose of the exercise of the powers that are available under section 69. So it is not necessarily that there is a different process, because you would still be prescribing an area in regulations, but it is the powers that attach to that area that is prescribed that is the issue. We do not feel that there is a need to prescribe an area under section 69 for the purpose of the powers that are available under section 69.

Hon ALISON XAMON: In terms of the areas that can be prescribed, again I appreciate the fact that you opened up this session by making it clear that it is not just about Northbridge, and it is not just about—I cannot think of the exact words that you used —

Mr Penn: Entertainment precincts, for want of better words.

Hon ALISON XAMON: Yes, and that is good, because I have some questions about what other areas might be covered. A concern has been raised about the possibility that a homeless shelter that was located in an entertainment precinct might be subject to a search under the new provisions. Can you make some comments about that? That was mentioned in one of the prepared questions for you.

Mr Penn: I will try to clarify the powers that will be available under proposed sections 70A and 70B. An area might be declared. However, the police would be able to conduct a search only in public places within that area. So if you took the Northbridge area as an example, there are a number of private residences that might potentially be in that area. The legislation will not give the police the power to conduct searches in those private residences. If the police felt that there was a need to conduct a search in a private residence, they would need to go through the normal process of getting a search warrant. In answer to your question about a homeless shelter, the Criminal Investigation Act has quite a broad definition of what is a “public place”. As to whether a homeless shelter would fit within that definition, I cannot categorically say whether it would or it would not.

It would depend on how the homeless shelter was managed, and who actually had access to that place and under what conditions, as to whether it would fit within the definition of a “public place” under the Criminal Investigation Act, and therefore whether, if it was in a prescribed area, the police would be able to exercise those powers.

Hon ALISON XAMON: So the police would not necessarily be able to carry out those powers?

Mr Penn: No. As I say, it would depend on whether it did fit within that definition. If we had more details of a particular homeless shelter, we could seek some legal advice as to whether that particular place did fit within the definition of a “public place” under the act, and therefore whether the police would be able to exercise those powers. But certainly places like restaurants and nightclubs are public places, so if those types of venues were within a prescribed area, the police would be able to exercise those powers in those venues.

Hon ALISON XAMON: What about things like rallies and legal protests? Would they be subject to these new provisions?

Mr Budge: I think it is probably fair to say that the new provisions are about places and not people. There has been some debate about who we are going to look at in regard to the proposed legislation. It is not about any particular group of people. It is about the place. Anyone who was in a prescribed place would be liable to be searched. But why we would be targeting a procession would be an interesting question.

Hon ALISON XAMON: With respect, the same concern was expressed about move-on notices—where they were being used for different purposes than was initially proposed. There still remains a concern that these laws may be expanded as well.

Mr Penn: Certainly from a legislative point of view, if a procession happened to pass through an area at a time when that area had been declared for these purposes, then, as Superintendent Budge has mentioned, the people who were part of that procession would be liable to be searched. Whether the police would chose to exercise those search powers —

Hon ALISON XAMON: Both Reclaim the Night and Pride go through Northbridge on a Friday and Saturday night.

Mr Penn: Certainly the police are not proposing that they will be conducting mass screenings or searchings of people in these areas. It is simply not practicable to do so. It will not be the case that if there are 5 000 people in an entertainment precinct, all of those 5 000 people will be searched. It is simply not practicable for police resourcing to do that.

[1.30 pm]

Hon ALISON XAMON: But they can be indiscriminately searched without consent or without reasonable suspicion.

Mr Penn: They can be searched, yes, without consent or reasonable suspicion. I do not know if it is necessarily indiscriminate. We would expect that —

Hon ALISON XAMON: By definition, it would be indiscriminate if it is without reasonable suspicion.

Mr Penn: We would expect that there would be some reason why the police officers would want to search someone.

Hon HELEN MORTON: I do not understand that.

Hon ALISON XAMON: No, neither do I.

Hon HELEN MORTON: I do not understand what the reasons would be.

Hon ALISON XAMON: Other than suspicion.

Mr Penn: Let us put it this way: certainly, the expectation is that police officers will be reasonable in the way that they exercise their powers—not being unreasonable.

Hon ALISON XAMON: It may be an expectation, but the law does not prescribe that. In fact, at the moment, the current law imposes that reasonableness on the way that searches can be undertaken through the simple definition of reasonable suspicion. But once we remove that, what legal safeguards do we have?

Mr Penn: From a legislative point of view, you are correct, but the commissioner is proposing to issue some guidelines to police officers.

Hon ALISON XAMON: Guidelines can be changed on a whim and can be ignored.

Mr Penn: I doubt whether police officers would ignore them. If they are found to ignore them, they would be subject to disciplinary action by the commissioner.

Hon ALISON XAMON: If it can be demonstrated or proven that it actually happened.

Mr Budge: The practicalities of it are important. We do not intend to be funnelling people through a gate and mass searching large gatherings through areas like Northbridge. It would be impractical for us to do that.

Hon ALISON XAMON: We are still trying to get to the bottom of why you would ever want to search anyone without reasonable suspicion. You have not had the opportunity to speak to that.

Hon JOCK FERGUSON: What are the statistics that you are relying on to apply this? What statistical evidence is there? Looking at the Big Day Out last weekend, there were only two arrests. The crowd was very well behaved, and that is without this legislation being in place.

Mr Budge: We have not proposed any areas. If the legislation were passed, we would have to undertake some very rigorous statistical analysis and information gathering.

Hon JOCK FERGUSON: So you have not already done that?

Mr Budge: No, we have not.

Mr Penn: The reason for that is there are no proposals at this stage for any particular area to be subject to a declaration or regulations to be made. We are not looking at any particular area at this point in time.

The CHAIRMAN: We are getting into the rationale behind it and I would like to understand enough about the proposed legislation to see if it matches the policy considerations. You are saying that at the moment we will remove the ability under section 69(1)(a) to prescribe “a place” by way of regulation —

Mr Penn: That is correct.

The CHAIRMAN: — and you are putting it into a new section 70A. Section 69 will be limited to either the consent to search, or go, scenario. Under section 70A the police can prescribe these areas and there will be no choice whether a person will be searched and no requirement that there be a reasonable suspicion that someone is in possession of something connected with an offence.

Mr Penn: That is correct.

The CHAIRMAN: However, under section 69, a senior police officer will still retain the ability to prepare a written declaration over an area limited to 48 hours.

Mr Penn: That is correct, yes.

The CHAIRMAN: And reasonable suspicion still needs to be established there; is that right?

Mr Penn: No, the senior officer declaration still relies upon the consent of the person.

The CHAIRMAN: Why are those not redundant under the new proposals and not being amended as well?

Mr Penn: Getting back to my earlier comments, to my knowledge, the powers under section 69 have not been exercised. It does not mean that there might not necessarily be an occasion when police officers need to act quickly to invoke a declaration for the purposes of section 69. They might not feel that there is a need to get a declaration under 70B, but they still feel that they want to have some say over a particular area, in terms of who can have access to that area. We have left it in for the occasion in the future where there might be some grounds where a senior officer or a police officer may want to make a declaration for those purposes, but does not feel there is any need or justification for seeking a declaration from the commissioner under proposed section 70B.

The CHAIRMAN: Section 70A provides two ways to exercise this unlimited and unrestrained power to stop and search. That is, by prescribing an area under regulation or by declaration. Why do you need both? If the declaration is so broad that all that needs to be done is the commissioner recommending to the minister, why would you use regulation power to prescribe an area?

Mr Penn: There may be occasions based upon levels of offences committed in a particular area—there might have been a recent increase in violent offences in a particular area—and there is a need for police to act quickly. There could be a particular event that is taking place that we have only just become aware of, and we feel there is a need because of the intelligence we have received that we want to exercise those powers. There may not be sufficient time to get the necessary regulations drafted, enacted and promulgated. That is why we have included a provision for the commissioner, with the approval of the minister, to declare an area.

The CHAIRMAN: Why would you ever use the regulation power?

Hon ALISON XAMON: That is a good question.

Mr Penn: The commissioner's powers last for only two months, so there might be occasions when we might want to declare an area for a longer period. That may be one of the thresholds for which we would need to go down the process of regulations. That is, if we wanted to have an area declared for longer than the ordinary two-month period.

The CHAIRMAN: They can only last for up to 12 months.

Mr Penn: That is right

The CHAIRMAN: If there is a continuing need, why would you not simply go back to the minister and say, "The two months is almost up. There is still a problem in the area. Let us extend it by another two months."

Hon ALISON XAMON: Or indefinitely.

The CHAIRMAN: And do so cyclically until —

Mr Penn: You could do that if the minister was satisfied, based upon the information you present at that particular point in time that there is a need to have a declaration.

The CHAIRMAN: And also to do it by way of regulation there is the potential for disallowance by Parliament.

Mr Penn: That is correct.

The CHAIRMAN: That may take several months.

