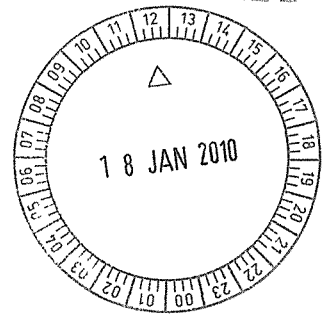


**Search for Your Rights Submission to the
Legislative Council Legislation Committee**

16th January 2010



Dear Members of the Legislative Council Legislation Committee,

Please find attached the submission from *Search for Your Rights* regarding the Legislation Committee's Review of the *Criminal Investigation Amendment Bill 2009*.

The submission will outline reasons why the *Criminal Investigation Amendment Bill 2009* makes amendments that have no place in Western Australia.

An analysis of the Bill highlights its poor construction, in terms of necessary legislative checks and the basis for introducing the Bill. It provides for an unprecedented expansion of the powers afforded to the Police Commissioner and police officers, with a frightening lack of statutory limits or accountability measures. The rationale behind the Bill, as provided by Police Minister Rob Johnson in the second reading speech of the Bill, is also unfounded in light of Western Australian crime statistics and trends.

The ratification of this Bill into legislation would have an immeasurable harmful effect on the Western Australian community. It would significantly detract on our civil liberties, which are one of the pillars of our society and something that we pride ourselves on upholding. The relationship between the police and public, which is already in need of repair, would be further damaged by the introduction of such radical powers. Tourism, businesses and nightlife in prescribed areas would also suffer from the negative image and consequences put forward with this Bill. Comparison to similar legislation in the United Kingdom also supports that this Bill will have a harmful effect on Western Australian society and civil liberties.

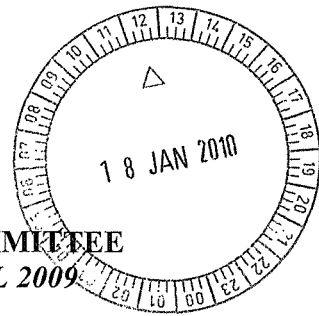
Kristian J. Barron and Yannis N. Vrodos would also like to offer their time and presence as representatives of *Search for Your Rights* for an interview with the Legislation Committee to elaborate and explain the content of this submission. The contact details for Yannis N. Vrodos (Submissions Co-ordinator) are included below should you require any information.

On behalf of the 2000 formal members of *Search for Your Rights*, along with the multitude of other Western Australians who oppose this draconian Bill, we implore you to advise the Legislative Council of the negative ramifications passing this Bill would have on the police force, corrective services system and on the collective rights of the citizens of Western Australia.

Yours sincerely,

Yannis N. Vrodos
Submissions Co-ordinator and Legal Contributor
Search for Your Rights

PUBLIC



**SUBMISSION TO THE LEGISLATIVE COUNCIL LEGISLATION COMMITTEE
REVIEWING THE *CRIMINAL INVESTIGATION AMENDMENT BILL 2009***

Introduction

Search for Your Rights is an organisation set up specifically to spread awareness about the *Criminal Investigation Amendment Bill 2009*, otherwise known as the 'stop and search' laws, being introduced by the Barnett Government. This organisation is made up of a number of young individuals, many students of the University of Western Australia, who have become concerned by the impact this legislation will have on Western Australia.

This organisation started on the social networking website Facebook and within a few months its membership had swelled to over 2000 concerned Western Australians. The campaign focused mainly on educating people on the Bill, engaging young people to write to their local parliamentarians and also providing people with a forum to express their distaste with the suggested measures. *Search for Your Rights* has gained some media attention and accomplished quite a lot in the past few months.

