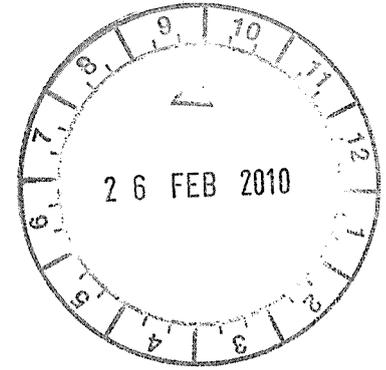


25 February 2010



Standing Committee on Legislation
Legislative Council Western Australia
Parliament House
PERTH WA 6000

Dear Ms Jewell

INQUIRY INTO CRIMINAL INVESTIGATION AMENDMENT BILL 2009

Further to my evidence on 9 February 2010 and supplementary questions asked by the Committee, please find attached the Society's answers to those questions. Also enclosed is my corrected transcript.

I further advise that the Society's inquiries have failed to find any instances of the exercise of police search powers under s69 of the *Criminal Investigation Act 2006*. What some members believed to have been exercises of such power were in fact instances of search as a condition of entry to private or licensed premises.

Given that the already wide powers contained in s69 have not been exercised, the Society fails to see why additional police powers are now required.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Hylton Quail'. The signature is fluid and cursive.

Hylton Quail
PRESIDENT

STANDING COMMITTEE ON LEGISLATION

INQUIRY INTO THE CRIMINAL INVESTIGATION AMENDMENT BILL 2009

ADDITIONAL QUESTIONS FOR THE LAW SOCIETY OF WESTERN AUSTRALIA

HEARING HELD ON TUESDAY, 9 FEBRUARY 2010

1. *Was the Society consulted during the preparation of the Bill? If so, what were its comments and what was the outcome of the consultation?*

The Law Society of Western Australia was not consulted.

2. *Your submission indicates that you do not think that the Bill is needed. Would you recommend that the Bill not be passed?*

Yes.

3. *The Society's submission indicates it is concerned that police officers will be given unqualified and unchecked, additional search powers. Would its concerns in this regard be eased if the Bill prescribed what the police officer may search for? Why/why not?*

The Society's concerns would not be eased. Our objections to s70A concern the removal of consent and reasonable suspicion as prerequisites for search. Prescription of reasons for search would not overcome these concerns unless the prescription also required reasonable suspicion on the part of a police officer before conducting the search.

If enactment of s70A is inevitable, then prescription of reasons for stop and search should be required as a check on otherwise completely unfettered police power. The only reason which could attach to such an extreme power is a search for weapons.

4. *Would the Society's concerns be eased if the Bill prescribed more procedures on how the proposed additional stop and search powers must be exercised? Why/why not?*

The Society opposes the Bill in principle for the reasons given in evidence. If however, extension of police stop and search powers is inevitable, then procedures should be put in place prescribing how the powers are to be exercised. Those procedures should include and enable parliamentary reporting and oversight and also specific police obligations covering the manner of exercise of the power (see further below).

5. *Would the Society's concerns be eased if the Bill required police officers, when conducting a stop and search under the proposed additional powers, to give the person being searched, or*

whose vehicle is being searched, a notice which advises the person of certain facts; for example, the fact that they have entered a prescribed/declared public place, the police officer's powers of stop and search and the person's rights and obligations during the stop and search? Why/why not?

Where powers as wide as s70A are contemplated, minimum standards for stop and search should be enacted requiring personal service and proper explanation of a notice advising of entry into a prescribed/declared public space, the police officer's powers of stop and search, the person's rights and obligations and the reasons for the stop and search. Enacted procedures should also require police officers to identify themselves by name and the station where they work to each person searched. Each search must be recorded by way of a "search record" as occurs in the United Kingdom for stop and searches under s60 of the *Criminal Justice and Public Order Act 1994* and as used to occur under s44 of the *Terrorism Act 2000*¹. The record must include :

- the officer's details
- date, time and place of search
- reason for search
- outcome of search
- the citizen's self defined ethnicity
- vehicle registration number (if any)
- reason for search
- result of search
- citizen name (if given)

6. *Would the Society's concerns be eased if the Bill requires the searching police officer to make a written record of the stop and search and to give the person being searched, or whose vehicle is being searched, that written record of the stop and search? Why/why not?*

Our concerns would not be eased. If our objections and those of others are not accommodated then, in our view, proper checks and balances as outlined above should be mandatory legislative requirements.

