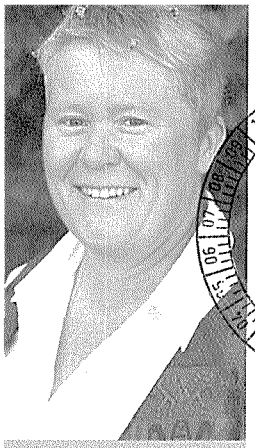

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Dear Mr Warner

Inquiry by Legislation Committee – Criminal Investigation Amendment Bill 2009

Thank you for the opportunity to make a submission to the Committee.

I submit that this Bill:

- Is unsupported by research demonstrating a problem with existing laws
- Is without precedent
- Is disproportionate, lacking adequate legislative safeguards
- Is likely to have a negative impact on the Western Australian public.

The Bill is unsupported by research demonstrating a problem with existing laws
Existing general powers to search people without a warrant are contained in Part 8 Division 2 of the Criminal Investigation Act 2006:

- Section 68 provides for searches (basic or strip) of people where an officer reasonably suspects s/he possesses or controls a thing relevant to an offence
- Section 69 provides for a senior police officer to make an order for up to 48 hours in respect of a public place. Such an order enables police to refuse a person entry to the place unless they consent to a basic search (and if applicable a vehicle search) for the purpose of searching for any thing the officer reasonably suspects does or may endanger the place or people in it, and seizing any such thing found.

Section 63 defines "basic search". It covers: using a scan/detector; removal and search of headwear, gloves, footwear and outer clothing only; and a frisk search.

Section 3 defines "public place". It includes places which the public or a section of it may access with or without payment, places which the public may access with the approval or without interference from the occupier (an example is the area at Central Park where people eat lunch), and places of education including schools and universities (except parts that neither students nor the public can access). It has been suggested to me that this definition could include a shelter for homeless people that is located within a prescribed/declared area. I am not certain if this is correct as I understand that at most night shelters clients must be let in by a worker rather than

being able to walk straight in; however I draw this point to the Committee's attention and request that it be clarified. Homelessness Australia has advised me that if the Bill's application could extend to shelters with prescribed/declared areas not only would the privacy of shelter clients be compromised but in addition young homeless people may be discouraged from accessing homelessness services and more mistrustful of youth workers.

As Hon Dr Sally Talbot MLC will recall, the Legislation Committee did a report investigating the Criminal Investigation Bill 2005 amongst other Bills: http://www.parliament.wa.gov.au/parliament/commit.nsf/(Report+Lookup+by+Com+ID)/F516E3BB4B8B7914482571EF002ABB0C/$file/ls.cib.060920.rpf.004.xx.a.pdf That report indicates in Appendix 7 at pages 101-104 that sections 68 and 69 were an expansion of the then law.

In addition to those search powers, at the briefing I received on this Bill I was told that liquor licences are a further source of search powers. I was told that most public functions include liquor licences, and that liquor licences can include conditions about entry criteria to the facility – for example, that a person be refused entry unless s/he submits to a search.

The Bill would provide for additional search powers to all of these; however, I submit that no case has been made out for that to happen.

The Second Reading speech says the Bill is in response to increasing concern by the government, police and the community regarding proliferation of weapons and increasing numbers of violent and anti-social incidents in entertainment precincts. The speech contains no statistics to support this claim and does not refer to any other research or consultation. In fact I was told at briefing that the only people consulted in respect of the Bill were police. It is particularly surprising that the Commissioner for Children and Young People was not consulted, especially given the history of the recent Bill on mandatory minimum sentences.

A media statement by the Premier and the Minister for Police dated 11 October 2009 says current laws are inadequate because when offenders are taken to court, time and resources are spent arguing whether the police had reasonable grounds to suspect the person possessed a thing relevant to an offence, and some offenders get off on a technicality related to the reasons for the search taking place. However the Minister was unable to provide details when he was pressed for further information during debate on the Bill in the Legislative Assembly.