Mr Penn: That could. That is one of the other issues. Certainly the government's view—if I am able to comment on the government's view—is that where it is proposed to have an area declared for that lengthy period of time that is something that probably should be subject to some type of parliamentary scrutiny. That is probably why they set that threshold for those regulations to kick in.

The CHAIRMAN: I would like—as I am sure do the others—to explore the circumstances under which that may arise. If I may for a moment continue to explore how the bill is going to change the

current situation. In that way, we can identify the changes and go back to the policy justifications underlying.

Mr Penn: Certainly.

Hon ALISON XAMON: I want to clarify that under the declaration, for example, that could include political protests, such as the climate change camp that was held recently down at Collie. I am curious to know the criteria by which the declaration would be employed. Let us say that *The West Australian* newspaper has a bee in its bonnet about a particular area and decides to whip up some public opinion—not that it would, I am sure, but just in case. Would that be an area? How do you determine the grounds on which an area is going to be declared?

Mr Penn: I mentioned earlier the guidelines that the commissioner is putting in place to guide officers in the conduct of the searches. There are also some criteria being put together to guide district superintendents, who would be putting the proposals up to the Commissioner of Police, to provide guidelines on the types of information they ought to have regard to before they put forward a proposal for declaration. At this point in time, a lot of that is being driven by the nature of offences taking place in certain areas and the risk that might be presented to the public in those areas. We are looking at things like violent offences, alcohol and drug offences or alcohol-fuelled behaviour and weapons offences. Those are the types of things that, at this point, we are looking at the drivers or the information we should have regard to in forming a view as to whether a declaration should be made. As Superintendent Budge mentioned earlier, it is looking at the place and it is not targeting groups of people. We are looking at wanting to declare a place because there is a need to invoke these powers, and we are having regard to all those pieces of information that will be put forward to the commissioner and, ultimately, to the minister for him to approve it.

[1.40 pm]

Hon ALISON XAMON: I just want to confirm that without any legislative guidelines, at the moment we are just relying on guidelines. I notice you said, “At this point in time,” which is clearly the case. Really, we could be looking at any criteria at all, going into the future, by which a place could be declared and, as the chair has pointed out, that could just be done over and again indefinitely.

Mr Penn: The bill does provide that if the commissioner, with the approval of the minister, does make a declaration, the reasons for making the declaration are to be made. Certainly in the context of your comment earlier, the people in the area that is to be declared should be cognisant of the reasons why you are making that declaration. That attempts to address any issues about there being a declaration for the whole of the state of Western Australia.

Hon ALISON XAMON: But my understanding is that there is no penalty for not having a declaration placed in the *Government Gazette*. Is that correct?

Mr Penn: The reason why we have the publication in the gazette is not the fact that the declaration will only have effect when it is published; it is actually trying to provide a mechanism of notification to the public. Unlike regulations and other notices that would only take effect when published in the gazette, this is more about saying to the commissioner, “You should be publishing it in the gazette so that it is an avenue for the public to be made aware of it, but if you don’t publish it, it does not invalidate the order.”

Hon ALISON XAMON: We have legislation that can invoke, without going through Parliament, any place and without any clear criteria and without any way of advising the public that it is happening, without any penalty if they do not. It is possible that that could occur under this legislation.

Mr Penn: There is no criteria in the legislation, but there is a requirement to publish the reasons for it.

Hon ALISON XAMON: But if you do not publish it, there is no penalty.

Mr Penn: No.

Hon ALISON XAMON: You could feasibly get away with never publishing the reasons and never letting the public know, and that would be that. I can only go with what the letter of the law is in terms of what is being put forward to me as a member of Parliament and what it is that I am being asked to pass. It seems to me that there are some pretty big holes in the legislation.

Mr Penn: As I say, the purpose of the publication in the gazette is more about providing one avenue to notify the public. There are a range of other avenues that WA Police would look at, depending on the nature of the area that has been declared. It could be that if it is a reasonably sized area, there could be signs posted at entry points into that area advising people they are about to enter into a declared area and there could be information put out in the local press in that area advising people —

Hon ALISON XAMON: But they do not have to know. I could turn up to the climate change camp without any knowledge or any way of knowing that it has been declared an area where, simply by walking in, I will be subject to a search and where I do not even have the capacity to say, “No, I really don’t want you to search me. I am going to walk away now.” I can be searched anyway.

Mr Penn: If that area was declared, that scenario could happen, yes.

Hon ALISON XAMON: Thank you.

Mr Penn: As Superintendent Budge pointed out earlier in terms of the process that officers would go through before they physically conducted the search, they would advise the person that they are a police officer, that they are proposing to conduct a search and where they derive their power to conduct that search. While you have the declaration of the area, before that search takes place, the police officer would be advising the person of why the search was being conducted.

Hon ALISON XAMON: By then it is too late.

Mr Budge: It is important for me to clarify a point because the climate change conference down south has been mentioned a number of times now. My understanding is that the relationship between the conservation people, the police and the townsfolk down there was excellent. Given that there has not been any trouble at all, why we would ever consider attempting to get a declaration for the climate change down south is confusing.

Hon ALISON XAMON: Can I clarify that, please?

The CHAIRMAN: It may as well be the school fete.

Hon ALISON XAMON: I hardly think so, and you are not going to get moved on from a school fete. I made reference to the move-on orders before, which it was made clear when they passed that they would never be used for those purposes, but they have been used for those purposes. My point is that at some time in the future, circumstances could change. The legislation, as it is being proposed here, would actually allow that scenario. Even if it is unforeseen now, it certainly is possible in the future, and it could be used for those purposes in the same way that we have seen with the move-on orders. That is the answer to that.

The CHAIRMAN: Was that a question or a statement?

Hon ALISON XAMON: That was a response to why. There was a question asked.

The CHAIRMAN: Before we go any further, we have the Commissioner for Children and Young People, who has to depart by 3.15 pm. This will plainly take some time, because a number of issues need to be explored. We can either continue with these witnesses and ask the commissioner to come back on another occasion or we can interrupt these proceedings and ask these witnesses to return on another occasion.

Hon HELEN MORTON: Can we consider this in committee?

The CHAIRMAN: I have raised the issue and we should consider it in committee. Therefore, I ask that the room be cleared, please, just for a moment.

Proceedings suspended from 1.45 to 2.00 pm

The CHAIRMAN: Unconnected with these witnesses, but for the information of the media, the Commissioner for Children and Young People has been rescheduled for next Tuesday at 10.00 am, so we will continue with these witnesses.

What we would like to now explore is the policy behind the bill and how it came about. Are you able to tell us how this legislation was initiated, the reasons for it and what mischief it is meant to address that is not currently addressed under the current legislation?

Mr Penn: I will provide just some information. The area that I work in—legal and legislative services in WA Police—we are responsible for progressing amendments to police legislation for the Minister for Police. In that context from the information that I have—and I have been in that area for a number of years—in relation to this particular bill, in mid-November 2008 our area first became aware of the government wanting to look at expanded police powers as a result of articles in the press. I think there was an article in *The West Australian* around 13 or 14 November 2008, which indicated that, I think, it might have been the Premier and the Minister for Police wanted to look at some enhanced police powers in the context of Northbridge, so that is certainly my first recollection of the driver behind this bill. Flowing from that media article, our Legal and Legislative Services area of WA Police were asked to look at what range of enhanced police powers might be able to be used in areas such as Northbridge but also in other contexts where there might be a need to conduct searches of people for dangerous items, weapons, drugs and those types of issues, so it was in that context in sort of mid-November 2008 that the legal and legislative services area were asked to look at that.

We had our own internal working group that looked at the existing provisions within the Criminal Investigation Act; looked at the powers that were available to police. We also looked at some of the provisions that had recently, at that point in time, been enacted in New South Wales and Victoria. From recollection, they had enacted provisions whereby if a person was in an area where there was a high incidence of personal violence that would give some greater grounds for a police officer to have reasonable suspicion to search a person who happened to be in that area, so we had regard to those provisions. I think at that point in time the Commissioner of Police had expressed some concern about the number of weapons coming into the central business district through the trains et cetera, so we also had a look at what provisions might be capable of being enacted in the context of the train lines. So we put together, for want of a better term, a general briefing note that we then sat down with some operational superintendents, some officers from central metropolitan district and some of the other metropolitan districts, and said to them: what would their views be on having some type of enhanced police powers where maybe police would be able to conduct a search without the consent or reasonable suspicion of a person?

What views they would have on how those laws might be framed; what safeguards they thought would need to be in place: how broad those powers of search should be; and what their views would be in terms of the type of search that could be conducted. We also sought their views about what would be in their mind the appropriate avenue for giving approval to the exercise of powers.

The CHAIRMAN: Could I just go back a moment? You mentioned that your section's first awareness was the government wishing to look at expanded powers as a result of some articles in the press. That was your first knowledge of it.

Mr Penn: That is right. I think that was on the day that the press article came out. We were asked by the minister's office to have a look at what exactly those enhanced powers might contemplate. At that point in time we had not been working on any submission for enhanced powers.

