The Law Society
OF WESTERN AUSTRALIA
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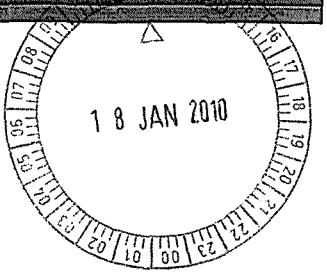

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OF WESTERN AUSTRALIA

Submission on Criminal Investigation Amendment Bill 2009

Submission to the Standing Committee on Legislation Legislative Council

January 2010

PUBLIC

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Submission

A Law Society of Western Australia submission in response to a request from the Standing Committee on Legislation for comment on the drafted *Criminal Investigation Amendment Bill 2009* advertised in the West Australian newspaper on 5 December 2009

1. **The Law Society of Western Australia Inc ("Society's") welcomes the opportunity to provide submission to the Standing Committee on Legislation on the drafted *Criminal Investigation Amendment Bill 2009* and requests the opportunity to appear before the Committee in support of this submission.**

2. **The 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.**

3. **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 this review.**

The *Criminal Investigation Amendment Bill 2009 ("the Bill")* currently before the Standing Committee on Legislation for report will substantially increase Police powers if it becomes law in Western Australia. The Society has grave concerns about the proposed extension of powers and is concerned that aspects of the Bill have the hallmarks of laws usually found in a Police State.

The amendment to s 69 of the *Criminal Investigation Act 2006*

The proposed amendment to s 69 of the *Criminal Investigation ("the Act")* removes the power to prescribe by regulations a place in which police can search people and vehicles that they are in charge of. The power to regulate these places was apparently not utilised. The existing power under the *Act* for senior police officers to continue to declare such places remains. This power has been exercised under the *Act*. The proposed amendment does not change current restrictions on the exercise of the power, in particular that a person gives their consent to undergoing a basic search.

Refusal by a person to give their consent has the consequence that the person will be ordered by the Police to leave or not to enter the declared place. Given that the person whom the Police wish to search can still refuse to give their consent to being searched, and thus prevent it from happening, albeit with consequences restricting their movement, the Society does not oppose this amendment.

Proposed new Sections 70A and 70B

Proposed new ss 70A and 70B of the *Criminal Investigation Amendment Bill 2009* combine to provide the Western Australia Police with an unqualified power to conduct a basic search of people and their vehicles within certain public places. The power is unqualified in that there are no restrictions or checks whatsoever on its practical use or application by WA police officers. Traditional restrictions which are removed include obtaining the consent of the person whom they wish to search and the requirement that Police have a valid

reason to search a person, such as a reasonable suspicion that they have committed an offence.

The public places in which these searches can occur must be either prescribed by regulation or declared by the Commissioner of Police. In the latter case the Minister of Police's approval is at least required, and the Commissioner may in writing delegate his power to one of his Deputy or Assistant Commissioners.

12 months is the maximum period that places can be prescribed, while 2 months is the maximum period that places can be declared. If the Commissioner of Police declares a place then he must publish a written record of it in the WA Government Gazette, however failure to do this does not affect the validity of his declaration. Accordingly, it is possible that citizens or visitors to Western Australia may not be aware that they are entering a place to which they could be subject to a random search of their person or vehicle without their consent. A basic search as defined at s 63 of the *Act* allows the Police to:

> "(a) scan the person with an electronic or mechanical device, whether hand held or not, to detect any thing;
>
> (b) remove the person's headwear, gloves, footwear or outer clothing (such as a coat or jacket), but not his or her inner clothing or underwear, in order to facilitate a frisk search;
>
> (c) frisk search the person;
>
> (d) search any article removed under paragraph (b)."

The Society strongly opposes providing the Police with an unqualified power to search persons or their vehicles through the introduction of sections 70A and 70B to the *Act*. To so do is a backward and retrograde step for the reasons which follow:

- While only a basic search can be conducted under ss 70A and 70B, such a search nonetheless has the real potential to be a major and confronting intrusion on the citizens of Western Australia or visitors to it. People should be allowed to go about their daily law-abiding business without the fear of intrusive and unjustified Police interference.

  Unwarranted examples of its application are readily apparent. A family travelling in their vehicle through a prescribed or declared place can first have their vehicle randomly stopped by the Police even though they have done nothing wrong. Without cause or justification, each of the occupants of the vehicle, including children, could be searched by the Police. Refusal would amount to the criminal offence of obstruction.