Both the Law Society and the Criminal Lawyers Association have advised me that they cannot think of any case where a legitimate prosecution has been dismissed for lack of reasonable suspicion regarding a search. The Criminal Lawyers Association pointed out that "reasonable suspicion" is a low threshold test as it is (ie police do not have to have a reasonable **belief**, just **suspicion**).

At the briefing I received I was provided with a copy of a sheet listing weapons related offences for Perth and Northbridge over the period July 2008 to September 2009. The total was 235 charges against 229 people. The police website also provides an activity log for a recent weekend: http://www.police.wa.gov.au/LinkClick.aspx?fileticket=kBK5qRXDKvU%3d&tabid=1488 This covers a variety of offences, including four references to seizure of weapons

or drugs. Later I was provided by police with further statistics indicating that Statewide between October 2008 and September 2009 1887 weapons charges were laid against 1738 people. The seizure statistics reflect the results of searches carried out under existing law. They are not evidence of a need for expanded search laws. I was told that based on experience police strongly believe that there are a lot more weapons and drugs being carried by people in public places than police are finding and seizing but I was not provided with evidence to support this.

At the briefing I was told that there are no statistics on how many people have been searched under existing powers and had nothing seized.

I was also told at the briefing that there are no statistics on how many charges have failed to secure conviction for reasons to do with the reasonable suspicion requirement under section 68 of the Act. I was referred to four court cases to support the contention that tricky defence lawyers are getting their clients off on technicalities. However not one of them shows any problem with the current laws.

The first case to which I was referred is a 2007 South Australian case – Police v Edwards [2007] SASC 289. In that case the appeal court found that the magistrate had erred, and remitted the case for re-hearing. The case does not demonstrate any need for our laws to be amended. It is not a Western Australian case and in any event what it demonstrates is the ability of the criminal law system to rectify mistakes without the need for legislative change of stop and search laws.

The second case to which I was referred is a 2005 South Australian case – Rankine v Police [2005] SASC 114. In that case the defendant appealed the finding of a magistrate that the police had reasonable suspicion to search him (a knife was found). The defendant lost the appeal. Again, the case is not a Western Australian one and again it demonstrates the effectiveness of search laws based on reasonable suspicion rather than otherwise.

The third case to which I was referred is a 1992 Western Australian case – Hurst v Ninyett (1992) 16 MVR 397. This case predates the Criminal Investigation Act and the expanded search powers it introduced. It is therefore not relevant to the question of the adequacy of current law. Further, it was not a stop and search situation. The defendant appealed his conviction on the ground that the magistrate had erred in holding that the police had reasonable grounds for believing he was in charge of a motor vehicle involved in a collision. The defendant lost the appeal. Once again, this case demonstrates the effectiveness of search laws based on reasonable suspicion rather than otherwise.

The final case to which I was referred is a 2006 Western Australian case. I do not have a citation; I was provided with a summary of the evidence. The summary says that this case was heard in February 2006. This was months before the Criminal Investigation Act received assent in November 2006. Once again therefore, it is not relevant to the expanded search powers introduced by that Act.

According to the summary of evidence, in that case the police stopped and searched Darren Van Dongan who was patched as a member of the Gypsy Jokers. One of the officers recognised him as having been involved in a previous court case about drugs (he had been acquitted). There was a search, methylamphetamine was found and Mr Van Dongan was charged. At trial the prosecution's examination in chief did not elicit

the reasons for the police having a reasonable suspicion. In cross examination the defence brought out the fact of the prior court case, upon which the magistrate asked if the defence really wanted to go down that road. The defence said nothing further on it after that. Re-examination by the prosecution brought out nothing more. In closing, the defence said the onus was on the prosecution to prove reasonable suspicion to justify the search, and the prosecution had not proved it. The magistrate asked the prosecution how it could establish there was a reasonable suspicion. The prosecution said if the magistrate wasn't satisfied on the police evidence the case would fail. The magistrate asked if there was anything more than the fact that Mr Van Dongan was a member of the Gypsy Jokers, a group that often comes to police attention. The prosecutor said "I suppose the suspicion is by reputation more than anything...but I'm not sure in the identification. But no specific evidence was given as to why [the officer] had that..." The magistrate found that the prosecution had not established evidence of sufficient grounds for a search and that the onus was on the prosecution to prove the case beyond reasonable doubt.