The CHAIRMAN: Had there been a perception at that stage on the part of the Commissioner of Police that there was some lack in police powers, some deficiency that needed to be addressed?

Mr Penn: Without talking for the commissioner, I am not sure what was in his mind. Certainly I do know that he had made some comments about the range of weapons being taken into the Perth area. So he was looking at what measures could possibly be done in terms of addressing that, but it was not in terms of necessarily enhanced police powers. He was looking at whether there could be targeted operations, and I think there were around that time some targeted operations by police officers at various rail platforms where they asked people to walk through metal detectors and things like that. So it was in the context of what operation police could do, but there was nothing at that point in time that the commissioner had said in terms of we need to necessarily have some enhanced police powers.

The CHAIRMAN: So would it be fair to say—if this is incorrect, then please correct me—that there had been some perception of a social problem or a criminal problem in the Northbridge entertainment district that the commissioner felt needed to be addressed?

Mr Penn: There was that aspect, but I think judging by the media articles there was obviously something also in the mind of the government. Now, I am not sure what information they had been given, as to what was in their mind.

The CHAIRMAN: So it was the government that had initiated the suggestion that enhanced powers were necessary.

Mr Penn: That certainly was the driver for our area to start work on the submission, yes.

Hon ALISON XAMON: So before the issue of enhanced powers had been raised by government, the police were already looking at a range of options on their own initiative in order to address the issues that had been arising in and around Northbridge or around the issue of weapons coming in. So you were already looking at alternative ideas.

Mr Penn: We were already looking at it but not necessarily looking at any specific enhancement of police powers, just looking at it.

Hon ALISON XAMON: I understand, but you were looking at a range of other alternatives to this which could be enacted.

Mr Penn: Yes.

Hon ALISON XAMON: Can I ask if there was any success in any of those initiatives that had been put forward by the police, the alternatives?

Mr Budge: In regard to Northbridge?

Hon ALISON XAMON: Yes.

Mr Budge: I can talk to it. Since my arrival there in December 2008, we have put in place a range of initiatives to deal with the crime and antisocial behaviour aspects in the Northbridge entertainment precinct, including an improved service on the street and more police on the street; a re-look at the young people in Northbridge policy, which is commonly referred to as the curfew; looking at specific licensed premises that were the subject of large volumes of antisocial behaviour and violence in and about their premises, which has resulted in a licence being cancelled and a person being banned; taking a no-tolerance policy to violence and antisocial behaviour in the street; and a range of other initiatives. At this stage we are seeing some encouraging signs in regard to Northbridge and in regard to volume crime.

The CHAIRMAN: I am sorry, you had been back in December 2008 seeing an encouraging response?

Mr Budge: No, in 2008 we commenced this program.

Hon ALISON XAMON: Since then quite a few encouraging results.

Mr Budge: At this time, when we were comparing last year to this year—I mean we are looking at financial years—we are having some encouraging results. Robberies are down about 45 per cent in the area —

[2.10 pm]

Hon ALISON XAMON: That is significant.

Mr Budge: — which are violent offences committed against people. We have burglaries and car theft down significantly. In regard to car theft, down about 60 per cent, and burglaries as well. In regard to stealing and damages offences, they are down quite significantly. In regard to assaults, they are at the same level as last year. We have not seen a significant drop or change in the report of assault statistics or the antisocial behaviour that is on the street. While we are having an impact in regard to volume crime, we are not at this particular time having a lot of success in regard to the violence and antisocial behaviour that is on the street, although it is encouraging that the numbers are starting to drop now with some other initiatives being put in place.

Hon ALISON XAMON: Can I just ask briefly the sorts of initiatives that we are talking about?

Mr Budge: Sure. We work quite strongly with the Department for Child Protection and Mission Australia in regard to the young people in Northbridge policy. We recognise that the philosophy of taking them off the street was a good one because these children were in need of care and protection, and they were subjected to physical and moral danger whilst they were in Northbridge. We certainly decided that there needed to be some more attention given to the families. We have certainly been working with Mission Australia and the Department for Child Protection in stronger relationships and some more intense work with families, because these children come from some of the most challenged backgrounds imaginable.

Hon ALISON XAMON: So dealing with the root causes?

Mr Budge: Exactly, yes. That is something we are still looking at. We are encouraged that it may have some impact into the future. Whether that is realised is something that we will only know into the future.

The CHAIRMAN: You mentioned, Mr Penn, an internal working group. That was already in place at the time of the newspaper reports?

Mr Penn: No, it was not.

The CHAIRMAN: That was established as a result of that?

Mr Penn: Yes. The issues that the commissioner was looking at at that time were more operational issues. We only established the internal working group as a result of that media article, to look at the question of what type of enhanced police powers could be put forward.

The CHAIRMAN: Was that working group set up to determine what powers would be necessary or what powers would be desirable in order to achieve certain ends; and what were those ends?

Mr Penn: The working group was really to look at the existing provisions of the act and exactly what powers police could derive from those, and then to look at, certainly in other jurisdictions, what powers they might have to combat antisocial behaviour or violent offences; so what additional powers other jurisdictions might have that we might be able to borrow from or to learn from. It was in the context of just looking at the various options for reform. Obviously one of those options for reform is to look at the issue of search without consent and without reasonable suspicion.

The CHAIRMAN: Was any deficiency identified in those powers of search before the media article and the establishment of the working group?

Mr Penn: Not to my knowledge. It was only through the work of the working group that we actually sought to clarify exactly where the boundaries of some of those powers were. Certainly I think there was an expectation at the time that maybe the powers under section 69 were broader than what people had contemplated. I think there was a belief that maybe if an area had been declared under section 69, that effectively gave police the power to search anybody in those areas. Certainly that was one of the misnomers that the working party addressed to say: No, those powers in there are very clear in terms of requiring the consent of the person. Beyond “reasonable suspicion” powers elsewhere in the act, there was not some of the same measures that some of the other jurisdictions had, which had gone a step further certainly in the “reasonable suspicion” area.

The CHAIRMAN: Why was it thought than an extension of those search powers to what is currently proposed were necessary in order to combat these particular social ills?

Mr Penn: It was not necessarily felt that there was a specific need to enhance those powers, it was more a case of there could be situations that arise where the existing powers may not address situations that would come up.

Hon JOCK FERGUSON: Are there any specific cases you could guide us to in that regard?

Mr Penn: In terms of specific cases—no. What I can do, if you like, in the context of maybe putting some of this Northbridge stuff into context, I have got some information here for the committee members. This is some information concerning offences committed in the Northbridge area over a period of time. This is weapons offences in Northbridge and Perth for the period of July 2008 through to September 2009. At the top of the chart, it gives a breakdown of the various weapons offences. Then the various tables below that give the breakdown in terms of the age of the offenders charged, the time of the day and the day of the week.

Hon ALISON XAMON: It is really not a huge number of offences.

Mr Penn: The point I want to make is that this is not a measure of the total number of weapons et cetera being found in that area. This is a measure of the weapons charges that are laid as a result generally of the reasonable suspicion. We certainly know that that is not by any stretch of the imagination the full extent of weapons being carried by people in those areas. Certainly a similar position would be presented in relation to drug offences—you present information in terms of drug offences taking place in any and various localities. That does not mean that is the total sum of people who are found in possession of drugs et cetera.

Hon JOCK FERGUSON: So the initiatives that apply to Northbridge, has that applied to the Perth area? Statistically, Perth seems much worse than Northbridge.

Mr Penn: If I can just put some of these figures into context. These are based upon the actual suburb localities. In Northbridge, where we have got around the cultural centre and you have got some of those areas of Beaufort Street and maybe even to the Perth railway station, they are part of the suburb of Perth, although people generally tend to think of those as Northbridge.

Hon HELEN MORTON: They are not included in here?

Mr Penn: They would be included in the Perth figures, not in the Northbridge figures.

The CHAIRMAN: So we are clear on that, because you have raised a very good point about what the geographical boundaries are that we are talking about when people refer to a problem in the Northbridge entertainment district—what is Northbridge for the purposes of these statistics?

Mr Budge: By suburb. The suburb of Northbridge, in quick terms, is bounded by Roe Street, William Street, Newcastle Street and the freeway. So anything east of William Street, which includes the cultural centre along Beaufort Street, is not in Northbridge. These figures that you see are related to that small area, which is 0.67 of a square kilometre, the suburb of Northbridge

The CHAIRMAN: And the statistics for Perth cover what—that area east of William Street past Barrack Street out to what Stirling Street and that area? Does it include the central business district as well?

Mr Budge: That is it, yes.

The CHAIRMAN: South of the railway line.

Mr Budge: Yes, that is correct.

The CHAIRMAN: As far west as where?

Mr Budge: I am not sure where the boundary of West Perth is, but up to the boundary of West Perth.

The CHAIRMAN: Parliament House presumably, or the freeway would be the western-most boundary.

Mr Budge: Yes.