Our main accomplishments to date have included Alex R. Cassie, the founder of *Search for Your Rights*, being interviewed by Giovanni Torre from RTR radio,¹ the establishment of a website on the 'stop and search' laws,² as well as distribution of 3,000 flyers across the metropolitan area, with the printing of several thousand more already underway. As an organisation we have been in contact with John Quigley MLA, Carmen Lawrence, The Lord Mayor Lisa Scaffidi, Paul Papalia MLA and Ben Wyatt MLA, just to name a few. The following interest groups and political factions have shown us their support: Labor Party, Greens Party, Young Liberals, Young Labor, Young Democrats, Young Greens, SCALES (Murdoch Universities' Legal Advocacy Group), National Children's and Youth Legal Centre and the ALP Law and Policy Committee.

Background

The first decade of the twentieth century saw the western world exposed to unknown threats and our notion of security was challenged on many levels. As Western Australians, living in the most isolated city in the world, we believed we were safe from these challenges. The Barnett Government's 'stop and search' laws mirror the world's struggle to find the balance between security and personal liberty in these modern times.

Introduced in October 2009 by Police Minister Rob Johnson, and passed by the Legislative Assembly on 12th November 2009, the Bill is currently under the consideration of the Legislative Council's Legislation Committee. This Bill seeks to amend the *Criminal Investigation Act 2006* to extend police search powers, and is a response to the 'increasing concern from the government, police and the community in relation for the proliferation of

¹ Radio interview available on: <http://rtrfm.com.au/restream/9148> [Interview starts half way through recorded program].

² Website available on: www.searchforyourrights.org

weapons and increasing number of incidences of violence and antisocial behaviour in entertainment precincts'.³

As the Act currently stands, police may stop and search a person or vehicle in a prescribed or declared area.⁴ Should the police find any weapons, drugs or items that are relevant to an offence that they reasonably suspect may endanger property or people, they have the power to confiscate the item. However, such a search can only take place with the person's consent. Should consent be refused, the actions the police can take are limited to refusing the person entry to the area in question.

The Criminal Investigation Amendment Bill 2009- An Analysis

1. Lack of checks and balances within the Bill

The *Criminal Investigation Amendment Bill 2009* will implement unsound law as the proposed changes do not contain the checks and balances that are required to protect both the public and our police officers. The absence of a clear statutory penalty or limit for unlawful stop and searches allows for police discretion to act without adequate accountability.⁵ Furthermore, the requirement of 'reasonable suspicion' being removed by this Bill removes public protection.

Section 70B(5) of the *Criminal Investigation Amendment Bill 2009* contains the only 'check and balance' within this Bill: that the Commissioner must publish the written record of the declaration in the *Gazette* as soon as practicable after the declaration is made. This same section removes the security that it creates by the validity of the declaration not being altered by the Commissioner failing to publicise the declaration. In Parliament John Quigley MLA displayed his concern at how the law 'could be changed in a heartbeat in the middle of the night without anyone in Western Australia knowing that it has changed.'⁶ The principle of law requires that the public at least have access to what the law is and more specifically in this situation that the public knows what areas have been declared.

2. Police Commissioner's extended powers: declaring 'prescribed areas', s 70B.

This part of the Bill allows for the police commissioner to make a declaration as to where these extended 'stop and search' laws may apply. The idea behind these declarations is that it allows for the Commissioner to target a specific area where violence and antisocial behaviour are common. In the second reading speech of the Bill the Police Minister said 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.'⁷ It is *Search for Your*

³ R. Johnson, Minister for Police, 'Second Reading Speech of the *Criminal Investigation Amendment Bill 2009*' (Speech delivered at the Legislative Assembly, Parliament of Western Australia, 14th October 2009, 12:32pm).

⁴ *Criminal Investigation Act 2006* (WA) s 69.

⁵ Ben Bowling and Coretta Phillips, 'Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search' (2007) 70(6) *The Modern Law Review* 936, 943.

⁶ Western Australia, *Parliamentary Debates*, Legislative Assembly, 11th November 2009, 8775-8785 (Mr J.R. Quigley).

⁷ Johnson, above n 3.

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Rights opinion that the protection that the Police Minister is providing is inadequate because those who actually require the ‘safeguards’ are those who are within the area.

