Equal Opportunity Commission

SUBMISSION

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INQUIRY INTO THE CRIMINAL INVESTIGATION AMENDMENT BILL 2009

COMMISSIONER FOR EQUAL OPPORTUNITY

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PUBLIC

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I wish to comment on the Criminal Investigation Amendment Bill 2009 which introduces the 'stop and search' powers by the Police without the need for a 'reasonable suspicion'. The Minister's second reading speech details that this legislation will permit the searching of persons who do not consent and of vehicles within a prescribed or declared area.

The second reading speech refers to the current law as only permitting such searches when the person provides consent or the police have a reasonable suspicion of the intention to commit a crime. Indicating that such powers are inadequate the Minister states: "The problem with this is that if a person does not consent to a search, police officers can then only refuse the person entry to the relevant area. This leaves the potential for drugs and weapons to remain in public....." If the rationale is to tackle increased violence and the carrying of weapons in certain areas then the existing powers to search on the suspicion of the carrying of weapons would appear to be adequate for this purpose. The Minister notes the power of the police to refuse the person entry to the relevant area should they refuse to be searched.

However if the intention is to search for the possibility of possession of drugs or weapons that could be used at any time or any place then this would appear to signal a desire to extend such stop and search powers so that they would become operative everywhere and would replace existing powers of the police to search where they have a reasonable suspicion.

The second reading speech goes on to detail that "to provide some safeguards to the public, police officers can exercise these new search powers only within a public place contained in the specified or declared area.", and further indicates that if a person "was found in possession of weapons, drugs etc that person would be arrested and then a strip search might occur....." "During the search, should the officer locate anything that is relevant to an offence that he or she reasonably suspects may endanger the place or people within it, the officer may seize that item".

Nowhere within the second reading speech is there a reference to any specific incidents where police lacked sufficient power to search for and seize a weapon which was later used in the commission of a crime or where a search was found to be unlawful as a result of failure to prove a 'reasonable suspicion' led to the search.

The Western Australian Equal Opportunity Commission has serious concerns about this law together with other existing and proposed laws which widen the powers of police to impose restrictions on persons in public places and which infringe fundamental human

rights such as the right to freedom of movement; access to public places, freedom of association and the right to privacy.

This ever expanding suite of laws including the power to issue move on orders (the Criminal Law Amendment (Simple Offences) Bill 2004) and the proposed Prohibited Behaviour Orders Bill 2009, together with the proposed stop and search powers substantially widens police powers and has the very real capacity to result in the disproportionate charging and possibly gaoling of people from minority groups in particular young people, Aboriginal young people and other vulnerable people who spend more of their time in public places.

The proposed 'stop and search powers' and the proposed prohibitive behavior orders as set out in the 'Prohibited Behaviour Orders Bill 2009 were introduced in the UK under the umbrella of anti-terrorism laws. Ministry of Justice figures there show that stop and searches soared from 37,197 in 2006/07 to 117,278 in 2007/08 (*The Guardian*, Friday May 1, 2009). The statistics disclose that black and Asian people were disproportionately targeted. The number of black people stopped under these powers rose 322% compared with an increase of 277% of Asian people and 185% for white people. Analysis of the figures shows that only 6 in 10,000 people stopped and searched were arrested for terrorism let alone charged or convicted. The disproportionate effect on minorities is alarming.

Other powers to search anyone for 24 hours for knives and other weapons in areas of 'potential violence' produced 53,000 such searches in 2007/08 mostly in London, Liverpool and Birmingham. In London, more than half of the searches under this power were conducted on black persons (*The Guardian*, Friday May 1, 2009).

England and Wales saw a general increase in the use of stop and search powers in 2007/08 to 1,035,438. The main reason cited by officers was the suspicion that drugs were being carried. In 2008 black people were seven times more likely to be stopped than white people (Source: *The Guardian* "Use of Police Stop and Search powers under terror law surges", 1 May 2009).

The Independent newspaper ran a feature article titled "The Scandal of Stop and Search" noting that lawyers, magistrates and leading figures in the arts and media had been stopped and searched repeatedly in Britain because they were black. In a series of documented incidents the paper named leading black figures including the head of the Commission for Racial Equality Trevor Phillips and magistrate Keith Kerr who was also an adviser on race issues to the Attorney-General – in each case these black citizens were driving expensive cars and had been repeatedly stopped and questioned

about the ownership of their cars; some have been searched and had goods from their cars strewn over the footpath and street.