Those who briefed me were of the view that either the magistrate had erred or alternatively the defence ought to have given notice of intention to challenge reasonable suspicion. As I have said, strictly speaking the case is irrelevant because it is based on different legislation. But to go on, and having discussed the case with the Law Society, I submit that in this case the responsibility for failure rests with the prosecution who did not bring into evidence the relevant information they held. I submit that better training for police prosecutors is a more appropriate remedy for this situation. Also, if the defence was discourteous in not giving advance notice of their intentions, I submit that the proper cure is to amend the law to require advance notice of the nature of any defence, not expansion of stop and search laws.

Regarding the suggestion that the majority of the public supports expanded stop and search laws, I draw the Committee's attention to a recent report. In 2009 the Australian Institute of Criminology published "What Australians think about crime and justice: results from the 2007 Survey of Social Attitudes": http://www.aic.gov.au/documents/4/8/A/%7B48A3B38B-376E-4A7A-A457-AA5CC37AE090%7Drpp101.pdf A key finding was that "a large majority of the public have inaccurate views about the occurrence of crime and the severity of sentencing. Consistent with previous Australian and international research, the Australian public perceives crime to be increasing when it isn't, overestimates the proportion of crime that involves violence and underestimates the proportion of charged persons who go on to be convicted and imprisoned." (From Executive Summary, page x)

Further, research indicates that the public is more interested in proportional measures than harsh ones. General survey questions result in stronger support for harsh measures because respondents tend to think of the worst offenders. When people are provided with more information, support drops. For example, I refer the Committee to these reports: Roberts, Julian V, "Public Opinion and Mandatory Sentencing – a review of international findings" Criminal Justice and Behaviour Vol 30 No 4 August 2003 483-508; Warner, K "Mandatory Sentencing and the Role of the Academic", International Society for the Reform of the Criminal Law, Brisbane, July 2006; and "Myths and Misconceptions: Public Opinion v Public Judgment about Sentences", Sentencing Advisory Council 2006 at pages 11-30. I also refer the Committee to the November 2009 address by the Honourable Wayne Martin, Chief Justice of Western Australia, to the Australian and New Zealand Criminal Justice Conference. It is called

"Popular Punitivism -The Role of the Courts in the Development of Criminal Justice Policies" and there is a link to it on Powanet (library home page). Although the bulk of the research relates to sentencing, I submit that the recent public reaction to the case of the child charged with receiving a stolen Freddo Frog and to the case where a doctor's car driven in a way not authorised by the owner was seized under hoon laws demonstrates that the public's interest in proportionate laws goes deeper than sentencing matters.

The Bill is without precedent
I was told at the briefing I received that there is no Australian precedent for this Bill. I was told that the Minister considered New South Wales laws passed after the Cronulla riots, but chose against following that precedent and that he did not consider any other examples of existing legislation.

Section 87D of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) – the Cronulla riots laws – provides a safeguard that is not present in this Bill. It provides for authorisation for the exercise of the special search powers to only be given if the police officer giving the authorisation has reasonable grounds for believing that there is a large-scale public disorder occurring or threat of such a disorder occurring in the near future, and is satisfied that the exercise of those powers is reasonably necessary to prevent or control public disorder. In giving the authorisation, the officer also has to be satisfied the nature and extent of powers given are proportionate.

These safeguards are not present in this Bill.