The other issue created by having ‘prescribed areas’ is that the extended powers can be abused when they are used outside the areas boundary. Officers may perform searches without a ‘reasonable suspicion’ in a non-prescribed area because of a misunderstanding of the declaration boundaries or time frame. This reflects the nature in which declared areas may change without adequate notice or expire without public notification.

3. Removal of reasonable suspicion

The removal of reasonable suspicion for police searches in ‘prescribed areas’ is the element of this Bill that created the most significant legal issues and that has caused the most debate. Bowling and Phillips suggest that searches should be restricted to situations where an officer has a genuine and reasonable belief that wrongdoing is afoot, rather than the slightest of suspicions.⁸ The *Criminal Investigation Amendment Bill 2009* does the opposite of this and removes the subjective element of reasonable suspicion and also removes the consensual element of the search.

Search for Your Rights believes that by removing the requirement of ‘reasonable suspicion’ we are legalising unreasonable searches within Western Australia. Michael Antrum suggests that the greater the level of discretion that we give officers the greater the scope for abuse that exists. Furthermore, Antrum goes on to suggest that the abuse of power by police officers is frequent, largely unchecked, and unmitigating.⁹ This Bill will give officers the ultimate discretion by allowing them to complete searches without providing a reason for choosing specific individuals for searches.

4. Lack of review: five year clause, s 157

Section 157 of the Bill is the only indication that the government wishes to review these proposed laws. This section requires that the Minister must carry out a review of the ‘operation and effectiveness’ of the amendments made five years after the commencement of these powers.

The first issue with this is that five years is a very long time for such unstable laws to operate without review. When such radical changes are made to long-standing public rights a shorter period of review, such as two years, should be adhered to. Furthermore, the Minister’s review of this Bill and the associated powers are not binding and section 157 does not require that this review be tabled or debated in Parliament. It would be a much more effective use of Parliament’s time if a sunset-clause were inserted instead of section 157 of the Bill. This clause should repeal the legislation after a two year trial and allow for Parliament to debate whether the ‘stop and search’ laws had been effective in deterring weapon based violence in prescribed areas.

5. Extended search powers: searching of cars within prescribed areas, s 70A

This Bill extends the search powers of officers to being able to search a person’s vehicle within a prescribed area. This level of public scrutiny and searching is not appropriate for

⁸ Bowling and Phillips, above n 5, 961.

⁹ Michael Antrum, ‘Contemporary Comments: Frisky business- Police, Search Powers and Young People’ (1998) 10(2) *Current Issues in Criminal Justice* 197, 198.

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Western Australia. It is clearly an invasion of privacy for officers to search a private vehicle without a warrant and furthermore an offensive invasion if there is no reason given for this search. The only situations that requires this measure of security is high security events where large numbers of people have gathered or where there is a large number of political figures.

6. Zeitgeist of the past decade: no increase in crime and ‘one punch’ assaults

Western Australia has generally seen no increase in crime and it appears that crimes, such as assaults against the person, have equilibrated over the past decade.¹⁰ It therefore seems to be contradictory that we are introducing new ‘stop and search’ laws based on the reasons given by the Police Minister during his second reading speech, when in fact there is limited evidence of an increase in crime. Campbell states that in Sydney ‘police interventions with children were perceived to be increasing although juvenile crime was not on the rise.’¹¹

Formal statistics actually show an increase in crime over the past decade. *Search for Your Rights*, under the instruction of Dr David Indermaur, attributes these increases to the way in which the role of insurance has changed over the past decade. People are more forthcoming in making insurance claims now than a decade ago: this is because the advancement and acceptance of internet and technology has reduced the difficulties associated with making a claim. As the number of insurance claims is the primary method for measuring crime rates, an increase in the number of claims made would be interpreted as an increase in crime if the above explanation was not taken into account.

In the second reading speech of this Bill the Police Minister makes specific reference to crimes relating to the ‘proliferation of weapons’. Again this seems contradictory when compared to legal amendments introduced into Western Australia over the past few years. The amendments to the *Criminal Code* in 2008 saw the introduction of s 281 (Unlawful assault causing death). The introduction of this offence was a response to assaults and ‘one punch killings’ being the greatest instance of violence against the person in Western Australia. Therefore, it seems contradictory that Western Australia needs to introduce laws to combat concealed objects, when in fact assaults without weapons are the main problem.