Keith Kerr a magistrate and adviser to the Attorney General has been reportedly stopped more than 50 times. He drives a Mercedes and is black.

Toussaint Davy, the editor of *Tense* a lifestyle magazine was stopped twice once apparently because he was wearing a jacket and carrying another he had collected from where he had left it the night before – his comment, were:

> *What worries me is that a lot of young kids react very badly when confronted by authority. That can be a quick way to get arrested..... There is a lot of pride involved when a young boy, wearing new clothes, maybe a bit cocky, is stopped.... (The Independent, The Scandal of Stop and Search* August 16, 2003*)*

Simon Woolley head of Operation Black Vote reported being stopped constantly. He described one occasion where he was carrying a bag of dirty washing and was approached and questioned by police. He said he was going to do some washing and the police asked for ID. He said he would need to go into his home to retrieve ID and he was arrested for potential burglary and handcuffed to his own front gate. It was only when his neighbor confirmed who he was that he was released.

In the recent case *Gillan and Quinton v the United Kingdom (2010)*, a decision delivered by the European Court of Human Rights on 12 January 2010 found that the stopping and searching of Gillan who was carrying a rucksack on her way to attend a demonstration and Quinton, a photographer also on her way to film the demonstration constituted a breach of Article 8 of the European Human Rights Convention as the powers of search were not sufficiently circumscribed nor subject to adequate legal safeguards against abuse. The Court in making its decision stated that the safeguards, the ability of an individual to challenge a stop and search by way of judicial review were insufficient and limited. "In particular in the absence of any obligation on the part of an officer to show a reasonable suspicion, it is likely to be difficult if not impossible to prove that the power was improperly exercised." case of *Gillan and Quinton v the United Kingdom*, ECHR; 12 January 2010, at paragraph 87).

The Court also noted that "the available statistics show that black and Asian persons are disproportionately affected by the powers, although the Independent Reviewer has also noted, in his most recent report, that there has also been a practice of stopping and searching white people purely to produce greater racial balance in the statistics." (*Ibid* at paragraph 87). The Court also noted that "there is a risk that such a widely framed power could be used against demonstrators and protestors" in breach of other articles

of the Convention. The Court awarded compensation in addition to legal costs in favour of the appellants.

A paper by the National Council for Civil Liberties UK (May 2006) states:

> *The absence of satisfactory legislative restrictions on the power to make authorizations creates great scope for abuse. Powers have been used in a way that has damaged community relations, as black and Asian people are stopped in numbers disproportionate to the population as a whole. Many young Muslim men in particular feel that they are stopped and searched simply because they fit a general stereotype held by the police. Section 44 has also been misused against peaceful protestors. National Centre for Policing Excellence Stop and Search Practice Advice Liberty's response to Consultation* at page 6.

The paper also cites concerns expressed by the Metropolitan Police Authority in evidence to the Select Committee on Home Affairs about the use of stop and search power:

> *Section 44 powers do not appear to have proved an effective weapon against terrorism and may be used for other purposes...It has increased the level of distrust of our police. It has created deeper racial and ethnic tensions against the police. It has trampled on the basic human rights of too many Londoners. It has cut off valuable sources of community information and intelligence. It has exacerbated community divisions and weakened social cohesion.* (at page 6, paragraph 11)

Whilst section 44 of *The Terrorism Act 2000* provides power to stop and search relating to items connected with acts of terrorism section 60 of *The Criminal Justice and Public Order Act* 1994 permits searches without the requirement of a reasonable suspicion in an authorized area for offensive weapons or dangerous instruments. This latter has parallels with the law under consideration in Western Australia by this Committee.

We have an opportunity to learn from the experience in the UK – black people and Asian people have been disproportionately targeted and substantial damage has probably been done to the relationships between these groups and police.

In Western Australia it is submitted we have a major problem as a result of a burgeoning prison population and in particular an escalating Aboriginal prison population.

The number of adult prisoners has increased between June 20, 2001 and November 2009 by 49%. The prison population grew by 27% over the past 18 months. Much of the increase in prisoner numbers over this period has been a result of a dramatic worsening of the over representation of Aboriginal people in our prisons. The number of sentenced Aboriginal prisoners over the above period has increased by 83% (compared with a 39% increase in non-Aboriginal prisoners). (Speech by the Hon Wayne Martin, Chief Justice of Western Australia to the Australian and New Zealand Society of Criminology conference, 23 November)

In response to a question asked in the Legislative council for the period 7 November 2008 to 30 September 2009 4144 adult persons became sentenced prisoners. Of these 601 were identified as having psychiatric issues on their medical records ie 14.5% of the total and another 78 were identified has having an intellectual disability. Another 20 had no fixed address.