The CHAIRMAN: The eastern-most boundary would be where—Heirisson Island or the river?

Mr Budge: No—that would be East Perth down there. I do not know

The CHAIRMAN: Victoria Avenue?

Mr Budge: It could be Victoria Avenue. It might be a bit further, it might be Plain Street.

[2.20 pm]

Hon ALISON XAMON: I am going to go back to where we were a while ago. I am reflecting on what you are telling us about how this bill came about, and I cannot help but think that it sounds as though, in response to a newspaper article, the government basically came to you and said, “Put together the wish list of increased powers that you want,” and that you went away and put it together, because I am still waiting to hear a compelling argument as to why the existing legislation is inadequate, and why those increased powers—which potentially take away quite significant civil liberties from innocent citizens—are actually needed, especially considering that I am hearing about some pretty positive initiatives, especially the ones you talked about dealing with the root causes of issues, that are being generated by the police force. Perhaps if more attention and resources were thrown towards that rather than these sorts of legislative provisions, I wonder how that would go. I just want to get it clarified, having said that, that this was not initiated by the police at all.

Mr Penn: I will just clarify that. The media article indicated that there had been some interview with the Premier or the Minister for Police, and that they had been looking at issues in relation to Northbridge. From that, we were then asked to look at enhanced powers. I do not think that it was necessarily a case of a media article talking about crime et cetera and the government then responding; there must have been something that happened prior to that, that I am not aware of, where the government decided that something needed to be done in the context of Northbridge, and that is when our area was asked to look at enhanced powers.

Hon ALISON XAMON: Can I just confirm, then —

The CHAIRMAN: If I understand that, whatever the article may have said, what initiated this was the police going to have a look at whether they needed further powers to deal with this issue.

Mr Penn: That is correct.

Hon ALISON XAMON: I want to confirm—let us get this very clear—that the police, at no point, initiated the need for this new legislation.

Mr Penn: We were not working on any proposals for enhanced police powers at the time that that article was in the press.

Hon ALISON XAMON: Thank you.

Hon JOCK FERGUSON: You were asked specifically to go and look at some improvement in police powers—I say that very loosely—to deal with problems in Northbridge?

Mr Penn: That was the driver at the time, but we were conscious that we did not want to be focused only on addressing Northbridge or entertainment precincts, because situations will always arise where there could be a sudden increase in violent offences in any particular locality; it does not need to be an entertainment precinct. We were conscious that any proposals we would put forward would need to be broad enough to cater for any eventuality, whether it was something that needed to be targeted in entertainment precincts or a sudden increase in violent offences in a particular area; it could be a range of those issues. The legislation needed to be broad enough to cater for that. Then there was the question of what powers the police would need to have if they were to have some measured effect in addressing some of the increase in violent offences. There was the question of what existing powers the police had, the limitations placed upon them, the thresholds that police had to go through for reasonable suspicion, and the limitations in relation to section 69 of the act. Beyond that, what additional powers would actually give police a greater tool to be able to target this increase in violent offences or weapons or drug offences? That is what we looked at. The next step beyond that is to look at the question of whether reasonable suspicion should apply in certain circumstances or whether consent should apply in certain circumstances. That is where it has moved—that threshold is where the bill is at.

The CHAIRMAN: Do you have handy the terms of reference for that working group?

Mr Penn: It was an informal working group. I think there may have been a phone contact from the minister's office or something along those lines to ask us to have a look at it, so I got together with a couple of other people and we started looking at it, meeting with the operational people and talking to them about what is happening in other jurisdictions and what other powers they —

Hon JOCK FERGUSON: So you have just done a cut-and-paste exercise?

Hon ALISON XAMON: With a whiteboard!

Mr Penn: No, we were examining what our laws are and examining —

Hon JOCK FERGUSON: Examining other laws and taking the best, or what you see as the best?

Mr Penn: We were looking at the context in which some of those laws have come about. Some of the laws in New South Wales have certainly come about as a result of the Cronulla riots, so we were conscious that maybe some of those laws had a different driver to them, but we still looked at them and notwithstanding what might have been the drivers for those laws to take place in those other jurisdictions, we looked at what exactly those laws provided for and asked whether it was something we might want to consider.

Hon ALISON XAMON: When this working group was putting together this list, did you do any consultation with anyone external to the police force?

Mr Penn: No.

Hon HELEN MORTON: I just want to ask some questions, again following up on the really good initiatives that you have put in place already. Why have you not ever used the place declaration, or whatever it is?

Mr Penn: Prescribed place regulation.

Hon HELEN MORTON: Why have you not ever used that? Is that piece of legislation useless? Is it of no value to you? Is it too hard to implement? Why have you never used it?

Mr Budge: I do not know that I have an easy answer for that. We certainly have been looking at other initiatives rather than the section 69 declaration. At this stage I have not considered using it.

Hon HELEN MORTON: How long has it been an option?

Hon ALISON XAMON: Three years?

Hon HELEN MORTON: Since 2006?

Mr Budge: Yes, 2006.

Mr Penn: I think it came into effect in July 2007.

Hon HELEN MORTON: So since that time—basically, four years—those powers have been available to police, but nowhere in the entire state of Western Australia have they ever been used?

Mr Budge: I am not aware of them having been used.

Mr Penn: To my knowledge, those powers under section 69 have not been utilised.

Hon HELEN MORTON: Is there any reason that you cannot use them? Is there a problem with them?

Mr Budge: I think, as Mr Penn said earlier, that the police perhaps understand that it may prove to be fruitless if we do not have the powers to search people in the prescribed area.

Hon HELEN MORTON: I actually heard you say before that there is almost no way that you cannot search someone in the area if you actually wanted to.

Mr Budge: No, the point I was making is that I did not think that if a person refused consent to a search that it would necessarily ground a reasonable suspicion. I do not believe that a refusal to undergo a search would necessarily provide reasonable suspicion.

Hon HELEN MORTON: Would it be necessary to perhaps do random searches? I do not know how you do random searches—is it every fifth person? How do you work it out?

Mr Penn: I suppose that that is the crux of it; there are no random search powers, aside from the terrorism laws, in Western Australia. There are no random search powers; we cannot simply say that we are going to search every fifth person.

Hon HELEN MORTON: I know; that is the point I am making. Therefore, when you are not using any random mechanism, you must be able to pinpoint someone doing something that must make you say to yourself that the person needs to be searched.

Mr Budge: I would have a reasonable suspicion, yes.

Hon HELEN MORTON: That is currently available. Why has that not been used in conjunction with section 69, if you want that power?

Mr Penn: I think the point that Superintendent Budge is making is that if an area is declared under section 69, which relies on a person consenting, there may be occasions where people simply do not want to be searched, but just because they do not want to be searched, it is not enough to then form a reasonable suspicion.

Hon HELEN MORTON: I understand that.

Mr Penn: In the absence of that, there would be no provision for the police to search that person.

Hon HELEN MORTON: Other than if you had a suspicion?

Mr Penn: That is right.

Hon HELEN MORTON: We already determined previously that the police do not randomly search people; you only search people if you have a suspicion.

Hon JOCK FERGUSON: You would not search them unless you had a suspicion.

Mr Penn: That is right.

Hon HELEN MORTON: Then you can search somebody in a declared area if you have some suspicion?

Mr Penn: One can search them anywhere, yes.

The CHAIRMAN: Perhaps I could try to synthesise this. We are looking at a scenario, let us say, in which there is a troubled area—perhaps like Northbridge—where statistics have revealed that there is a certain level of unlawful weapons being carted around, and perhaps drugs and the like. A police officer on the beat can look at someone and conclude that he is up to no good, and there could be a variety of factors, including the place he is in, the way he is behaving, how he is dressed—whether he is dressed for the season or wearing something that is particularly bulky that may conceal things.

So you might form—others might take a different view as to whether it is objective or reasonable or not—a suspicion, and think it is a reasonable suspicion, to stop and pat them down; correct?

[2.30 pm]

Mr Budge: Correct.

The CHAIRMAN: You may find that they are, in fact, carrying something that is connected with an offence, in which case you then seize that article under the current legislation and arrest the person; correct?

Mr Budge: Correct.

The CHAIRMAN: You can, under the current legislation, either because a senior enough police officer has declared an area as one that is a particular trouble spot or because some regulation has been passed, have a particular area that is interdicted but is an area where a police officer can then pull people up and, without any particular suspicion but just from the nature of the area, want to ensure that they are not carrying weapons or drugs.

Mr Budge: That is correct.

The CHAIRMAN: And so you just come up to them and you say, “All right, this is a trouble spot, we have had a lot of weapons and violence offences around this area, drugs are being taken to this particular area; I want to check you out. I have no particular suspicion about you, sir, but I want to make sure that there are no drugs being taken in this area, but I can only do that with your consent.” If the person says, “Well, no, I don’t want you to search me”, then the officer will say, “All right, move on; I want you out of here”; correct?

Mr Budge: Correct.

