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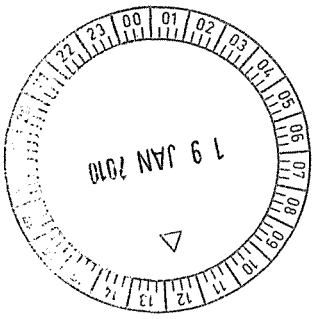

KITTO & KITTO
BARRISTERS SOLICITORS

Your Reference:
Our Reference: **JK Personal**
Our Contact: **Johnson Kitto**

The Legislation Committee
Parliament House
Harvest Terrace
WEST PERTH WA 6005

Attention: Mr Mark Warner and Ms Denise Wong

Dear Sirs,

Criminal Investigation Amendment Bill 2009

I **enclose** submission on the Criminal Investigation Amendment Bill 2009.

I do not object to this submission being made public.

I would respectfully request your committee, if it sees fit, to call me to give oral evidence on the submission and invite your staff to contact me on the below addresses.

Yours faithfully,

Johnson Kitto
15 January, 2010

PUBLIC

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Five Arguments against the Criminal Investigation Amendment Bill 2009

1. This legislation is badly misconceived

I refer to the Minister for Police (Mr R.F. Johnson)'s, second reading of the Bill on 14 October 2009.

The Bill is clearly predicated on obvious errors and an absence of reasoning.

The Minister refers to the Bill as a response to antisocial behaviour in entertainment precincts. Observably, the Bill has nothing to do with antisocial behaviour, and it will probably have no effect on such behaviour which is often (but not always) fuelled by drug and alcohol abuse. While this is a burgeoning and very disturbing danger to all West Australians, police power to stop and search citizens in the street will do nothing at all to reverse or overcome the problem.

If the Bill were to pass into legislation, absolutely nothing would change the root causes of violence and antisocial behaviour in entertainment precincts and elsewhere. Alcohol would still be lawfully sold and consumed in pubs and clubs and patrons will still drink too much. Packaged alcohol will still be lawfully carried around entertainment precincts and elsewhere. Drugs giving rise to violent and antisocial conduct (mainly the amphetamine group of drugs and their derivatives) will still be legally trafficked and manufactured and consumed in homes and workplaces around the state.

This Bill does not seek to (and cannot) change any of that. It is observably useless in that regard.

Nor will this Bill will have any effect on the "incidents of violence" also relied on by the Minister in commending the Bill to the House. Both antisocial behaviour and violent tendencies are entirely separate to concealed weapons, and/or drugs. One need only see

the rise in the incidence of "road rage" or "sport rage" typically among citizens unaffected by drugs, and typically not carrying concealed weapons, to see that anti-social behaviour has different genesis to drug use, or weapon possession.

I note the Minister cites no studies, source of evidence, anecdotal or otherwise, to suggest that there is in fact an increasing incidence of violence or antisocial behaviour in entertainment precincts.

Assuming for the moment however that the Minister is correct it is by no means clear how the amendment proposed by the Bill will have any beneficial effect on such incidents.

In relation specifically to drugs, there appears to be no evidence or cogent development of thinking, that commonly carried "party" drugs (e.g. ecstasy - MDMA, cannabis, cocaine, or MDA), contribute to either the increasing number of incidents of violence claimed by the Minister to be occurring, or to antisocial behaviour, whether in entertainment precincts or elsewhere.

Accordingly, the Bill is conceptually misconceived from the outset.

2. The Irony of a "Safeguard"

The Minister also refers to the Bill as being necessary to "*provide some safeguards to the public...*", however this particular Bill does no such thing, and to the contrary, removes one of the most powerful, long-standing, and democratically vital safeguards the public have, namely a safeguard against the power of the executive to arbitrarily stop and search a citizen.

I do not propose in this submission to detail the constitutional development of this fundamental safeguard, in Australia, the United Kingdom, or elsewhere in the common

law world, other than to observe it to be the bedrock of individual liberty in the United States Constitution and in British/Australian common law, in the protection against arbitrary search and seizure.

This Bill is dangerously tinkering with a fundamental and very longstanding principle, and the legislature must tread carefully. The power it introduces wasn't needed in Australia "to safeguard the public" in 2 World Wars, so what is the new and horrible threat to public safety that necessitates it now?

Windowdressing unneeded legislation as being necessary to "*provide some safeguards to the public...*" is a disturbing trend of this government and its predecessor. The same meaningless justification is being used by the Minister to justify the outrageous law that empowers confiscation of a motor vehicle without compensation from a law-abiding, tax-paying citizen if a 3rd party offender beyond the control of the vehicle owner, commits certain driving offences in that vehicle.