Effects on Western Australian Society

1. Infringement on rights

These extended ‘stop and search’ laws do curtail Western Australians rights and subtract from long-standing civil liberties. The question is whether this encroachment on our civil liberties is worth the increased ‘safety’ that we gain. The first thing that must be established is that being searched is not a harmless process. Searches are an invasion of our body’s integrity and an invasion of privacy.¹² In Parliament John Quigley MLA displayed his concern for how he believes the introduction of this legislation may be one of the smaller steps towards Western Australia becoming a police state.¹³

¹⁰ Winthrop Professor Neil Morgan, Inspector of Custodial Services, ‘Crime and Justice within Western Australia: The Ward Perspective’ (Speech delivered as a guest lecture in Criminal Law II, Alexander Lecture Theatre UWA, 7th October 2010).

¹¹ Steve Campbell, ‘Reality Checks: The changing relationship in the policing of young people and its implications for legal practitioners’ (1999) *Law Society Journal* 58, 58.

¹² Antrum, above n 9, 199.

¹³ Quigley, above n 6.

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Campbell emphasises that there are significant human rights aspects to these laws and the way they are being put into operation. He goes on to say that rights are not 'tradable' in any way, nor are they subject to an individual's social class.¹⁴

Liverani states that 'by giving police sweeping powers to demand information, carry out searches and move citizens we will create a regime reminiscent of totalitarian societies. It is not the way the Australian public expects its Police Service to behave'.¹⁵ Furthermore, when these 'stop and search' powers are used for other purposes, such as for social control, the public benefit gained is minimal compared to the loss of liberty.

2. The creation of tension between the police and public

The laws enacted by Parliament have the ability to dramatically change police powers and therefore change the public-police relationship. Bowling and Phillips state that suspicion-less stop and searches damage the relationship between police and community, and undermine the legitimacy of, and respect for, the police.¹⁶ At a time when Western Australia is trying to introduce measures to reduce our crime rates, damaging the relationship between police and the public is the most counter-productive thing we can do to our justice system.

Racial tension between police officers and the public is an area that attracts a lot of attention. This is not to suggest that the police force as a whole is racist. Within our society some racist ideologies still exist, therefore as the police force represents a cross-section of the community, it can be expected that some officers will be racially prejudiced.¹⁷ Searches based on stereotype rather than suspicion are unlawful and furthermore groups who are continually targeted by law enforces will respond negatively and will undermine social order, regardless of whether this group is age, race or belief based.

The radical nature of these 'stop and search' laws increases the chance that a negative response, such as assault, may occur when a person is forced to submit to a search without giving their consent. The combination of the 'stop and search' laws with the mandatory sentencing for assaults against public officers legislation is a recipe for disaster. Police officers searching people without a reason may incite persons to the point of assault.

The person being searched would have no defence for this assault and would have to go to jail under the mandatory sentencing laws. This influences younger people further because young people have a lower level of self-control in terms of provocation,¹⁸ they know less about the law and are often under the influence of alcohol in these social situations. Paul Papalia MLA epitomises this tension between the two laws by stating that 'this law adds to other laws that are already impacting in a negative, unfair and disadvantageous manner on the poor, the mentally ill and the Aboriginal people in the state of Western Australia.'¹⁹

¹⁴ Campbell, above n 11, 59.

¹⁵ Mary Rose Liverani, 'For the disadvantaged young, NSW is a police State' (1999) *Law Society Journal* 62, 62.

¹⁶ Bowling and Phillips, above n 5, 939.

¹⁷ See generally Ibid, 954.

¹⁸ See generally *Stingel v The Queen* (1990) 50 A Crim R 186 and *Verhoeven v R* (1998) 101 A Crim R 24

¹⁹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 11th November 2009, 8775-8785 (Mr P. Papalia).