The CHAIRMAN: The fact that they say, “I don’t want to be searched, I am just minding my own business here with my girlfriend”, or whatever, “I don’t want you to lay a hand on me and search me”, and the police officer says, “Well, fine; in that case, leave”, if the person leaves, then you have no basis for searching; correct?

Mr Budge: Correct.

The CHAIRMAN: What you are trying to overcome with this legislation is that that person may in fact be carrying something that is illicit or dangerous or harmful and you do not want him to slip through because he has decided that he does not want to be searched.

Mr Budge: Correct.

The CHAIRMAN: The fact that that may reveal or deter persons is enhanced by what is proposed under the legislation, in the police view.

Mr Budge: I certainly believe there is a strong crime prevention aspect to the proposed legislation.

The CHAIRMAN: We will get to the reasons why on that, but one that springs to mind would be that if people know that that area is under a declaration from the minister on the recommendation of the Commissioner of Police or one of the deputy commissioners for a period of time at certain times, then troublemakers may stay out of there and go elsewhere.

Mr Budge: Correct, which is one of the reasons we would like to make sure that it was well publicised.

The CHAIRMAN: To what extent, though, bearing in mind the current problems in, let us say, Northbridge, although I take the point that there may be a variety of other areas across the state, some of them in remote communities, some of them in regional centres, some of them in suburbs of Perth other than Northbridge, to what extent is this a desirable power rather than a necessary power?

Mr Budge: The levels of violence and antisocial behaviour in Perth and Northbridge are the highest levels in the state. It causes us concern. The levels of weapons-related offences in those two areas cause us some concern. We accept that those statistics we have in front of us are a percentage of the number of people who would be in possession of weapons within those areas. I would not hazard a guess at what percentage, but the fact that we are seizing that amount of weapons is a clear indication to us that there are a number of people who are entering those areas in possession of dangerous and offensive weapons. The levels of assault in Perth and Northbridge are the highest in the state. People in possession of weapons are likely to use those weapons when conflict or aggression occurs, on many occasions with devastating consequences, be they fatal or very serious, and that is a concern to us.

The CHAIRMAN: This will help, you say, by then, firstly, the deterrence, as troublemakers will think that: "Okay, there is a better than even chance that police officers are on the beat and may not like the look of my face and stop and search me and find me with a knife or other weapon, or drugs", and so stay away from that area and drift off elsewhere; or that you would stop someone and, rather than them being able to say, "Okay, I'll shoot through and peddle my stuff somewhere else", they in fact would be searched and found with this stuff and so you would expose more of these articles.

Mr Budge: Yes. As I have said, we certainly believe there is a strong crime prevention aspect to it by having it declared and putting it out into the public arena that it is an area where, if you attend, you would be liable to be searched. We certainly are keen to identify those other people that may be carrying weapons or drugs into the area.

The CHAIRMAN: You currently cannot do that, even if you did prescribe a place under section 69(1)(a), because all that that would allow you to do is to give them the consent or leave option, and so allow miscreants to simply remove themselves from the area.

Mr Budge: We could only search them if we have developed or formed a reasonable suspicion, and if they walked off we would have no powers to search them.

The CHAIRMAN: How many cases have there been, whether anecdotally or based on statistical evidence, of police officers believing that someone has been in possession of an item relevant to an offence and has felt that they have not had a basis for stopping and searching that person and has allowed them to depart?

Mr Budge: Because it is such a subjective test, I do not know that we keep statistics on that information.

The CHAIRMAN: Even anecdotally, are you aware of circumstances that have suggested that there is a need for this enhanced power because a police officer or officers have felt frustrated that they have allowed someone that they are convinced they should search but do not feel they have a reasonably based suspicion to search, and have felt that they have had to allow someone to leave?

Mr Budge: There is certainly anecdotal evidence of that and I have certainly been involved in discussions with police officers, and there has been much debate about the subjective nature of reasonable suspicion. We have talked about scenarios where some police say, "Yes, I believe that would give me a reasonable suspicion to search the person", and others have said, "No, I don't think that would give me a reasonable suspicion."

The CHAIRMAN: I would like to explore some of those scenarios, because I think we are getting to the nub of how necessary these powers are, as opposed to how desirable these powers are. But are you able to put a figure on or give us some indication of the extent of the problem that requires a step such as the one that is being proposed under this legislation? Are you aware, for example, of any cases of an arrest or a charge by summons where a brief manager or supervisor has said, “No, we can’t proceed with a charge here because I don’t think you had a reasonable enough suspicion to stop and search this accused.”

Mr Budge: No, I do not know of any cases. As you are suggesting, in fact the finding of an article or drugs would corroborate the officer’s reasonable suspicion.

The CHAIRMAN: You are not aware of any cases where a lawyer has raised, either prior to a hearing or during a hearing, that evidence of a search ought to be excluded because the officer who conducted the search had no reasonable suspicion for doing so?

Mr Penn: If I can just comment on that.

The CHAIRMAN: Please.

Mr Penn: I do have a particular case here, and maybe I could provide some papers to the committee. This involves a case where —

[2.40 pm]

The CHAIRMAN: Before you go on, should we have time to read this before you explain it, or are you going to summarise it?

Mr Penn: No, if you want to take a minute to, there are only a couple of pages there. It does not go into a lot of the detail but it goes into what actually happened in the court and a matter being thrown out and touches on the issue reasonable suspicion.

The CHAIRMAN: Perhaps if you can summarise it for us. If you are able to or you propose to do that, it might not be necessary for us to read it right at this moment.

Hon ALISON XAMON: This is 9 February 2006, so this is before the new legislation—this is before the present legislation came into force.

Mr Penn: Yes, but it touches on the issue of reasonable suspicion, and while the Criminal Investigation Act has those particular provisions in there, they were pretty much the same as what existed prior to the Criminal Investigation Act, so that reasonable suspicion test has not altered with the enactment of the Criminal Investigation Act.

In essence, what happened was that a couple of police officers pulled a person over to conduct a search and told the person in question that they were going to search them. They uncovered some drugs. During the course of the arrest also there was a short struggle, so that the person was charged with the drug offences and also, I think, a hindering police offence. The trial proceeded as per normal, but the officers in question gave their evidence. At no point during the trial was there any question raised or the officers had to give any indication to the magistrate as to what their reasonable suspicion was. It was never an issue raised by defence counsel, so the officers did not have to go into, “This is the reason why I searched the person.” It was only in the final summing up of the defence counsel that defence counsel put in the mind of the magistrate that, “Well, the officers have not shown any justification for their reasonable suspicion, so because they have not shown that justification, you ought to throw this matter out and that you ought not to admit into evidence the fact that the drugs were found.” So there was no opportunity in this particular case for the officers to actually put their grounds to the magistrate and the magistrate took on face value what defence counsel had put an threw out the case. So there was no opportunity to test the reasonable suspicion on that one and the WA Police decided that given the nature of the offences and what the likely penalty might be if we were to appeal against it, we decided not to appeal against this. So there is a question there with reasonable suspicion that the court has not even given

the officers the opportunity to put their case and it is well established that even if a court cannot find that the officers had a reasonable suspicion, the court can still allow that into evidence. Have another case here —

Hon ALISON XAMON: I am sorry. I would like to respond to that, though. The magistrate has clearly erred, because even looking the set of facts as outlined here, clearly the police officers did have grounds to actually search under the existing legislation, and it would appear from what is been presented that the police officers did not err. I would suggest respectfully that if it had been appealed, this probably would have been overturned, which actually tells me that the existing legislation does work, It is just that we have one case from four years ago where the magistrate got it wrong. I am struggling as to why that means —

Mr Penn: This is an example of one. I have also got one, admittedly not from WA and but from South Australia, which was the Court of Appeal, but they rely on the same issues of reasonable suspicion.

Hon ALISON XAMON: So another jurisdiction.

Mr Penn: Yes, but the reasonable suspicion test is pretty much standard right across Australia in terms of the courts and the officers having to satisfy a court as to the grounds for carrying out a search on the person and then the consequences that arise from that. I will briefly touch upon this case, and obviously the committee can take time to read through it, but this came about in relation to some burglaries that had taken place in a particular area. Police officers who were in that area had received information over the police radio of a broad description of a person who was understood to be probably connected with those burglary offences. They came across this particular individual who, by and large, fitted the description that the officers had been given. They carried out a search and found a number of implements on the person that suggested that they might have been involved in the burglary. The matter went to trial and the magistrate felt that the information that the officers had put forward, based upon what they heard over the police radio was not a reasonable suspicion enough for them to stop this person and conduct the search, and the magistrate then also ruled on the information that the officers found as a result of the search. Even though he could have allowed those into evidence, he chose on public policy grounds not to. The matter was taken by the South Australian police to the Court of Appeal over there.

Hon ALISON XAMON: And overturned.

Mr Penn: The Court of Appeal found that the magistrate erred on both of those occasions, in that the court did find that the officers did have a reasonable suspicion, and even if the court had not found that the officers had a reasonable suspicion, that the court should still have allowed that into evidence. So I am just putting these forward —

Hon ALISON XAMON: You have just given evidence that it mean that the existing laws are working.

