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YOUTH AFFAIRS COUNCIL OF WESTERN AUSTRALIA SUBMISSION TO THE STANDING COMMITTEE ON LEGISLATION CRIMINAL INVESTIGATION AMENDMENT BILL (2009)

The Youth Affairs Council of Western Australia (YACWA) is the peak non-government youth organisation in Western Australia with a membership of over 250 youth service organisations, community organisations and young people. Established in 1980, YACWA has worked tirelessly for 30 years to deliver high-level representation and advocacy for the Western Australian youth sector and young people.

Our role includes:

- Acting as a lobbying group for the non-government youth sector and Western Australian young people aged 12-25
- Providing information and support to the non-government youth sector
- Working to promote fair and positive outcomes for young people in our community
- Promoting equity, equality, access and participation for young people in Western Australia
- Advocating to all levels of government on the best interests of Western Australia's young people
- Encouraging the active participation of young people in identifying and dealing with issues that are important to them
- Improving youth services by exchanging ideas, information, skills and resources
- Providing a strong, united and informed voice capable of effectively advocating for the non-government youth sector and the young people with whom they work

Being the peak non-government youth association in Western Australia, we have a responsibility to advocate for young people and to ensure the youth sectors' views are heard on the very important issue of 'stop and search' legislation.

PUBLIC

INTRODUCTION

The Criminal Investigation Amendment Bill (2009) – a.k.a. the ‘stop and search’ Bill – is an alarming piece of legislation for Youth Affairs Council of Western Australia (YACWA), as it will have a number of detrimental effects on young people and minority groups, without affording the community any significant increase in safety.

Figures from the United Kingdom, where similar laws are in place, have shown that less than 1% of those searched in 2008/09 were charged with an offence.ⁱ The efficacy of widespread searching must be questioned in light of such figures, which suggest that community safety is not enhanced by such practices.

Without this benefit of increased security, we fail to see how the Minister for Police can justify the introduction of ‘stop and search’ legislation, which constitutes a serious infringement on the rights of young West Australians and an unprecedented increase in the rights and powers of police officers. For us, it is deeply concerning that seemingly inviolable civil rights - such as the right to privacy, freedom of movement and the presumption of innocence - are under threat from the very bodies that serve to protect the community: the government and the police force.

The stripping away of young people’s rights that this amendment entails is also problematic in light of the reasons given for introducing the Bill. One reason was to remove the provision where a defendant could argue that there was a lack of reasonable suspicion for an officer to have conducted a search initially, thereby defeating any charges laid. The only individuals who can utilise this defence are those with legal representation in court, which is rare amongst young people. However, it is young people who will bear a disproportionate impact of the new laws, which do away with the requirement for reasonable suspicion upon the part of the police. Young people are thus being punished for the actions of others more powerful than themselves and are left in a more vulnerable position.

Indeed, the removal of the reasonable suspicion clause will have a disproportionately negative impact on vulnerable groups, particularly minorities in our community. Statistics from the UK have shown this to be the case, with black citizens *six* times more likely than whites to be searched, while Asian citizens are *twice* as likely.ⁱⁱ Racial profiling appears to be a widely-used tool in deciding whom to search, which poses a grave danger to Indigenous Australians, who are already over-represented in our justice system. Once again, this violates the principle of non-discrimination which lies at the heart of a just and fair multicultural society such as our own.

Essentially, the cumulative effect of this and other laws targeting young people is the creation of a youth-hostile society, where behaviour is strictly monitored and expression is curtailed. YACWA is deeply concerned at the future of young West Australians and feels that this legislation will leave young people more excluded from society, with fewer rights and with a negative view of our justice system.

This month, a Court of Human Rights case in the UK ruled that the 'stop and search' laws under the Terrorism Act violate the right to respect for private life guaranteed by Article 8 of the Convention on Human Rightsⁱⁱⁱ. It appears that after many years of complaints and government enquiries, the United Kingdom is beginning to realise the danger of imposing sweeping police powers in a liberal democracy. We call on the West Australian Government to avoid such a mistake by not introducing these unnecessary 'stop and search' laws in Western Australia.