When account is taken of fine defaulters and the group of prisoners with shorter sentences the Chief Justice (November 2009) expresses the view that the majority of the prison intake over recent times has been fine defaulters and those convicted of offences at the lower end of the spectrum. He notes "A significant proportion of the intake have psychiatric or intellectual disability issues and of course, a very significant proportion of the intake is Aboriginal".

The over-representation of Aboriginal people within the criminal justice system is of the scale of a disaster and appears to be steadily worsening.

The United States has the highest rate of adult imprisonment in the world with 1 in 100 adults in the US in prison. African-American males are the most highly imprisoned group with a rate of 1 in 15. The incarceration of adult Aboriginal men in WA in June 2008 was also 1 in 15.

Similarly the rate of female incarceration in the United States is highest for African-American women at a rate of 1 in 203. In Western Australia Aboriginal adult women are imprisoned at a rate of 1 in 160. So as noted by the chief Justice the rate of imprisonment of Aboriginal women in Western Australia is worse than the rate of incarceration of African-American women in the United States.

In Western Australia adult Aboriginals are imprisoned at a rate 25 times that of non-Aboriginal people. In the United States African-American adults are imprisoned at a rate that is seven times that of white American adults.

The figures for juveniles are much worse. Western Australia has the highest rate of detention of Aboriginal juveniles in Australia – 700 per 100,000 in June 2007. South Australia was next at a rate of 528. The proportion of Aboriginal juveniles detained in Western Australia has varied between 75% and 80% of all those detained. Given the current rates of recidivison it is likely that these young Aboriginal people will go on to form part of the over represented Aboriginal adults who occupy our prisons.

The rate of return to custody for Aboriginal juveniles is 64% for females and 80% for males. Speech by the Hon Wayne Martin Chief Justice of Western Australia. *Corrective Services for Indigenous Offenders – Stopping the Revolving door*, 17 September 2009.

The Chief Justice points to the "alarmingly high proportion of the Aboriginal population of Western Australia who are caught in a metaphysical revolving door at the entrance to the criminal justice system."

There is no question that young people and Aboriginal people occupy public places in disproportionate numbers to their numbers in the population.

Stop and Search laws will impact disproportionately on those most likely to be on the streets – areas designated for stop and search purposes.

Previous concerns were expressed about the numbers of Aboriginal young people likely to be affected by move on orders and by the Northbridge curfew.

It was reported on 13 January 2010 that the number of children picked up as a result of the curfew during 2009 increased by 100 to 1339 and that most of these were Aboriginal children. In the first eight months of 2009 the police were reported to have picked up children in Northbridge 1,000 times with at least 714 of these incidents involving Aboriginal children (*The West Australian*, September 14, 2009 at p5). Aboriginal leader Ted Wilkes has described the figures as showing that the policy has 'racist underpinnings'.

Health economist Gavin Mooney has also described the policy as racist (*The West Australian* 14/09/09 p.5).

Various articles have been written about the effectiveness of curfews and some have addressed specifically the Northbridge curfew. Arguments in favour of curfews include that they make the streets safer, by removing juveniles from areas making them less

likely to commit crimes. Other arguments in favour include that they place responsibility back onto parents and encourage parental responsibility for their children as well as providing an opportunity for early intervention in the lives of children at risk.

Arguments against curfews emphasize the lack of research on the effectiveness of curfews, that they provide a superficial 'quick fix' which relied on naïve assumptions such as that home is always a safe and secure place for young people and that the infringement on the rights of young people is outweighed by reduction in crime.

Figures reported since the implementation of the curfew in Northbridge in 2003 consistently reveal a very high proportion of Aboriginal youth and particularly females aged between 13 and 15 have been apprehended by Police as a result of the curfew. Statistics from Mission Australia reveal 75-85% of these apprehended under the Northbridge curfew are Aboriginal (*MacArthur* 2007).

Whilst the curfew may on its face appear to be non-discriminatory in nature, its effect in practice is to disproportionately affect Aboriginal young people. As such it may well be a form of indirect discrimination.