Mr Penn: No, am just giving you some evidence in terms of the types of issues that go through not only the police officers' mind in terms of trying to frame a reasonable suspicion but also then a court et cetera, after the event, trying to judge whether what the officers were looking at at the time was a reasonable suspicion. I think it goes to the comments that superintendent Budge said, that each individual officer has to satisfy themselves about that reasonable suspicion, and it is not always going to be an occasion whereby, in that context of section 69, a person does not consent to being searched, they will not form a reasonable suspicion . I am just putting these forward to say that there is some grey area in reasonable suspicion and that is also grey area from one police officer to another. I think superintendent Budge said there are scenarios. You could put a scenario to five different police officers. Three of them might say, "Based upon that information, I think I would have reasonable suspicion to search that person." Two other officers might say, "Well, I do not really think so."

Hon ALISON XAMON: I am sure if we were to sit here and talk scenarios, we could spend an entire day comparing scenarios about violation of liberties where there would be major injustices done—a whole range of things. I am interested in looking at what is real, what is actually ahead of us. What you have just demonstrated is that there is nothing wrong with the law. It sounds like there may be some issues around training of police officers in terms of what that actually means—reasonable suspicion and the like—and certainly it is a subjective test. But I am still yet to hear anything compelling, other than it would be a deterrent, as to why the law should be changed. I can think of a number of things that would be deterrents that nevertheless are highly undesirable. We could look at microchipping all babies at birth. We can look at any set of absurd situations, but the thing is to what degree are we going to cut into people's individual rights in order to achieve a particular outcome. I am yet to be convinced.

Mr Penn: On that issue of advise, I think there is a balance between the rights afforded to people in a particular area, be it the law-abiding citizens to feel safe going into the area and not to feel threatened —

Hon ALISON XAMON: Which is why you have got 69.

The CHAIRMAN: With respect, it is not helpful to talk over a witness. If you have got a question and you would like an answer, I do not think it is really a matter of debate to then try to stretch the information for arguments later on. But you were saying something about the —

Mr Penn: I think there is also the question here in terms of the right of, I suppose, the law-abiding citizens who are going into these areas to not feel apprehensive that they may come into contact with somebody who is exhibiting signs of violence, that they are not going to be going into an area where they might be exposing their children to seeing people doing drug trafficking et cetera. What the legislation tries to achieve is to provide some enhanced powers for police officers, but there are some measures to try to also balance up in terms of the people that are being searched. For example, one of the things in there is that it does not allow a strip search to take place.

[2.50 pm]

The CHAIRMAN: I understand that. I want to get back to the area that is troubling me, or rather is exercising my mind in this area. I go back to what Hon Alison Xamon has said about powers. There is a variety of powers that it may be desirable to have in any circumstance to deal with a particular criminal issue. To what extent has the lack of these powers impeded the ability of the police to deal with the problems in Northbridge? How necessary are these powers, as opposed to desirable? Just to give you an example of what I am driving at—you may or may not be able to answer this—you may find that legislation that gives the police certain powers requires that in every case the police cannot search a person, even with a reasonable suspicion, unless the person consents. That would obviously be an area that would need to be addressed in order to give the police the power to do their job. This seems to go a bit further than that, because it is removing even that threshold. The question that then arises is: is it really necessary, as opposed to simply desirable, for that additional power to be given to the police?

Mr Budge: I would say that we need this legislation to ensure that the environment is safer and more secure for the community. The statistics that we provided with regard to weapons are of concern. As I have said previously, they are clearly a percentage of the weapons that are brought into the CBD and the Northbridge area. The legislation is all about providing a safer and more secure community.

The CHAIRMAN: All right. Before I forget—I am drifting off the subject a little bit and am going back a stage—are you able to tell us who prepared that summary of the evidence in the magistrate's decision?

Mr Penn: My understanding is that that summary was prepared by somebody in the State Solicitor's Office.

The CHAIRMAN: Okay. That was a case in which the charges were resisting or hindering a public officer, and being in possession of methyl amphetamine.

Mr Penn: That is correct.

The CHAIRMAN: Were all the charges dismissed by the magistrate on this basis?

Mr Penn: That is right, and WA Police chose not to appeal,

The CHAIRMAN: Since this case, we have the Criminal Investigation Act 2006, and we have section 155 of that act, which in fact provides a bias towards the admission of evidence that would otherwise be excluded. With the passage of the Criminal Investigation Act, part of the situation that the magistrate was addressing is now covered by section 155 of that act, which puts a bias towards the admission of evidence that might have been unlawfully obtained. Would that be correct?

Mr Penn: Yes.

The CHAIRMAN: So there would be even less of a prospect of this Western Australian magistrate's decision being correct? Would that be right?

Mr Penn: That is correct, yes.

The CHAIRMAN: To take the point about the South Australian case, again you are not able to identify any Western Australian instance in which a case was frustrated because a police officer was not able to demonstrate to the satisfaction of a magistrate that he did not have a reasonable suspicion to search a person?

Mr Penn: No, I am not.

The CHAIRMAN: And you are not able to identify any case in which a brief manager or supervisor has said to an officer that he cannot charge X because he did not have a reasonable suspicion to search that person?

Mr Penn: I am not aware of any particular cases.

Mr Budge: I am not aware of any cases, either.

The CHAIRMAN: What about anecdotally?

Mr Budge: I am not aware of any, no.

Mr Penn: No.

The CHAIRMAN: Okay. As far as the statistical information that you provided, firstly, we will have to decide whether to accept it as part of the record and evidence of the proceedings, but do you have any objection to that forming part of the evidence?

Mr Penn: No objection at all.

The CHAIRMAN: And likewise, what about the summary of the case that you have provided, and the South Australian decision?

Mr Penn: No, there is no issue with that.

The CHAIRMAN: Okay. Is there anything that you can put forward to us that would persuade us that this change to the law would actually make a difference? Attached to that, how would you measure the success of this new law?

Mr Penn: That is something that we have considered. I mean, certainly there is not necessarily any guarantee that we can put forward that if these search powers are enacted, we are going to uncover more weapons or drug offences. However, we certainly believe that that will happen, because we believe that the information that I have presented to you is only a snapshot of the number of people in certain areas who are carrying weapons or drugs. One of the things that we consider would be a measure of effectiveness, if these laws were to be enacted, would be to look at what the position might be in Northbridge or Perth in 12 months' time, if a declaration had been made, and at the

number of weapons charges that had been laid. You might find that initially there was an increase, because the message had not gone out to people, and they might still be going into these areas carrying weapons and drugs, but you would hope that, over time, the number of charges brought would diminish, because the message had gone out that people should not come into these areas carrying weapons or drugs et cetera. So that could be a measure that you could look at to see how effective these laws have been.

The CHAIRMAN: How could you measure the failure of this legislation if it were to be passed—by the number of complaints about the police searching people and not finding anything on them?

Mr Penn: That could be a measure. It could also be a subjective measure in terms of how the public now feel when they go into these areas—that is, what is the public perception now when they go into these areas; how safe do they feel; and how likely do they think it is that they are going to come into contact with people who are behaving in a violent manner, or who are carrying weapons or drugs? Part of that could be that if these laws are in place and the police are utilising them, but the public perceptions do not change, then maybe that could demonstrate that the laws are not working properly, or the police are not carrying out the powers properly.

Hon MIA DAVIES: Are there are proposals to benchmark the public perception at the moment? You are talking about the public perception in 12 months' time, if and when the legislation is enacted. But how can you tell whether the public perception has changed if you do not know what it is now? It sounds to me as though it has come from the government and the media that we need to address this, and not necessarily from statistical information.

Mr Penn: I think it could be a balance between the two. There are a number of survey forums out there to gauge public opinion. Some of them have more rigour than others. Certainly I think that when this bill was being debated in the Assembly, the Minister for Police said that one of the things that he is willing to provide, say on an annual basis, is the number of charges laid in certain areas so that we can see whether there has actually been a decrease in the number of offences. That would certainly be one of the things that we would hope would come out of this, even if it is only because of the deterrent effect, where people no longer want to go into these areas carrying weapons and drugs.

[3.00 pm]

Hon JOCK FERGUSON: Or the public may feel safer if they see people getting searched in a specific area.

Mr Penn: That could very well be the case. That might be in the public's mind. They might feel much safer going in there, knowing that the police are exercising these powers.

The CHAIRMAN: If that is the case, and you say there has been no attempt to exercise the power under existing section 69—even though it is limited, as they require consent—would that not form some kind of a measure that police officers can report on the number of folk to whom they say, “We want to search you, or else you will have to leave” and the number of people who say, “Go on; frisk me!” or who say, “No, I am taking off.”

Mr Penn: That could be, but the only measure you get out of that is the percentage of people who are not prepared to consent.

The CHAIRMAN: True, but they are also chasing people out of the area.

Hon ALISON XAMON: Yes.