SECTION 70A

Officers do not require the consent of an individual before they conduct a search. This removes the current provision where an individual must consent to being searched.

The amendment under this Section removing the current provision where an individual must consent to being searched is one of the most concerning aspects of this Bill. The forcible search of an individual is antithetical to every principle of a liberal democracy, particularly the right to privacy and the freedom of movement.

As the peak body for young people in Western Australia, YACWA feels that this amendment poses a serious threat to the rights and safety of young people. Under this Section there is no provision made for minors or their rights. We call on the Minister to specify whether those under the age of 18 will also be subjected to a forcible search of their person and, if so, whether a parent or legal guardian will be present when this takes place. The safety of vulnerable members of our society is too important to risk with unwarranted police searches against the individual's will, without proper adult presence there.

Officers do not require the 'ordinary circumstances of reasonable suspicion' which are currently in place.

The second amendment under this Section which removes the requirement for proof of reasonable suspicion before conducting a search is problematic for a number of reasons. Firstly, there is an unacceptable degree of police discretion granted under this amendment, which leaves large numbers of individuals without their usual rights and more vulnerable to being searched. Such individuals include young people as a broad group, but more specifically homeless young people, Indigenous young people, Islamic young people, young people of colour and young people who dress differently to the socially accepted 'norm'. As mentioned above, statistics from the UK indicate that racial profiling is widely used to determine who to search. Removing the requirement for reasonable suspicion legalises any potential discriminatory practices within the police force. Further, it effectively circumvents anti-discrimination laws that currently exist in Australia, thereby suspending the rights of these people.

There is also no provision for recourse available to those individuals who feel they have been unfairly chosen to be searched. This violates the principles of natural justice, which state that an individual has

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the right to procedural fairness and lack of bias. A forcible search, without grounds of reasonable suspicion and without any opportunity to dispute the search itself, undermines the very foundations of what is considered a fair and just legal system in this state.

The type of search: will be a 'basic' search that may involve metal detectors

What will be seized in a search: anything which may endanger the public place or people in it; anything relevant to an offence

Under this Section, the type of search and what may be seized are mentioned only briefly and in vague terms. We ask that the legislation expands on the definition of a 'basic' search, specifies whether metal detectors are likely to be used and in what event, and provides more detail around what will be seized in a search. It also needs to be disclosed whether an individual can be searched by an officer of the opposite gender, whether the search will take place in a public or private area, and whether considerations will be made for religious or cultural beliefs. If someone feels they were wrongly or inappropriately treated by an officer, individuals must be advised of the appropriate action they can take. For example, in the UK the Independent Police Complaints Commission has heard numerous cases relating to the misuse of 'stop and search' laws.^{iv}

'Anything relevant to an offence' is an aspect of the legislation which needs greater clarification, due to the raft of laws passed in 2009 which criminalised previously legal behaviour of young people. This includes the Anti-Graffiti Bill, which now makes it illegal for a minor to possess any non-soluble marker. Proposed new cannabis laws are also significant in light of 'stop and search' powers, increasing the penalties for possession of small amounts of cannabis and including under-18s in the list of punishable offenders. YACWA has concerns that young adults (18-25 year olds) found with markers or any other 'graffiti implement' will not only be charged for possession of an object 'relevant to an offence' but may also be wrongfully accused of graffiti or vandalism, merely for possessing a newly criminalised art tool.

Should this legislation be passed, we would call on the State Government to publicly announce exactly what objects may be considered 'relevant to an offence' – aside from the obvious weapons and drugs – and to communicate the likely penalties faced by young people should they be caught with such an object. Younger members of our community are often not as familiar with law and order issues as their older peers and so should be given the necessary information surrounding these laws to ensure they are fully aware of their rights and responsibilities as citizens.