3. Potential for Abuse

To demonstrate how readily the proposed power might be abused, and how illusionary the "protections" offered by the proponents of the Bill are one must consider how the legislation would operate on a pragmatic level. The proposed powers of arbitrary search and seizure may be exercised by any police officer whatsoever, provided the geographic parameters are met. Very junior police officers, or those with particular political or cultural persuasions, would have full arbitrary power to stop and search any citizen going about their lawful business, for example if that citizen had identified with a political, racial, or cultural group or movement contrary to that police officer's personal views.

True, the search may not reveal anything, but the citizen would still be stopped,

delayed, detained, inconvenienced, and humiliated by the whole affair.

With Western Australia's present culture of political tolerance, it is difficult, in the present environment, to envisage how the power might be abused, but the passing of this legislation could well encourage the following scenario:

1. Members of a trade union, an ethnic minority, or any other organised assembly of law-abiding citizens, might be stopped and searched simply because any member of the police force, for his or her own personal reasons, desires to do so.

2. Members of a political party contrary to the police officer's political views could be stopped and searched.

3. Members of any other special interest group against whom the police officer has (for whatever reason) an issue, would all become victims of this legislation.

In short, lawful assemblies of people exercising the democratic right to assemble and protest, or citizens going about their lawful business, will be delayed, detained, searched, and generally humiliated, and intimidated by any police officers or any group of police officers, lawfully, under the guise of "protecting the public".

It would be naive in the extreme to believe that police officers would not be effected by their personal views on the exercise of this extraordinarily wide power. The Mallard Commission's opinions of misconduct against two very senior police officers (Shervill and Caporn) readily exemplify how personal opinions held by those officers perverted the investigation and prosecution of Mr Mallard.

Would police sensibly use this power? Hopefully yes, but realistically no. We recall the temporary powers extended to police at the 2007 APEC conference, followed by the appalling police conduct against media representatives who were critical of some police security measures such as refusal to wear name identification badges, assaulting camera

crews, arrest without charge, etc.

4. What's Wrong with Existing Laws?

The present legislative framework gives police officers a workable and extraordinarily wide power to stop, search, and seize potentially dangerous material. I refer the committee to:

1. Section 13 of the *Weapons Act 1999*;
2. Section 24 (2) (a) and (4) (b) of the *Firearms Act 1973*;
3. Section 2 of the *Misuse of Drugs Act 1981*; and
4. Sections 33, 68 and 69 (when read with Section 4) of the *Criminal Investigation Act 2006*.

These existing legislative provisions give police officers very extensive powers to stop, search, detain and seize in public places (and indeed private places).

To get an idea of the extent of existing police powers consider these examples:

1. A police officer observes 3 members of an ethnically based gang, or maybe a member of an outlaw motorcycle gang, in the course of a routine street patrol in Northbridge. The police officer probably has a reasonable suspicion that these persons may be carrying concealed or dangerous weapons, or illegal drugs, based on previous searches of those particular persons or members of the same gang. Under the existing legislation the police officer is lawfully empowered to stop and search those persons. If an illegal article or drugs are found, they may be confiscated and the offender arrested and prosecuted. On the existing laws of evidence (as I understand them) even if a court were later to find that the police officer did not have reasonable suspicion, this would not provide a legal defence to the offender on the charge of possession of weapons and/or drugs.

2. A police officer is patrolling an open air concert and observes an individual who appears to be effected by drugs. Under the existing legislation the police officer is lawfully empowered to stop and search the person (and their bags or car etc), and if necessary, to detain him or her, and to seize not only any illegal drugs, but anything that's illegal for the person to possess (eg, a weapon, false drivers licence, stolen goods, etc). The same applies to anyone the police officer may reasonably suspect of supplying drugs, a suspicion founded on observation of the person, previous convictions, or information received from other people.

3. A police officer is on a routine patrol of Perth Railway Station. She reasonably suspects that its necessary for her to conduct "public place searches" to safeguard the area. She sets up a barrier at the station entrance and unless people consent to a electronic scan and frisk search, stripping down to their inner clothing or underwear, use of a police sniffer dog and to being photographed while being searched, she lawfully refuses them entry. In this case, it doesn't matter that elderly or young commuter are denied train transport home, or that commuters are delayed. There is no requirement for the police officer to apply to any authority to do this, nor any limitation on how long the barrier can be there. Under the existing legislation the police officer is lawfully empowered to do all this, without the requirement to justify or explain her decision to the people she wants to search.