Mr Penn: There are some arguments about —

The CHAIRMAN: But that has not been attempted to see whether that has been a deterrent. In the year and a bit since the working party was established and these amendments were proposed, there has been no imperative to use the existing powers before determining that they are inadequate to achieve the policy ends that we are trying to achieve.

Mr Penn: If I can comment on that: we would not deliberately go out and seek to invoke section 69 powers just to see whether they worked. We would want to have some real evidence of a need to invoke these powers for security purposes. It may be that officers find that they do not have a belief that it is necessary to invoke those powers.

Hon JOCK FERGUSON: Surely you must have evidence to increase them.

Hon ALISON XAMON: Yet you want us to extend them.

The CHAIRMAN: We are talking about security purposes; effectively, the same sort of criteria that you will be applying to Northbridge or other areas under the new legislation for safety and security.

Mr Penn: That is part of it, yes.

The CHAIRMAN: There has been no need to date to use the limited, albeit inadequate powers, that are already available under the act, yet they are being extended on the basis that they may be more effective in achieving something.

Mr Penn: I do not necessarily know whether they are actually being extended. We are talking about a different range of powers in different circumstances. I have pointed out some of the drivers that might give rise to an area being declared in regulations or the commissioner's declaration, and certainly we would be looking at the levels of violent crime and antisocial behaviour. That obviously does touch upon how safe people might feel going into areas, but that is not necessarily the only thing that might warrant an area being declared.

The CHAIRMAN: What other considerations do you have in mind? Can we examine some of the scenarios in which this amendment could be applied?

Before we do that, we have been sitting more or less without a break since about half past 12. Does anyone want a 10-minute break, and we can consider whether to proceed further today or adjourn to another day. I think there is a lot more here?

Hon HELEN MORTON: I want an answer to that last question.

Hon ALISON XAMON: I have been waiting for the answer.

The CHAIRMAN: All right; I would not want to rob anyone of the opportunity.

If you can address that question, we will have a brief 10-minute break.

Mr Budge: There are a number of different aspects that the proposed legislation could be used for, if we are looking for scenario-type situations.

The CHAIRMAN: I am looking at something that you would perchance recommend to your district supervisor, who would recommend to the commissioner, who would recommend to the minister to apply the proposed amendments.

Mr Budge: Sure, and I think there are different aspects to it—whether it is used in the street or at an event. We may have some very strong intelligence linked in with an informant's advice, and other information, that might suggest that some groups are going to become involved in some serious violence, including weapons, at an event, and we may seek a declaration under those circumstances to put a metal detector at the entry to those premises so that persons entering the premises have to pass through that metal detector to ensure the safety and security of people attending the event. At the moment, we do not have powers to do that. We do attempt to get a condition put on liquor licences and we ask the Director of Liquor Licensing to invoke a condition on the event managers that people entering the event have to pass through a metal detector. But time is of the essence and it may not be in all circumstances that we have sufficient time for that to happen, because there needs to be notification made to event managers and the like. To do something like that, we would say, is looking at public safety and security at an event where there may be a propensity to violence and the use of weapons.

Hon HELEN MORTON: I am sorry, but I have to interrupt now, because I understand that you can do that now. If you used section 69 and declared the place where that event is going to be held, people going into that venue are told that they now have the choice to walk through the metal detector and go to the event or they have the choice not to go through it and to go home. Those people who have nothing to worry about will go in, and those who have something to worry about will not. I understand that that is available to you now.

Mr Budge: It might be better to talk on 69.

Mr Penn: Certainly that is available, but you can be left with the situation that a significant group of people could decide that they do not wish to go through that metal detector, but they still want to mill round that area.

Hon ALISON XAMON: But if you have a reasonable suspicion they are doing something wrong, then you can search them.

Mr Penn: You would have to have a reasonable suspicion for each individual. You could not say that because they are part of a particular group that gives rise for us to suspect that they are carrying something.

Hon ALISON XAMON: That may be the grounds for reasonable suspicion, though.

Mr Penn: It would not be enough.

The CHAIRMAN: Can we examine those for a moment?

Mr Penn: But it would not be enough just to be a member of a group.

Hon ALISON XAMON: It could be.

The CHAIRMAN: Excuse me; we can examine those in a moment. I want to get an idea of the scenarios in each one of them in order to deal with them—that is, unless there is some specific aspect you wish to raise.

Hon ALISON XAMON: I want to go back to 10 minutes ago! I still have questions I want to ask on a range of other issues.

The CHAIRMAN: We have that scenario that you say they can then hang around outside the event. In fact, at the moment under section 69, you do not even need a ministerial declaration, because subsection (1)(c) specifies that the officer reasonably thinks it is necessary to exercise the powers there.

Mr Budge: That is correct

The CHAIRMAN: Therefore, he or she can simply say that they think there is trouble brewing and anyone who wants to get in either submits to a search or they rack off; however, if they rack on off but they hang around somewhere else, there is no law that can deal with that.

Mr Budge: We do not have the ability then to search under 69 without reasonable suspicion.

The CHAIRMAN: But you can say about that particular area where they are congregating, “I have a reasonable suspicion there may be trouble brewing; either you submit to a search or move on elsewhere.”

Mr Budge: That is the subjective nature of reasonable suspicion.

Hon ALISON XAMON: Yes.

The CHAIRMAN: It says if it is necessary to exercise the purposes of safeguarding the place or people.

Hon JOCK FERGUSON: Are you saying that this would be used only where there is suspicion of drugs being present, weapons or a threat of violence or a criminal act?

Mr Budge: I do not think the legislation sets out anything.

Mr Penn: Those are certainly some of the drivers for it.

Hon JOCK FERGUSON: Could this be used in an industrial context on a community picket line, for example?

Hon ALISON XAMON: Yes, yes, because you do not have reasonable suspicion; that is gone.

Mr Penn: I do not know whether the minister of the day would approve.

Hon JOCK FERGUSON: I am quite sure.

Hon ALISON XAMON: The cynical old union official is here!

The CHAIRMAN: I promised a few minutes' break. We will adjourn for 10 minutes. Meanwhile, if members of the committee remain for a few minutes, we will decide how much further we need to proceed today. It may be that we will ask witnesses to come back because there are still a number of questions we have not got into at this stage.

Proceedings suspended from 3.10 to 3.18 pm

The CHAIRMAN: It is close to the time when we should wind up for the day, because it has been a long session for you gentlemen. One area that we would like to explore though—we started on that—is the sort of scenarios where you see this proposed legislation being applied. You mentioned one, superintendent. Can you give us some further examples where you feel the current legislation is lacking and where this legislation will allow you to achieve what it plans to achieve, which is a more effective result?

Mr Budge: With the scenario situation, it will always come back to us not being able to search people. We have spoken about section 69 and the powers that we have under section 69, but with the proposed legislation we would have the ability to search people. We do not have that ability now unless we form that reasonable suspicion. If we are just talking about the proposed legislation, we would have to do a body of work to identify an area that we considered grounded sufficient information to seek a declaration. When we talk about the Northbridge scenario, it may be that we identify that the seizures we have had were all after midnight and were all in the cultural centre. We may ask for and try to refine the area to just the cultural centre between certain hours. We would not propose making the area broader than we needed or making the times wider than the information or the intelligence provided to us suggested. It would take a considerable amount of effort and work to identify the specific areas that we would propose to be declared.

The CHAIRMAN: On the basis of the information that you have to date, are you able to say whether consideration would be given to making a declaration over any parts of Western Australia?

Mr Budge: We have not looked at —

The CHAIRMAN: Northbridge has been bandied about. Is it thought, for example, that once this legislation comes into effect, a declaration will be sought in respect of parts of Northbridge or all of Northbridge, or a part of the CBD, or any other place?

Hon JOCK FERGUSON: Or Skyworks?

Mr Penn: In the context of Northbridge, it may be that the government asks us to look at whether there is any merit in declaring a part of Northbridge and asks us to look at various issues that might have taken place, such as the antisocial behaviour over a period of time, and we might present that to the government and say, "This is the information you have asked for." The government might then decide it wants some regulations drawn up to cover that particular area. From that point of view, some of those are pretty much in the government's hands as to whether they want us to look at particular areas and to look at the incidents of violence or drug offences and weapons offences in that area, to give the government some information as to whether it thinks, for example, that regulations ought to be made. Certainly from the perspective of WA Police, we are not looking at

any areas to put forward to the government at this stage, and we certainly are not looking at any areas to put forward to the commissioner to take to the minister.

Hon JOCK FERGUSON: So the government is going to determine which areas —

Mr Penn: The government obviously has a hand in it in two ways. One is because the minister has to approve an area that the commissioner wants to get declared. You would expect that a proposal would go from the commissioner to the minister. The other scenario, where you have regulations that need to be drawn up, could be that the government asks us to look at particular areas such as Northbridge, Fremantle and various areas, and then ask us to provide the government with information about reported crime or offences that have taken place there over a period of time. On the strength of that, the government might decide that it would like regulations drafted up, and we would then be directed to draw up some regulations.