7. *Would the Society's concerns about the Bill be eased if it had more instructions about how or why an area would be chosen to be prescribed or declared? Why/why not?*

¹ S44 stop and search powers were recently held to be illegal by the European Court of Human Rights in *Gillan & Quinton v The United Kingdom* (Application no. 4158/05)

No. It is not important that the Society have instructions. Rather, it would be necessary for the public to have such information.

8. *Would your concerns about the Bill be eased if it had more requirements for notifying the public about the prescription or declaration of an area where the proposed additional stop and search powers may be used? Why/why not?*

If the Bill is enacted then provisions requiring wide publication in all forms of media of prescribed/declared areas should also be enacted. There should also be wide publicity explaining the reasons for and effect of any new laws and the substantial changes to pre-existing laws, as most people would not be aware of the substantial obligations imposed by s70A.

9. *Under the Bill, a public place may be prescribed for up to 12 months and be declared for up to two months.*

- a) Are these maximum periods of prescription/declaration too long?

Yes

- b) If so, why and what maximum periods would be preferable?

The only justification for s70A has been on the basis of searching for weapons in entertainment precincts such as Northbridge or during school leavers week. Given this, the Society believes that the maximum period for prescription should be 1 month and for declaration, 7 days.

10. *Under proposed section 70B, the Commissioner of Police may declare an area only with the approval of the Minister. Under proposed section 70A (prescription of an area), no additional approval is required. Would your concerns about the Bill be eased if both the prescription and declaration of areas were required to be approved by a person independent of the Government? Why/why not?*

Whilst independence from Government would improve prescription and declaration, it is difficult to see how such a mechanism might work without the creation of a new and specific executive position. Prescription and declaration are arguably not judicial functions and should not be done through a court process.

11. *Under proposed section 70B, the Commissioner of Police is able to delegate his or her power to declare a public place to the Deputy Commissioner or an Assistant Commissioner. Does this concern you? Why/why not?*

A power as wide as s70B should be non-delegable save only for when the Commissioner is incapacitated and then only to the Deputy Commissioner.

12. *The Bill provides that the Minister, rather than a person independent of the Government, must*

conduct a review of the operation and effectiveness of proposed sections 70A and 70B. Would you prefer an independent reviewer? Why/why not?

If the Bill becomes law, independent review of its operation is essential. Given the substantial extension of police powers that is contemplated, a Parliamentary Inspector function similar to that under the *Corruption and Crime Commission Act 2003* should be enacted. All “search records” must be provided to the Parliamentary Inspector who would review all searches and report to Parliament at least annually. If a Parliamentary Inspector were established, the office would need to be adequately resourced.

13. *The Bill provides that the operation and effectiveness of proposed sections 70A and 70B must be reviewed after five years. Do you agree with a five-year review or do you think that the timing of the review should be sooner or later than that?*

Rather than review, the Bill should have a two year sunset clause. Powers as wide as those contemplated should not be allowed to lie on the statute books if they remain unused or their use can no longer be justified.

14. *Would the Society's concerns be eased if the Bill required the Minister or the Commissioner of Police to report to Parliament regarding the use of the proposed additional stop and search powers?*

See above

15. *Would the Society's concerns about the Bill be eased if it provided for the Minister, or a person independent of the Government, to revoke or cancel the prescription/declaration of a public place for the purposes of the proposed additional powers? Why/why not?*

If an independent position is established as discussed at question 10 above, that person should have the power of revocation.

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