As if these existing powers aren't wide enough, the law already gives police every assistance in having "reasonable suspicion": Extraordinarily, even if a police officer's grounds for suspecting something are later found to be false or non-existent, the officer still has a valid power to stop and search, providing it is objectively reasonable at the time.

In simple terms, the existing powers are far wider than most people realise. It is not too

much to ask that a police officer exercising these already very substantial powers, actually suspect a risk to the public, as a prerequisite to infringing a citizen's fundamental right to pass freely in the street.

I note in passing that the Minister's justification for the Bill is that police officers can seize anything found on persons arbitrarily searched, as if this is some kind of justification. The Minister neglects to mention that the existing legislative regime (referred to above) already gives police officers extensive powers to seize weapons, firearms, drugs and in fact anything that may be evidence of an offence, should these be found in the course of any search conducted under the present legislative regime.

5. Another Danger: It's Poorly Drafted

The great danger with the present Bill is that it vests in potentially very junior police officers, or alternatively police officers with some other agenda, a power to seize anything which "*may endanger the place or people*".

The House might query whether this would include, for example, pamphlets published by a political lobby, calling for mass demonstrations, a boycott of particular places or institutions, civil disobedience, or any other democratic right.

This hopelessly wide and vague definition, would empower a police officer to seize any such material.

Clearly the legislation is presently so poorly drafted that it is not limited to genuinely harmful articles such as firearms, weapons, and drugs. Presently, it may be "anything". A pamphlet advising people of their rights in relation to the police, could foreseeably be considered by a police officer to be such a thing capable of being lawfully seized, effectively putting an end to any kind of democratic, lawful public demonstration, political rally, or march.

I accept that there is a strong argument that the public expect the police to be proactive, and to locate harmful materials (such as weapons, drugs, etc) on people, obviously before they are used in the commission of a crime. The problem with the present Bill is that it is not limited to weapons or drugs, but to "anything" which any police officer may in his or her ultimate discretion consider potentially harmful. Interestingly, there is no criminal penalty, nor civil liability available against a police officer irrespective of how misplaced or bizarre this discretion might be.

The proposed legislation is unnecessary, fraught with ambiguity, contains no effective check or balance against an excess of executive power. Above all it represents such a retrograde and substantial movement away from democratic process, and a citizens right to pass unhindered by the executive through public places without exposure to arbitrary search and seizure, but the legislation must be rejected. Existing legislative framework which requires reasonable suspicion, must be retained, and has worked admirably in the past.

Summary

Its impossible to see that if somebody is going to commit a crime of violence by suddenly lashing out, as we have seen all too much of recently, that this allegedly preventative measure will do anything at all to prevent to occurrence of such crime. It is a knee jerk and ill-thought reaction to criminal behaviour unbacked by any evidence it might actually do anything positive.

This Bill carries with it enormous risks to fundamental democratic rights in this state.

The existing powers are extremely wide, and there's no evidence that policing in WA is being restricted by those powers. The Bill is dangerous, badly drafted, and utterly unnecessary.

Johnson Kitto
15 January 2010.

My Interest, Expertise, and Impartiality.

This submission is made in my personal capacity, not as a member of any organisation, including the Law Society of Western Australia, Criminal Lawyers Association, or any political party.

Police powers and duties, and the prosecution and defence of criminal charges has been the "heartland" of my professional career since my admission in to the WA Supreme Court 1990. I have appeared as counsel on contested criminal matters in every West Australian court, many tribunals and regulatory boards, at inquests and Royal Commissions and formerly in the National Crimes Authority. I have also appeared on contested matters as counsel in courts in other states, and in federal jurisdictions within Western Australia.

I have represented junior and senior police officers in various courts (most recently the Mallard Commission).

I was an adviser to the former Commissioner of Police on the "Police Core Services – Courts and Security Panel" and have lectured at the WA Police Services Detective Training School on subjects such as cross-examination, video interviewing of persons of interest and treatment of persons in custody.

I am not, and have never been a member of any political party, political movement, club, interest group or campaign, and I have always strived to present a balanced and fair view of legal matters when appearing in public forums and on my weekly ABC radio talkback presentation. Specifically in this latter capacity, I have fairly commented on, and where appropriate defended, the policy positions of the Commissioner of Police and the sentencing decisions of various judges and magistrates, as I have similarly defended the treatment of aggrieved persons by members of the police service.