Hon JOCK FERGUSON: But the minister may make a declaration as he or she sees fit?

Mr Penn: There are two levels. The declaration can be made by the Commissioner of Police with the approval of the minister and, separately, you could prescribe an area in regulations, which would go through the Governor in Executive Council.

Hon JOCK FERGUSON: Can the minister do it?

Mr Penn: No. The minister approves the declaration that is made by the Commissioner of Police. The minister does not have the power in his own right to declare an area. The commissioner would put something up and the minister would endorse what the commissioner put up.

The CHAIRMAN: Is it fair to say that notwithstanding the statistics you have provided, the concerns that prompted an examination of whether police powers ought to be enhanced or could be enhanced to deal with the problems in Northbridge, there are no current plans, should this legislation be passed tomorrow, to put it into effect, to achieve any end in Northbridge?

Mr Penn: No. We have not been given any direction to look at defining a particular area for either of those purposes.

The CHAIRMAN: So is it fair to say that there is no immediate need for this legislation?

Mr Penn: I would not say that there is no immediate need, because the government is obviously keen to get the legislation through.

Hon JOCK FERGUSON: From a police perspective.

The CHAIRMAN: He is not waiting on this legislation to be passed to be able to complete his Northbridge strategy to clean the area up?

Mr Penn: The Commissioner of Police?

The CHAIRMAN: Yes.

Mr Penn: No.

Hon HELEN MORTON: Is the legislation urgent?

Mr Penn: I suppose that it is urgent in the context of, as Superintendent Budge mentioned, there is a crime prevention and deterrent aspect to this. Certainly if the legislation was enacted in the immediate future, I certainly think that the government would then probably be looking at what areas ought to be declared to try to maybe clean up some of those areas and make them safer for people to go into them. I am just surmising that that might be in the government's mind. I think that from that perspective, the government is probably keen to get the legislation through so that if they would want to enact these powers, then they could do so, but there is certainly nothing that we have been directed to do at this stage to address it.

Hon JOCK FERGUSON: When do you think the guidelines will be drawn up?

Mr Penn: The guidelines from the Commissioner of Police?

Hon JOCK FERGUSON: Yes.

Mr Penn: We have some draft ones at the moment that we have drawn up. We have had some informal discussions with the commissioner. He has not seen those draft guidelines, but at this stage we are not doing any further work on those because we do not know what the final version of the legislation will be. It could be that, depending upon the deliberations of this committee and the upper house, that amendments may be made to the legislation that will need to be taken into account in whatever guidelines the commissioner chooses to issue.

Hon JOCK FERGUSON: Who is responsible for doing that, and would the Minister for Police have any part to play in the process?

Mr Penn: The guidelines would be released into what we call the “police manual”, which is an electronic manual that the commissioner issues that covers the whole range of powers that police officers have and gives them guidance as to how they are to exercise their powers. It may be that in the context of the guidelines applying to this, the Commissioner of Police may very well discuss those with the minister and say, “This is what I am proposing to tell the police officers as to how I expect them to go about exercising the powers.” He could very well discuss that with the minister.

The CHAIRMAN: By “guidelines”, does that also apply to the criteria for declaring an area under the legislation?

Mr Penn: We have in the guidelines some of the factors that we think ought to be considered before a proposal is put forward. That touches upon things like the level of offences that have occurred, be it violent offences, weapons or drugs. We have said that if you want to have a proper look at declaring an area, then certainly those are some of the things that you really ought to have as part of looking at it. You really ought to look at the snapshot of offences. That should be one of the key things in the back of your mind as to why you are declaring an area. We certainly have put some wording around for the superintendents to say, “If you are looking at putting a proposal together, we would want you to at least look at some of these issues as part of your proposal going forward.” That will be part of what is in the police manual. In addition to the guidelines that the commissioner will give to the officers as to how he expects these laws to be applied and enacted, in there is the process to drive those submissions for declaring areas.

[3.30 pm]

Hon HELEN MORTON: I noticed in the earlier evidence you said that there had been no consultation outside of the group of people that you had working within the department.

Mr Penn: Yes; when we were originally looking at the proposals and the options for reform, yes, that was just internal in WA Police.

Hon HELEN MORTON: So given the interest in the public arena around this particular piece of legislation and given that it sounds to me like it is not urgent-urgent legislation, is there room for some public consultation other than or as well as this public inquiry? Do you think that the legislation might be improved had you had the opportunity to go to speak more or consult more into the public arena; is that of any benefit to you?

Mr Penn: I certainly think that if you do have some extended consultation, it provides the opportunity for other issues to come up that you may not have considered, but in terms of the degree of consultation that has taken place, we were pretty much guided by the government as to how they wanted to manage the development of this legislation. So, at this point I suppose if the government wanted to take a step back in terms of what its views might be in terms of a time line for this legislation going through and undertake some further consultation, obviously beyond what the committee is doing, that is I suppose a decision for the minister as to how far he wants to take that.

Hon HELEN MORTON: Have things come up that you were not aware of in the process to date? Have things arisen that have given you issues to consider?

Mr Penn: By and large we expected a lot of the issues that were coming up, and we have raised some of those things with the minister and they have decided to take some of our suggestions on board and others they have decided as a matter of whatever policy that they wanted to progress the legislation as it is.

Hon MIA DAVIES: Was consideration taken as to results of similar legislation in other jurisdictions, like in the United Kingdom, in providing advice to the minister about the outcome of the legislation?

Mr Penn: What we did provide was just an overview of the legislation certainly in New South Wales and Victoria and the UK so that the government could put into context what was being proposed in light of what is happening in other jurisdictions. There was nothing put to them in terms of the effectiveness or otherwise of legislation in other jurisdictions.

The CHAIRMAN: Can we get that? Are you able to give us copies of that material?

Mr Penn: I should be able to; yes. I do not have it with me here.

The CHAIRMAN: All right. What we propose is to adjourn fairly shortly. You have the questions that have been provided and we would like a written response to those that allows you to formulate specific answers. We may, after hearing further evidence and considering other submissions, have you back to deal with areas that are exposed by those submissions and evidence.

Hon ALISON XAMON: I suspect I know what the answer will be but I will give it a go anyway. What elements of the legislation do you not agree with that you brought to the government's attention that they are not prepared to alter?

Mr Penn: That I do not—there is nothing that I —

Hon ALISON XAMON: You indicated that you proposed some changes; that some were taken on board and some were not by the government for policy reasons. I am interested to know which ones were not taken on board by the government that you proposed.

Mr Penn: There was not necessarily what we proposed in terms of changes to the legislation; it was issues for the government to consider —

Hon ALISON XAMON: What were those issues?

Mr Penn: There are things like statutory review provisions, sunset clauses, external oversight, so we just flagged those as issues with the government as to whether they wanted those provisions in there. So it was not that we were saying necessarily that the legislation was deficient in that; they were things that we wanted to clarify with the government in terms of when we were putting legislation together just to find out whether they wanted provisions along those lines put in.

Hon ALISON XAMON: What did you propose in terms of statutory oversight?

Mr Penn: We did not propose any particular model of statutory oversight; we just flagged with the government the question as to whether —

Hon ALISON XAMON: And the government said, "No, we don't want any." You proposed it as an issue for them to address but they just never took it up.

Mr Penn: We just said it was an option for them to consider: did they want to have something in there along those lines? We did not propose any particular model if there was to be any external oversight, as to who that would be, but we said that there are examples in other jurisdictions where you do have some external oversight of police powers. I think in New South Wales that the Ombudsman's office over there has quite significant powers in reviewing various police that have

been enacted over a number of years. We just put that to the government to say: are those things that you want to consider in the legislation?

Hon JOCK FERGUSON: So what was the government's response to that?

Hon ALISON XAMON: Well, they did not include it.

Mr Penn: Yes.

The CHAIRMAN: Clarification of drafting instructions in effect.

Mr Penn: Yes; do you want those aspects included?

The CHAIRMAN: What do you want included in the legislation?

Mr Penn: Exactly; what do you want included? They said, "We want included this, this, this."

The CHAIRMAN: Thanks very much, gentlemen, for your time and assistance. As I say, you have the questions. Could you provide us with written responses to those plus the information regarding those other jurisdictions? We need to set a time limit, I suppose. How long do you expect it would take to provide us with written responses to those?

Mr Penn: I would anticipate we would probably have a written response to those by the end of next week. We have most of the information to hand; it is just a case of putting it together, so I would say that would probably be a realistic time frame.

The CHAIRMAN: Okay, unless anyone has an objection, I would say the end of the week after to allow you a bit of extra time if there are any unforeseen problems in formulating the answers and providing the research and the like. We will do that and if you could let us have those back and then we will consider whether we need to hear from you again. We will adjourn, but not before I congratulate Superintendent Budge on his recent recognition.

Mr Budge: Thank you very much; I feel very humbled by that.

Hearing concluded at 3.36 pm