SECTION 70B

New powers for the Commissioner (or an approved delegate) to declare an area with the Minister's approval

Under this Section, the Police Commissioner is granted new powers to 'declare' an area – with the Minister's approval – in which individuals can be stopped and searched. This amendment is

extraordinary in the power that it grants an unelected individual, while reducing the elected representative's role to that of a 'rubber stamp'. We ask that proper Parliamentary checks and balances are applied to the declaration of an area to ensure that the Commissioner and Minister are not wielding undue influence over public life.

Period of declaration must be no more than 2 months

While it is reassuring to see that an area may not be declared for more than two months, YACWA is alarmed by the omission of any details regarding the re-declaration of a previously declared area. Under similar stop and search laws in the UK, Greater London is under permanent declaration, meaning its residents are always at risk of being searched. This is because its 'declared' status is automatically renewed without review.^v We call on the Minister to ensure such a situation does not arise in Western Australia by making it mandatory for a declared area to be reviewed before it can be re-declared.

Notification of a declared area should be published in the Government Gazette as soon as practicably possible but the declaration remains valid even if this does not take place

We feel that the mechanism by which the public will be notified of the declaration of an area – a published notice in the Government Gazette – is inappropriate and inadequate. The majority of the public, particularly young people, are unaware of the very existence of the Gazette, let alone where it can be accessed. This will result in most people being unaware of the declaration of an area. We propose a media announcement followed by a published notice in The West Australian as a more appropriate and fair method of informing the public about the declaration of an area.

However, what is more inappropriate under this Section is the fact that the declaration of an area remains valid even without a published notice in the Gazette. We feel that this amounts to the Police not fulfilling the responsibilities that naturally come with such unprecedented rights to search individuals. We call on the Minister to adopt our proposal above and make it a *requirement* that any declaration must be accompanied by a published notice.

SECTION 157

The Minister will review the legislation after five years

Given the controversial nature of this legislation and the significant community concern around it, a review period of five years is entirely unacceptable. This period allows the Government that introduced the Bill to effectively 'wash their hands' of it, as it will be a new Government and possibly a new Minister that will undertake the review. Further, the true efficacy of what is a questionable public safety policy will be concealed for the next five years from the very public it claims to protect. We strongly urge the

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Minister to implement a six to twelve month review period, to ensure that these laws are properly scrutinised and then amended or phased out if necessary.

CONCLUDING REMARKS

YACWA is firmly opposed to the proposed amendments to the Criminal Investigation Bill for a number of reasons, specifically:

- The removal of safeguards and rights that have previously ensured the fair and equal treatment of all citizens at the hands of police
- The disproportionate impact a lack of safeguards will have on minorities and vulnerable individuals, including young people generally but also homeless young people, young Indigenous people, Islamic young people and young people who do not adhere to social 'norms'
- The increase in powers for police officers, at the expense of citizens, without any attendant increase in responsibility
- The lack of a foreseeable review period for what is a contentious piece of legislation
- The cumulative effect this and other recently passed laws will have on young people, whose behaviour is becoming increasingly criminalised

We would urge the Committee to think carefully about the consequences of this piece of legislation for young people and other vulnerable groups in our community.

ⁱ Liberty. 'Liberty's Second Reading Briefing on the Crime and Security Bill in the House of Commons – non DNA provisions'. London, January 2010.

<http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-2nd-reading-briefing-on-crime-and-security-bill.pdf>

ⁱⁱ Alan Travis. 'Unequal use of stop and search against ethnic minorities'. *The Guardian*, London, 31 March 2006.

<http://www.guardian.co.uk/uk/2006/mar/31/ukcrime.race>

ⁱⁱⁱ Liberty, 'Liberty wins landmark stop and search case in Court of Human Rights', 12 January 2010.

<http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2010/12-01-10-liberty-wins-landmark-stop-and-search-case-in-court-of-human-righ.shtml>

^{iv} Paul Lewis. 'Police investigated over stop and search of man and children under terror law'. *The Guardian*, London, 10 September 2009.

^v Alan Travis. 'Terror law used to stop thousands 'just to balance racial statistics''. *The Guardian*, London, 17 June 2009.

<http://www.guardian.co.uk/uk/2009/jun/17/stop-search-terror-law-met>