The Committee Office advises that the submission of the Criminal Lawyers' Association of Western Australia regarding the Criminal Investigation Bill 2005 refers to clause numbers in the version of the Bill which was debated in the Legislative Assembly. That Bill was amended in the Legislative Assembly and as a result, the clause numbering was altered. The Committee then scrutinised the amended version of the Bill in the Legislative Council.

CRIMINAL LAWYERS' ASSOCIATION OF WESTERN AUSTRALIA

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17 November 2005

The Hon. G. Giffard MLC
Chairman
Standing Committee on Legislation
Parliament House
PERTH WA 6000
By Fax: 9222 7805

Dear Sir

Comments regarding the Draft Criminal Investigation Bill

Legal Professional Privilege and Self Incrimination

Part 6 of the Bill relates to obtaining business records from third parties.

It appears Clause 50(1) is intended to preserve citizens' rights to self-incrimination, i.e. a person cannot be ordered to produce to Police records that may relate to an offence he or she is suspected of committing.

We are extremely concerned that section 50 does not extend to cover a person's legal advisers. The definition of "business" in section 49 is such that it could easily cover lawyers as it includes "any occupation, trade or calling."

Our reading of Part 6 is that a lawyer could be ordered to produce "business records" relating to clients. The definition of "business records" is wide enough to include letters containing legal advice, notes taken at a meeting with a client, research, expert reports obtained for the purpose of giving advice and myriad other documents that lawyers prepare in the course of advising and representing clients. It could potentially extend to documents stored in electronic form.

If a lawyer was ordered to produce business records relating to a client, he or she would have to go through the procedure in section 149 in order to assert legal professional privilege over the material. However, section 149 does not prevent the Police, in the meantime, reading or examining the documents; thereby lose the protection of the privilege. There is no penalty to discourage Police from doing so, and Police are not under the same ethical constraints as lawyers in terms of reading documents that may be privileged.

The effect of these Parts is that lawyers could not keep hard or electronic copies of any documents that may contain potentially incriminating information about clients. If enacted,

it would place lawyers in a conflict situation in that a lawyer's obligation is to act in the best interests of his or her client, however, if they did so by refusing to comply with the order, they would be committing an offence under section 54(2).

In our view these provisions are very concerning as they are drafted to apply to all criminal offences. There does not seem to be any justification for removing or restricting legal professional privilege, which has been recognised for hundreds of years.

The intent of the provisions as they stand is confusing, as it protects a person from having to incriminate him or herself by provision of potentially incriminating documents, but puts lawyers in the position of potentially having to incriminate their own clients.

We are also concerned about the effect of Part 7 of the Bill. Section 57 allows police to apply for "data access orders" and section 60 makes it an offence not to comply with a "data access order." There is no equivalent to section 50 in respect of data access orders, meaning that a person could be required to provide data that would incriminate him or herself. In fact, section 60(3) specifies that the fact the data would potentially incriminate him it is not a defence to a charge of refusing to obey a data access order.

We are strongly of the view that a person should never be required to incriminate him or herself by providing hard or electronic copies of material to police. It is unclear why a person would be protected from having to provide a hard copy of potentially incriminating material pursuant to section 50(1) but would be committing an offence under section 60(2) if they refused to provide an electronic copy of the same material.

We suggest that an equivalent to section 50(1) be inserted in Part 7 (extending to legal adviser as well as persons suspected of committing offences). If this were done, sub-sections 60(2) and (3) could remain as drafted, as they would only apply to third parties, not to people suspected of committing offences, or to their advisers.

Forensic samples

We would like to see the addition of provisions that allow an accused person access to the samples he or she has provided, for the purpose of conducting independent tests on the material. Over the past few years, concerns have been raised on a number of occasions regarding the methods used by an independence of, government laboratories. It is in the interest of accused people that they be able to satisfy themselves that forensic analysis provided by government laboratories is accurate. If there are concerns about the accuracy of any results or the validity of any analysis, it is in the interests of justice that this independent testing occurs.

We also note that the Police Act currently provides for a person to request that his or her forensic material be destroyed after the person is acquitted. We cannot see equivalent provisions in this legislation. If this legislation is intended to repeal the relevant section of the Police Act, we request that the new legislation contain a comparable provision.

Thank you for considering our submissions.

Yours faithfully

Belinda Lonsdale
President