Definition of Indirect Discrimination – *Equal Opportunity Act 1984*

> *Section 36 (2)*
>
> *For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of race if the discriminator requires the aggrieved person to comply with a requirement or condition:-*
>
> *(a) with which a substantially higher proportion of persons not of the same race as the aggrieved person comply or are able to comply;*
>
> *(b) which is not reasonable having regard to the circumstances of the case; and*
>
> *(c) with which the aggrieved person does not or is not able to comply.*

Overall it would appear that despite reliance on legislation which was designed for the care and protection of children curfews such as that introduced in Northbridge appear to have a greater interest in coercion and control of young people which must be weighed up in the light of evidence that early contact with the police and the criminal justice system can be predictive of future contact with the criminal justice system (Koch 2003, Cuneen 2007).

A great deal has been written and debated about Aboriginal disadvantage. Nationally the rate of unemployment of Aboriginal people is more than three times that of the non-Aboriginal population (16.6% cf 5.9% respectively – Australian Bureau of Statistics, National Aboriginal and Torres Strait Islander Social Survey, 2008). In Western Australia the Aboriginal unemployment rate is 16.8%.

The Equal Opportunity Commission is empowered to receive complaints of discrimination on the basis of a spent conviction *Spent Convictions Act 1988* (Sections 17 to 24). The intention of this provision is to prevent discrimination against persons in employment on the basis of spent convictions. In reality the Commission receives very few complaints under this ground and anecdotal evidence received through informal enquiries to the commission is that the requirement of a Police clearance is increasingly common by employers. This makes the gaining of employment by a person with any conviction regardless of the seriousness or the age of the offence (where it is less than ten years old) increasingly problematic.

Laws which widen the net and make it more likely that young people and in particular Aboriginal young people will attain criminal records will undoubtedly impact on the ability of the community to achieve progress in increasing the health and well being of Aboriginal people, in increasing their participation in the workforce and in reducing their imprisonment rate.

Much publicity has been given to the view that anti-social behavior in entertainment precincts such as Northbridge is increasing and the legislation under consideration by the Committee has been described as designed in part to address this.

Alcohol affected young people are notoriously more likely to engage in behavior they would otherwise not do including challenging the directions of authority figures including police officers. This combination of circumstances is likely to lead to more young people being arrested for refusing to co-operate with officers seeking to search them and consequently resisting arrest etc. If the behavior to be tackled is alcohol fuelled anti-social behavior or the use of weapons in nightclubs etc then it would appear that enforcement of laws to require better observance of the requirement not to serve alcohol to those who are intoxicated would be more effective. Similarly if the carrying of weapons in clubs and pubs is of concern a requirement of such venues to search their clients by means of metal detectors would be a more appropriate and targeted response.

The suite of laws and proposed laws likely to lead to increasing incarceration rates among young people and particularly Aboriginal young people includes the proposed anti-social behavior laws created by the Prohibited Behavior Orders Bill 2009. Modelled

on the UK orders created under the *Police Reform Act 2002* (UK). This Bill creates a system of orders prohibiting a wide range of behavior that led up to the offending conduct and which can be issued at the time of sentencing for the relevant offence. Such prohibited behavior orders can impose a ban on a wide range of behaviours for a period of two years which, if breached will result in further criminal penalties (in addition to the penalty for the offence) of fines and imprisonment of up to five years. The sorts of behaviours to be captured by these orders would not normally be designated as criminal (such as being in a prohibited area; carrying a spray can etc) but the breach of the order would result in a criminal conviction.

In considering this kind of legislation it would be instructive for us to consider the results of such legislation in countries such as the UK where they have been in place for some time. Anti-social behavior orders in the UK have been found to have been breached in four out of 10 cases. Statistics from the UK indicate that one in every four people who have an ABSO order placed on them end up in prison. *Anti-social Behaviour Orders, Youth Affairs Council of South Australia, November 2007*

In the UK anti-social behavior is defined as anything "likely to cause offence, harassment or fear". It has resulted in "playing football in the street and being sarcastic to one's neighbours being defined as 'anti-social'." ASBOs have the effect of criminalizing behavior that would otherwise not be illegal.

Anecdotal evidence suggests that young people and people from culturally and linguistically diverse background have been disproportionately impacted by ASBOs. Since the programme's inception more than four in ten ASBOs have been applied to children under 17 years. In 2005 a study by the British Institute for Brain Injured Children showed that approximately 35% of ASBOs have been applied to young people with a diagnosed metal illness or learning disability (Youth Affairs Council of South Australia, November 2007).

ASBOs in the UK have been used to ban begging, prostitution, being drunk, using abusive language and sleeping rough. They have been used to bar people from public places or from engaging in behavior in public places. ASBOs disproportionately impact on homeless people. Andrew White, a 43 year old homeless man breached his ASBO by sitting on the bottom steps of a fire escape. He is illiterate and was gaoled for two years. He served eight months and was released but breached his order again and was gaoled for three years for a non-criminal offence.

