

The Committee Office advises that the submission of the Law Society 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.

6 July 2006

Mr David Driscoll  
Senior Committee Clerk  
Standing Committee on Legislation  
Legislative Council  
Parliament House  
Perth WA 6000

Dear Mr Driscoll

**Criminal Law Reform Package 2005 – LSWA389)**

I refer to your letter dated 22 June 2006 to the President of the Law Society inviting comment on the following legislative package:

- *Criminal Investigation Bill 2005*
- *Criminal and Found Property Disposal Bill 2005*
- *Criminal Investigation (Consequential Provisions) Bill 2005*

The Society's submission on the draft Bills is attached. Thank you for the opportunity to comment on the draft guidelines.

I confirm the Society's interest in participating at a hearing, should it be decided that one be held at a later date.

Yours sincerely

Maria Saraceni  
President



## **Criminal Law Reform Package 2005**

**A Law Society of Western Australia submission in response to a request from the Legislative Council's Standing Committee on Legislation for comment on the *Criminal Investigations Bill 2005, Criminal and Found Property Disposal Bill 2005* and the *Criminal Investigations (Consequential Provisions) Bill 2005***

- A. The Law Society of Western Australia Inc (Society) welcomes the opportunity to provide submissions to Legislative Council's Standing Committee on the Criminal Law Reform Package 2005.
- B. The Law Society is the professional association for Western Australian barristers and solicitors. This submission therefore is based on the experience of members of the legal profession from working within the jurisdiction of the legislation.
- C. The submission is not intended to represent the interests of clients or groups of clients. The Society expects individual firms to present submissions on behalf of specific clients if those clients wish to comment on the package.

### **1.0 CRIMINAL INVESTIGATION BILL 2005**

The Bill is part of a program of legislative reform, and must be read in that context. In general, offence provisions have been removed from the Police Act 1892 and put in the Criminal Code. This Bill deals with police powers. In part it merely restates the existing law. However, it contains new or extended powers:

- to take what are called 'forensic samples'
- to detain for questioning

The powers under the Bill may be exercised by an 'officer', defined in cl 3 to include a police officer or other public officer. The final identity of the latter category will be determined by regulation. Potentially the categories are broad; for example, transit guards would be included.

The powers of those within this category may be restricted To 'allowing for public officers to be given only those powers that are necessary and appropriate for their functions' (ref: second reading speech, 23 November 2005, John Kobelke MLA).

The Society believes this Bill will allow them to be given much greater powers than that. The legislation thus relies upon the executive to restrict the powers that are described. In the Society's view, it would be preferable if the default provision was that the extensive powers conferred by the legislation are not conferred on "public officers" other than police officers, unless expressly conferred by Regulation.

## 1.1 Some specific provisions

- **Protected forensic areas**

There is power to create a 'protected forensic area' (cl 45). Apart from its obvious etymological shortcomings, this concept is a far-reaching one. It is unclear to what mischief this is directed. The two most likely targets may be home-built drug laboratories or some sort of suggested terrorist activity.

- **Road blocks**

There is a power to create road blocks (cl 17). These require the authorisation of a senior police officer (ie someone of the rank of inspector or above), except in 'serious and urgent circumstances'. Any police officer may decide that those serious and urgent circumstances exist, though a senior police officer must then be informed.

- **Search warrants**

Part 5, Div 2 allows significant powers to be exercised without a search warrant.

Part 5, Div 3 sets out the extensive powers available under search warrants, including the entry into (but not the search of) places other than those in respect of which the warrant was issued (cl 43). The safeguard for these powers is the authorisation of another police officer, although not one involved in the investigation (cl 43). There is potential for misuse or abuse of these powers, and the Society's view is that this form of authorisation is not sufficient given the personal liberties potentially being affected.

- **Body searches**

Part 8 contains comprehensive powers in relation to searching people. A warrant is not required (cl 66). There are however protective provisions about basic and strip searches.

- **Police powers**

The Bill at first glance confers very extensive powers on police and other public officers. For some of its processes, no warrant is required. For others, the suggested oversight comes from another police officer, although on occasions this must be an officer not connected with a particular investigation. The comments made under 'search warrants' apply here also.

- **Arrest of suspects**

Clause 140 permits the arrest and detention of suspects. The provisions are not easy to follow. A police officer may arrest someone who the officer suspects has committed, is committing or 'is just about to commit' an offence [cl 126(2)]. However, s 138 contains a definition of arrested suspect. It is 'a person arrested under s 126 ... on suspicion of *having committed* an offence' (emphasis added) [NB: the words in parenthesis have been omitted, and regarded the qualifying phrase as applying to each of the categories.]

It is only this person – not someone arrested for being about to commit an offence – who may be detained under cl 138. Nevertheless, the power clearly now exists for detention after arrest and before charge. At common law, arrest follows the decision that there is evidence sufficient to bring a charge, and a person is arrested for the offence indicated by the evidence.<sup>1</sup>

For the first time, the police or other public officers may hold someone for the purpose of making further enquiries. In this context, the suspicion that a person has committed an offence is something much less than a belief that allows someone to be charged.