At the end of 2009 Victoria's Upper House passed the Summary Offences and Control of Weapons Amendment Bill. Like this Bill, it permits searches of people who are within a designated area, without a warrant or a reasonable suspicion. Unlike this Bill, it provides safeguards that tie the exercise of the power to the nature of the threat and that facilitate the making of a complaint if the power is misused: the Chief Commissioner must be satisfied of particular matters relating to the likelihood of violence or disorder before declaring a designated area; the area must not be larger than reasonably necessary for police to respond to the threat of violence or disorder; the period of the declaration is limited 12 hours or such lesser period that is reasonable for police to effectively respond to the threat of violence or disorder; and if requested the officer must provide his or her identifying details in writing to the person being searched.

At the briefing I was told there is also no international precedent for the Bill.

I was told the United Kingdom's stop and search legislation has some similarities, but that reasonable suspicion is still required. During debate in the Legislative Assembly it was noted that the Bill also has some similarities with section 44 of the United Kingdom's Terrorism Act 2000:
http://www.opsi.gov.uk/Acts/acts2000/pdf/ukpga_20000011_en.pdf But even that legislation contains limitations. It specifies that the person giving the authorisation must consider it expedient for the prevention of acts of terrorism. It further specifies that the search must be for the purpose of searching for articles of a kind which could be used in connection with terrorism.

Liberty (UK National Council for Civil Liberties) says: "Ministry of Justice statistics showed that in 2008 there was a three-fold increase in the use of the power, but fewer than 0.1% of those stopped were arrested for terrorism offences (let alone charged or convicted).

"Even more worryingly, the statistics also reveal that if you are black or Asian, you are around four times more likely to be stopped than if you are white." - http://www.liberty-human-rights.org.uk/issues/6-free-speech/s44-terrorism-act/index.shtml

A review tabled in the UK Parliament in 2008 said in relation to section 44: "130. I am sure beyond any doubt that section 44 could be used less and expect it to be used less. There is little or no evidence that the use of section 44 has the potential to prevent an act of terrorism as compared with other statutory powers of stop and search. Whilst arrests for other crime have followed searches under the section, none of the many thousands of searches has ever related to a terrorism offence. Its utility has been questioned publicly by senior Metropolitan Police staff with wide experience of terrorism policing." http://security.homeoffice.gov.uk/news-publications/publication-search/terrorism-act-2000/lord-carlile-report-07/lord-carliles-report-2008?view=Binary

I note the safeguards present in the laws of other jurisdictions but I do not do not suggest the government should simply substitute those laws for this Bill. An article published in Australian Policy Online by Ben Saul called "Out of Balance" and dated 21 September 2005 points out the danger in selectively transplanting laws from legal systems different from our own. In particular, human rights principles may be embedded in the other jurisdiction in ways unknown in WA, providing safeguards that would be "lost in transplantation": http://apo.org.au/commentary/out-balance My point is that legislation elsewhere regarding random stop and search powers includes more safeguards than the Criminal Investigation Amendment Bill 2009 does.

The Bill is disproportionate, lacking adequate legislative safeguards
I acknowledge that the Bill contains some safeguards. I submit they are inadequate and the Bill is disproportionate. The Bill lacks all of the following safeguards:

- Search warrant
- Reasonable suspicion that the person has a thing relevant to an offence (as in s68)
- Consent of the person to be searched or alternatively that the person have an opportunity to not enter/remain the place rather than undergoing a search (as in s69 and in liquor licence conditions)
- Legislative requirement of proportionality, ie that before making a declaration the Commissioner or Minister have formed a particular opinion regarding: a. the nature, likelihood, degree and imminence of danger to people at the particular location and b. effective police response to that danger (as in s69 and in New South Wales, Victoria and the United Kingdom). Even if police or Ministerial guidelines are drafted regarding this, they will not be subject to the scrutiny that applies to Parliament's laws and courts' decisions. Further, if the guidelines are not followed or if they are cancelled, what then? I understand the declaration will not be invalid. If we as Parliamentarians consider that particular matters should be considered before a declaration is made, we should ensure the Bill reflects that.

I also draw to the Committee's attention that the Bill does not exclude Police Auxiliary Officers from having these powers. Now the Police Amendment Bill 2009 has been passed, Police Auxiliary Officers will (unless limited by some other written law or by their appointment document) have the same stop and search powers under this Bill as police officers, but not the same training.