As at June 2005 6,500 ASBOs had been issued and the numbers were increasing each year. Vulnerable people such as the mentally ill or drug dependant are the most affected by ASBOs. Studies in the UK have concluded that people who are the most

vulnerable and in need of assistance and support or referral are the ones most likely to receive ASBOs. They have been described as contributing to the problems of homelessness and effectively criminalizing homelessness. *A New (Legal) Threat to Public Space: the Rise and Rise of the ASBO, Fitzroy Legal Service 2006.*

Research conducted in 2006 by Neil Wain, a criminologist and serving Police Chief Superintendant of the Stockport division of Greater Manchester Police, on the effects of ASBOs on crime is revealing. Reported in *The ASBO: Wrong Turning – Dead End, by Neil Wain and Elizabeth Burney (2007).* He examined a sample of offenders aged 15 to 50. Over half indicated they had failed to comply with the conditions of the ASBOs. Some 86% had been caught for failing to comply. Prison was the most common consequence of the breach and had been imposed in 71% of the cases. Most (81%) of the respondents stated that ASBOs had not prevented them from committing further crimes. The author argued that the study threw doubt on the ability of ASBOs to combat unruly behavior and crime. He also noted that ASBOs were rarely associated with any constructive interventions to address offending behavior.

The Minister's statement on 1 December 2009 on the tabling of the Draft Bill for the Prohibited Behaviour Orders 2009 refers to "serious and repeat anti-social behavior" and also to "anti-social behavior" as "criminal behavior which causes alarm, intimidation or harassment to the community".

I am pleased to see the use of the word 'criminal behaviour' with anti-social behavior because the Liberal Party Policy Document, entitled *Protecting Our Community – Prohibited Behaviour Orders*, refers to these orders as providing the opportunity to "respond to surrounding behavior rather than criminal acts". The paper uses as examples – an order banning someone from possessing spray cans, or being on the streets at night. It also lists the types of behaviours prohibited in the UK by similar orders which could be targetted:

- Verbal abuse
- Harassment of passers by or residents
- Graffiti
- Substance abuse
- Assault
- Vehicle vandalism

Whilst some of these are potentially criminal offences others would not necessarily be so and it is clear that the intention is to issue orders requiring people to desist from some anti-social behavior which may not be criminal with the result that a breach of this order "would result in significant criminal penalties, including a real prospect of goal time".

The paper indicates:

> *These measures would give police the power to far more effectively respond to future complaints of anti-social behavior relating to that person because they would be able to respond to surrounding behavior rather than criminal criminal acts itself (sic).*

Although the Committee is not at this stage examining this Bill it is discussed as part of the suite of legislation referred to above.

Reasons given for providing ever-increasing powers to the Police as set out above usually refer to rising levels of crime and violence.

In a detailed analysis of the incidence of criminal offending and sentencing the Chief Justice indicated that:

> *Over the past 20 years the general imprisonment rate per capital has more than doubled. Offending rates per capita have generally remained constant or fallen significantly.*
>
> *Over the 10 years ending 2008 in Western Australia, indexed rates of reported homicides declined by 40%, armed robbery by 45% ; burglary by 45%; motor vehicle theft by 50%; and other theft by 12%. Over the same period reported assaults increased by 27%. Reported sexual assaults stayed much the same.*

He concludes:

> *While one would never diminish the seriousness of offences of assault, over the last 10 years there has been a general decrease in the rates of reported offending in WA and significant decreases in many of the categories of most serious offending.*

Popular Punitivism – the role of the Courts in the Development of Criminal Justice Policies – address to Australian and New Zealand Society of Criminology Conference, 23 November 2009.

I would encourage the Committee to carefully review statistics relating to the use of move on orders and young people taken home or to safe places as a result of breaches of the curfew. Such information will assist the committee to assess the risk of the proposed stop and search laws disproportionately affecting young people and in particular Aboriginal young people. Any laws which increase the likelihood of Aboriginal young people entering into altercations with the police will inevitably add to the already unacceptable levels of incarceration of Aboriginal young people. Any prospect of improving relations between young people and police will be jeopardized.

Whilst the proposed new laws have been heralded as an attempt to make various precincts including Northbridge safer places by removing weapons before they are used to injure citizens thought needs to be given to the implications of searching significant numbers of young people who may socialize in places such as Northbridge.