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Antrum partially justifies the above-mentioned response in his article by stating that 'searching a person is confrontational, and it is no wonder that some young people offer mild resistance to being searched.'²⁰ Also, in Parliament John Quigley MLA suggested that there are men, when they see their wives having to remove articles of clothing, may become offended and will have to restrain themselves.²¹

3. Economic impact: tourism, businesses and nightlife

The Barnett Government's fear campaign purports a negative view of Northbridge that will influence tourism, business and nightlife in the area. The 'stop and search' laws have been marketed by the Government to tackle such 'problem areas' as Northbridge, an area that will probably be declared by the Commissioner. The Lord Mayor Lisa Scaffidi and the State Government have engaged countless programs and events to make Northbridge the cultural centre it is today. The Government seeks to reverse the work that has gone into Northbridge by creating this fear campaign.

John Quigley MLA points out in parliamentary debate²² that the government is suggesting that Perth has a bigger problem than Fortitude Valley, Kings Cross and Fitzroy because we are the only jurisdiction that would remove the requirement of a reasonable suspicion.²³ It is *Search for Your Rights* opinion that the government's argument for this legislation is purely based on inducing a state of fear and for appearing to be tough on non-existent crime.

This legislation will have a direct negative economic impact on Perth businesses in the prescribed areas, particularly in Northbridge and the city in two ways. The first is that young people who utilise the nightlife, clubs and bars will not enter these areas for fear of unreasonable searches by the police. The second is that families and people using the surrounding businesses will not enter these prescribed areas because of the connotations and safety ideas that are associated with areas of high security and law enforcement.

A Comparative Study

1. Europe: United Kingdom and human rights

Similar measures to those currently proposed in the *Criminal Investigation Amendment Bill 2009* were enacted by the United Kingdom with the passing of the *Terrorism Act 2000* (UK) in response to terrorist attacks. This legislation has recently been repealed in the United Kingdom due to police officers admitting that 'extended search powers damage community relations and produce little or no benefit'.²⁴ Lord Carlile, an independent reviewer of terrorism legislation, stated in an interview that the 'stop and search' powers were over used and caused alienation in some communities.²⁵

²⁰ Antrum, above n 9, 199.

²¹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 19th November 2009, 48-58 (Mr J.R. Quigley).

²² Quigley, above n 6.

²³ Victoria and New South Wales are looking at introducing similar legislation, but such bills have received an identical response to the one seen in Western Australia.

²⁴ Vikram Dodd, *Police to severely curtail use of stop and search powers* (2009) Guardian Newspaper <<http://www.guardian.co.uk/uk/2009/may/06/police-stop-and-search-reform>> at 16th of January 2010.

²⁵ Ibid.

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'Stop and search' statistics in the *Guardian* (UK) stated that the police had conducted 154,293 section 44 searches since 2000.²⁶ After this legislation was enacted the percentage increase in searches of black, Asian and white people were 322%, 277% and 185% respectively. Also, for every 100,000 stop and searches completed only six arrests were made. These statistics indicate that the 'stop and search' laws introduced by the United Kingdom targeted ethnic minority groups, were ineffective and wasted already limited police resources.

Recently the European court of human rights ruled that the United Kingdom's extended police powers under the *Terrorism Act 2000* violate the European Convention of Human Rights.²⁷ The court ruled that it was unlawful for police to use these powers without needing any grounds of suspicion. The court further criticised the legislation for not having adequate legal safeguards against abuse. The legislation also allowed for specific areas to be made 'prescribed areas'. The article pointed out that London was re-prescribed as a designated area every 28 days after the laws introduction. This could easily happen in Western Australia to an area such as Northbridge that has been targeted by the Barnett Government.

As lawyers and law students one of the most effective measures that we have of comparing laws and their effectiveness is by comparing how they have worked in jurisdictions with similar legal backgrounds and political systems. The comparison of the *Terrorism Act 2000* and the *Criminal Investigation Amendment Bill 2009* indicates that these laws are ineffective and have no place in Western Australia.