These are complex issues. The detention clearly contemplates the potential to interview an arrested suspect [see for example cl 140(2)(i) and (j)].

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<sup>1</sup> Seen for example in the common current police practice to arrest someone for doing grievous bodily harm after a 'suspicious death' has occurred. That charge is then commonly altered to wilful murder once a post mortem examination establishes the cause of death.

Formerly, a person could be interviewed by police – although there was no power of compulsion – until the police officer formed the belief that the person was reasonably suspected of the offence. At that point, there was a requirement to administer the ‘caution’.

In the new legislation, the suspicion that the arrested person has committed an offence must already have been formed, in order to allow arrest under the relevant head of s 126. It seems to follow that an arrested suspect can never be interviewed without a caution.

The current police practice is to conduct recorded interviews wherever possible, (as required in the case of serious offences) which requires the accused to consent. The recording protects against some of the practices of the past, well documented by the recent Kennedy Royal Commission into the Police Force. However, it should be borne in mind that conceptually this practice differs markedly from the original custom of recording a voluntary confession. The trend is frequently much closer to a recorded interrogation. In practice, depending upon the manner of interviewing, this can represent a significant incursion into the right to remain silent. The Society hopes that the enacted requirement to allow a suspect to obtain legal advice will militate against this practice being further developed.

Clause 153, which contains something akin to a *Bunning v Cross* discretion, does not seem to apply to this part of the Act, although it is difficult to tell from subsection (1) which reads:

*This section applies if under another section a court may make a decision under this section in relation to evidence that is not admissible in proceedings in the court.*

If it is intended to apply to this part of the Act, it could represent a significant reduction in the protection of an accused. *Bunning v Cross* is not itself much referred to in this context. Although arguably its principles are applicable, the courts have taken a more robust line in relation to confessional material. The section could be construed as a “green light” to the Courts to admit confessional evidence absent a caution, or in the face of grossly improper police conduct.

## 1.2 General

It is a matter of legitimate public debate whether all of these powers are required. It is the Society's view that some are not, although there is merit in having powers codified and properly authorised by legislation. Some provisions assist a suspect or an accused: see for example cl 136 and 137. The right to contact someone is new [cl 136(2)(c)]. The position seems still to be that a person can decline to be interviewed entirely, but cannot insist on another person's presence at an interview. Often interviews are presently conducted before a person contacts a lawyer. This provision may allow more people to exercise an informed choice to decline to participate.

## 1.3 *Bunning v Cross*

The explanatory memorandum notes that the Bill gives statutory effect to the *Bunning v Cross* discretion (this appears at cl 153). See the comments in respect of this clause above.

Clause 152 is a provision which protects those whose rights are infringed, broadly by making evidence inadmissible which is obtained in contravention of the Act. Clause 153 then confers a statutory discretion to admit that evidence, essentially on the basis outlined in *Bunning v Cross*. The need to ensure that the police or other investigating authorities act lawfully is to be balanced against the gravity of the offence and the usefulness of the evidence obtained.

At one level, it is hard to disagree with this approach. *Bunning v Cross* has been part of Australian law for some 30 years, and the Bill does not seem to disturb the balance. Nevertheless, it must be recognised that

- (i) the Bill confers significant, and in some cases much increased, powers on the police; and
- (ii) although the powers conferred on the police have clearly defined limits, evidence obtained in contravention of them will often be admissible.

To take an obvious example, there was previously no general power to establish road blocks.



It is suggested that this should have meant that any evidence obtained at what was clearly a road block might have failed a *Bunning v Cross* test of admissibility unless it was especially compelling and the offence to which it related was especially serious. The fact that road blocks are in themselves now lawful will arguably lower that threshold.

Self-evidently, as noted above, provisions that suggest that a contravention of the legislation may nevertheless result in the obtaining of useful evidence have an obvious tendency to encourage that contravening behaviour. This could only be desirable if the offences prosecuted as a result were of real gravity.

### **1.3 Conclusion**

The Bill gives very extensive and in some cases new powers to the police and potentially to others. It is a welcome development that they are codified. The Society considers many of the powers as noted above to be unnecessary. Further, many of the provisions of the Act impose purported requirements on the police or others which in the end are not mandatory. For example, the right to communicate with others in cl 136(2) may be removed on the grounds contained in cl 136(4). This is unacceptable.

### **2.0 CRIMINAL AND FOUND PROPERTY DISPOSAL BILL 2005**

The *Criminal and Found Property Disposal Bill* sets out practices and procedures, for dealing with seized and found property. The Society has no comment to make on these administrative systems.

### **3.0 CRIMINAL INVESTIGATION (CONSEQUENTIAL PROVISIONS) BILL 2005**

The Society does not have any comment to make on the consequential provisions relating to the above legislation.

Maria Saraceni  
President

6 July 2006