There is no system in place for any record containing full details of all searches done to assist Parliament or anyone else to identify whether particular ethnic or age or other groups (for example homeless people sleeping rough, who Homelessness Australia advise already receive disproportionate police attention compared with other members of the public) are being targeted, nor the proportion of searches that result in charges compared with those that don't, nor whether any person has been searched repeatedly. I understand that only limited information will be recorded, for example the number and nature of any charges, time and place. This is insufficient to enable Parliamentary or public scrutiny of the effect of the Bill. Further, as the Bill does not require that even those minimal records be kept, the Minister of the day is free to change his or her mind.

Systemic scrutiny being impossible, scrutiny will be limited to situations where individuals make a formal complaint about their treatment. This is a very hit and miss approach as it depends on the complainant having the ability, energy and courage to pursue a formal complaint. It is also not a safeguard against wrongs occurring in the first place.

In essence, within prescribed/declared areas police and Police Auxiliary Officers will be permitted by the Bill to search anyone they like for whatever reason they like, regardless of any biases or prejudices they may have in reaching that decision, and there is no opportunity for the person to refuse. There is nothing in the Bill to prevent police from stopping and searching the same person under the Bill's provisions more than once in a set period. It empowers police to be capricious. Further, because the prescription/declaration is required by the Bill to be published only in the Government Gazette (and is not invalid if the Commissioner of the time fails to do even that – see proposed s70B(5)) people will not necessarily be able to avoid areas where these powers apply.

I was told at the briefing that the plan is to let the public know that an area has been prescribed/declared, and that the Minister will consider publicising this information via signage, media alert, website and notifying backpacker hostels during regular police visits to inform backpackers about crime in Western Australia. I would support this, but note that some people will nonetheless be unable to avoid public places within a prescribed/declared area eg people reliant on public transport that travels to/from/through the area, and people who live or work in the area.

Comparisons have been made between the search powers proposed in the Bill and passing through the metal detector and bag X-ray search processes at the airport. They are not the same. At the airport, everyone has to submit to the tests. Flying is also a situation where one person's actions can have large scale catastrophic effects, endangering the lives of hundreds of people simultaneously. The Christmas 2009 attempt to detonate a bomb on a passenger plane travelling to the United States is a recent reminder of this. The proposal in the Bill is not like this at all. The Bill is not aimed at a large scale catastrophe, it authorises a variety of types of search and for

practical reasons it is highly unlikely that everyone in a prescribed/declared area will be searched.

Comparisons have also been made between the search powers proposed in the Bill and random breath testing of drivers. Again, they are not the same. Compared with the figures cited above that I was provided with at the briefing in support of the powers proposed in the Bill, the most recent police annual report indicates that over the last financial year 21 955 or 2.9% of drivers tested were found to exceed the lawful alcohol limit and that this figure has increased both consistently and substantially since 2004/2005: http://www.police.wa.gov.au/LinkClick.aspx?fileticket=uTfh%2fv7ajDU%3d&tabid=935 The nature of the search is a breath sample rather than the potentially more personal search processes permitted by the Bill. There is more privacy because the driver stays in the vehicle unless the test indicates s/he is over the limit. There is less opportunity for police caprice because there is less time to study a driver before making a decision. I suggest there is also less opportunity for the same driver to be breath tested repeatedly on the same day.

The Bill is likely to have a negative impact on the Western Australian public
I am concerned about the likely reaction of members of the community to being compulsorily searched despite no wrongdoing, possibly having been unaware when they entered the area that a search could occur.