  In the context of alfresco dining in precincts such as Northbridge, a member of a family dining party could endure the indignity and embarrassment of being searched in full view of the general public, with no ability to prevent such a search occurring.

- The accepted practice not only by the Parliament of Western Australia but also the other legislatures throughout the Commonwealth is that there be statutory checks and balances on powers given to Police.

  Examples include WA Police only being able to request that a person provide their name and address if they have a *reasonable suspicion* that they have, for example, committed or are committing or are about to commit an offence – s 16 of the *Criminal Investigation (Identifying People) Act 2002.* Similarly a police officer may only order a person who is in a public place to leave it if the officer *reasonably suspects* that the person, for example, is committing a breach of the peace – s 27(1)(c) of the *Act.* A member of the Police Force may require any person who he has *reasonable grounds* to believe was the driver of a

vehicle to provide a sample of his breath for a preliminary test – s 66(1) of the *Road Traffic Act 1974*.

- The Police already have relevant, workable and extensive powers of search in the *Act*. Further, these powers are consistent with the above accepted legislated practice of qualifying their use. For example, if an officer *reasonably suspects* that a person has in his possession or under his control any thing relevant to an offence, the officer may do a basic search or strip search of the person – s 68(1) of the *Act*.

  Further examples include where a police officer *reasonably suspects* that it is necessary to prevent a vehicle from being used in the commission of an offence or that a vehicle is carrying a thing relevant to an offence. In both cases the officer may stop, enter and search the vehicle – ss 38(1)(a)(i) and 39(1)(a) respectively of the *Act*.

  The power in s 69 of the *Act* to declare places in which basic searches can be conducted with the consent of the person is also at least generally qualified. Such places can only be declared if a senior police officer is of the opinion that it is necessary to do so to safeguard a particular public place or people who are in or may enter the place – s 69(2) of the *Act*. In stark contrast, ss 70A and 70B are completely silent of any reason which may justify places being prescribed or declared and the consequent application of the search power.

  Introducing an unqualified power of search through proposed ss 70A and 70B with no safeguards as to its use or application, would be entirely inconsistent with the general scheme of the *Act* of qualifying the use of all the other powers it currently gives to the Police.

- The importance of Police having a valid reason for searching a person has been recognised not just by legislatures throughout the Commonwealth but also by all superior courts throughout Australia and

the Commonwealth. In the UK Court of Appeal decision of *Lindley v Rutter* (1980) 72 Cr App R 1 Donaldson LJ at p 6 stated:

> *"So far as searches are concerned, he (the officer having custody of a prisoner) should appreciate that they involve an affront to the dignity and privacy of the individual. Furthermore there are degrees of affront involved in such a search. Clearly going through someone's pockets or handbag is less of an affront than a body search. In every case a police officer ordering a search or depriving a prisoner of property should have a very good reason for doing so."*

In a later UK Court of Appeal decision of *Brazil v Chief Constable of Surrey* (1983) 77 Cr App R 237, Goff LJ at p 245 stated:

> *"In general terms, the citizens of this country should not have their freedom interfered with unless it would be lawful to do so and, in my judgment, an explanation should generally be given to persons why a personal search is to be carried out."*

These principles were applied in the New Zealand Court of Appeal decision in *Perkins v Police* [1988] 1 NZLR 257 (CA) and the Victorian Supreme Court decision of *Guyen v Elliott* (1995) 19 Crim LJ 342.

- Providing an individual, be it a police officer or anyone else for that matter, with an unqualified or unchecked power of search of a person or their vehicle lends itself to arbitrary application and would be open to abuse.

  Members of minority groups such as the Aboriginal community are likely to be unfairly targeted in its exercise, simply by virtue of the over representation of its members in the WA justice system. Further,

Muslim community members are also at risk of being regular targeted over and above other members of the general community.

Free speech demonstrated through political rallies in prescribed or declared places could be in jeopardy through members of the Police who have a contrary view, as they stop and search those participating.

- Providing the Police with an unqualified and absolute power of search is a major infringement of civil liberties as we have come to know and accept in civilized, democratic states. In the context of free and democratic societies it would be a backward and retrograde step to provide Police with powers that are common in, and defining of, fascist regimes.

In conclusion, the Society is firmly of the view that the introduction of ss 70A and 70B into law in Western Australia is not only undesirable but unjustified. The Government has not made a case for the need for such restrictive laws. Its claims that current laws are inadequate are not supported by any evidence or case examples.

Hylton Quail
President