Recommendations

Search for Your Rights recommends in light of the arguments, examples and sources given above that the *Criminal Investigation Amendment Bill 2009* should be rejected by the Legislative Council and that the Legislation Committee of the Legislative Council advises the Council on the ramifications this Bill will have on all Western Australians.

Further to this, *Search for Your Rights* also recommends that in the future a Bill should be introduced which establishes a set of criteria which is more specific in defining procedure and appropriate modes of intervention for 'stop and searches'. A specific procedure and mode of intervention would allow for the public to have a more detailed knowledge of what their rights are and for police to have the scope of their powers outlined by the legislature, not by 'reasonable suspicion'. This will provide the correct balance of civil liberty and safety for all in our community. Antrum suggests this argument in his article by stating that 'reasonable suspicion is a phrase that is in dire need of concrete guidelines... 'reasonable suspicion' is a legal catch-all word.'²⁸

²⁶ Ibid.

²⁷ Alan Travis, *Stop and search powers illegal, European court rules* (2010) *Guardian Newspaper* <<http://www.guardian.co.uk/world/2010/jan/12/stop-and-search-ruled-illegal>> at 16th of January 2010.

²⁸ Antrum, above n 9, 199.

Appendix 1

Section 44 of the *Terrorism Act 2000* (UK)

s 44 Authorisations.

- (1) An authorisation under this subsection authorises any constable in uniform to stop a vehicle in an area or at a place specified in the authorisation and to search-
- (a) the vehicle; (b) the driver of the vehicle; (c) a passenger in the vehicle; (d) anything in or on the vehicle or carried by the driver or a passenger.
- (2) An authorisation under this subsection authorises any constable in uniform to stop a pedestrian in an area or at a place specified in the authorisation and to search-
- (a) the pedestrian;
- (b) anything carried by him.
- (3) An authorisation under subsection (1) or (2) may be given only if the person giving it considers it expedient for the prevention of acts of terrorism.
- (4) An authorisation may be given-
- (a) where the specified area or place is the whole or part of a police area outside Northern Ireland other than one mentioned in paragraph (b) or (c), by a police officer for the area who is of at least the rank of assistant chief constable;
- (b) where the specified area or place is the whole or part of the metropolitan police district, by a police officer for the district who is of at least the rank of commander of the metropolitan police;
- (c) where the specified area or place is the whole or part of the City of London, by a police officer for the City who is of at least the rank of commander in the City of London police force;
- (d) where the specified area or place is the whole or part of Northern Ireland, by a member of the Royal Ulster Constabulary who is of at least the rank of assistant chief constable.
- (4ZA) The power of a person mentioned in subsection (4) to give an authorisation specifying an area or place so mentioned includes power to give such an authorisation specifying such an area or place together with-
- (a) the internal waters adjacent to that area or place; or
- (b) such area of those internal waters as is specified in the authorisation.
- (4A) In a case (within subsection (4)(a), (b) or (c) in which the specified area or place is in a place described in section 34(1A), an authorisation may also be given by a member of the British Transport Police Force who is of at least the rank of assistant chief constable.
- (4B) In a case in which the specified area or place is a place to which section 2(2) of the Ministry of Defence Police Act 1987 applies, an authorisation may also be given by a member of the Ministry of Defence Police who is of at least the rank of assistant chief constable.
- (4BA) In a case in which the specified area or place is a place in which members of the Civil Nuclear Constabulary have the powers and privileges of a constable, an authorisation may also be given by a member of that Constabulary who is of at least the rank of assistant chief constable.
- (4C) But an authorisation may not be given by-- (a) a member of the British Transport Police Force, (b) a member of the Ministry of Defence Police, or (c) a member of the Civil Nuclear Constabulary.
- in any other case.
- (5) If an authorisation is given orally, the person giving it shall confirm it in writing as soon as is reasonably practicable.

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Appendix 2

Search for Your Rights

A Community Organisation

Email: searchforyourrights@gmail.com

Facebook: 'Search for your rights'

Website: www.searchforyourrights.org

Submissions Co-ordinator and Legal Contributor

Yannis N. Vrodos

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