I am particularly concerned about:

- The impact on groups who already receive disproportionate police attention compared with other members of the public, for example people who are Aboriginal, young, homeless or from certain ethnic backgrounds
- The impact on children. Under the Bill, a school, university, train station or bus station could become or fall within a specified/declared area. On 25 November 2009 in answer to question without notice 1192 from Hon Sue Ellery MLC, the Minister for Child Protection said the Bill excludes under 17s. I understand this is not correct. Parent groups have not been consulted about their views on this. The special provisions in the Act requiring strip searches of children or incapable people to be conducted in the presence of a parent, guardian or other responsible person do not appear to apply to basic searches
- The impact on groups who object to removing items of their outer clothing (eg headwear) in public for cultural reasons. I understand there is a procedure being finalised at the Perth Watchhouse for police to provide disposable headgear to people who wear headgear for cultural reasons and have had their own removed. However, I understand police are not intending (nor probably able) to carry disposable headgear about with them when exercising their powers under this Bill
- The likely reaction of people with mental health issues to being searched pursuant to the authority granted by the Bill
- Any impact on the willingness of members of the public, particularly from the above groups, to provide intelligence to the police relevant to crime prevention or crime investigation
- The possibility that the Bill could lead to offences arising through people who possess nothing unlawful nonetheless refusing to cooperate with being searched. This would impact negatively on the safety of police. Prosecuting offences arising from resisting a search would take up public resources

allocated to prosecution, publicly funded defence, courts and our already overcrowded prisons. If resisting a search escalates to assault and injury to a police officer, the consequence could be a mandatory prison sentence. Regarding imprisonment, I draw to the Committee's attention a report published in November 2009 by Murdoch University's Dr Brian Steels and Dr Dot Goulding that explains the risk of sexual assault in prison and the consequent impact on victims' mental health, family relationships and rehabilitation: http://www.cscr.murdoch.edu.au/_docs/predatororprey.pdf

I acknowledge the training that police undergo. However police are only human and there are no safeguards in the Bill to protect the public against any lapses. The latest police annual report indicates that over the last financial year 2,855 complaints were received against police and that 426 were sustained. This means that even leaving aside all of these:

- The 2007 submission by the Aboriginal Legal Service that suggested more complaints ought to be being sustained but are not due to weaknesses in the police complaints system
- The recent Freddo Frog case where the police are reported as having offered to withdraw the charges
- The two recent cases of assault on a public officer by people with mental health issues which would have attracted mandatory imprisonment had the cases proceeded as far as conviction
- The 2008 report by the Office of the Auditor General "The Juvenile Justice System: Dealing with Young People under the Young Offenders Act 1994" which found that children are not being diverted from court as often as appropriate and recommended Western Australia Police ensure that officers consider redirection options in line with the Young Offenders Act

on their own figures, over the last financial year police erred at least 426 times.

My point is not the number of errors, it is that police are human and that in the difficult job they perform they sometimes make mistakes. Some officers also sometimes do the wrong thing and I remind Committee members of the cases of the Mickelberg brothers and of Andrew Mallard, the death of Mr Ward who came to be in the van partly as a result of police error in respect of bail, the November 2009 media report of a Western Australian police detective repeatedly and improperly accessing and using information from a police computer http://www.perthnow.com.au/news/western-australia/officer-used-police-computer-to-access-womens-details/story-e6frg143-1225798680912 and the finding of the Kennedy Royal Commission that: "The evidence obtained by this Royal Commission has revealed the existence of similar practices [to corrupt and criminal conduct found in Queensland, New York, NSW, Los Angeles and the United Kingdom] by officers of the Western Australian Police Service since 1985 [the report spanned a 19 year period]. Examples of the full range of corrupt or criminal conduct from stealing to assaults, perjury, drug dealing and the improper disclosure of confidential information has been examined. That in itself is not surprising...It would have been quite remarkable if that evidence had not emerged."

The CCC Commissioner Mr Len Roberts-Smith has been reported in the media as having expressed concern that the powers in the Bill carry an increased risk of misconduct or corruption. This Bill provides no safeguards to help prevent police mistakes, crime or corruption, from impacting on members of the public.

The Bill is unjustified, unprecedented and disproportionate and is likely to impact negatively on Western Australians. I would be happy to appear before the Committee to further discuss my concerns.

Yours sincerely

G. Watson

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