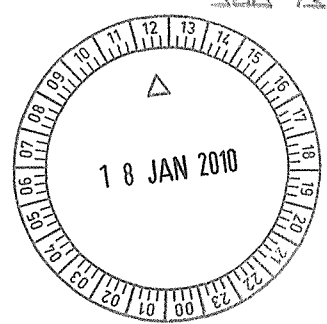


**Submission to the Legislation Committee  
Parliament of Western Australia  
on Proposed *Criminal Investigation Amendment Bill***



**SCALES Community Legal Centre**

**January 2010**

This submission addresses the concerns that SCALES has regarding the introduction of the *Criminal Investigation Amendment Bill*. This bill proposes to give police extremely wide powers of stop and search in prescribed or declared areas.

**This submission is brief given the time restraints at a particularly busy time of year; however SCALES would welcome the opportunity to speak with the Committee to further explain and discuss its objections to the proposed legislation.**

**About SCALES**

Until the mid 1990s there was no community legal service between Fremantle and Bunbury. These communities typically had high rates of unemployment, public housing, social security recipients, low incomes and high rates of domestic violence. In addition there are many indigenous families with additional problems of discrimination and access to justice. In 1996 discussions began with Kwinana and Rockingham community members and the School of Law at Murdoch University which recognised the need for a community legal service in the southern suburbs and lent its support to the establishment of SCALES as a community legal centre and a legal education clinic.

SCALES opened its doors on the 7<sup>th</sup> of April 1997. Since then it has gone from strength to strength. Some highlights have been winning the Human Rights and Equal Opportunity Commission's National Award, a High Commendation in the Premier's Awards for Excellence in Public Sector Management and a National Citation from the Carrick Institute. We have also established an advanced clinic with streams in immigration, advocacy and family law. But without doubt our greatest success has been in legal practice which has enabled us to provide legal assistance to over 7,000 clients.

SCALES seeks to:

***Develop the confidence, skills and ethics of law students through clinical legal education in a community-based environment, and***

***Facilitate access to justice for low income and disadvantaged members of the Southern communities.***

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## **Introductory Comments**

Through our daily work, SCALES witnesses the impact of legislative amendments such as the ones proposed. There are many difficulties with the proposed *Criminal Investigation Amendment Bill*; however the three main issues that we would like to deal with in this submission are:

- They breach human rights; specifically the right to privacy and freedom from degrading treatment;
- They have an increased negative impact on vulnerable groups;
- They have already been proven to be a failure in other jurisdictions; such as the UK and Victoria.

## **Breach of Human Rights**

### ***Right to privacy***

SCALES is very concerned that these proposed laws represent a breach of both civil and human rights. The most flagrant breach is clearly the breach of privacy, because the searches possible under the proposed law could entail the disclosure of personal information to the view of others, causing humiliation and embarrassment. In addition, such a search may be made worse by the presence of cross cultural or personal circumstances, for example if the person has in the past been a victim of abuse or assault, it may be much more difficult to submit themselves to a search.

### ***Freedom of Speech***

These new powers have the potential to have a significant detrimental effect on freedom of speech. Western Australian Police could potentially publicly declare an area where they know a protest is to occur and would then have powers to search anybody in that area, including peaceful protesters and bystanders, without a warrant or reasonable suspicion. The exercise of these powers, and indeed even foreshadowing prior to a protest that they will be used, could significantly- deter people from attending a protest, given the risk they will be arbitrarily searched by police.

### ***Freedom of movement***

SCALES is also concerned that these powers breach the rights to freedom of movement and right to liberty and bodily integrity. These powers could also be used around particular events such as music festivals or concerts. The effect would be that anyone wanting to attend such events would have to be prepared to subject themselves to searches. The obvious consequence is that people not wanting to subject themselves to these searches would have their freedom of movement and association curtailed.

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### ***Right to Liberty and Bodily Integrity***

The South Australian Supreme Court in the 1992 case of *Gibson v Ellis*<sup>1</sup> held that a police search was effectively a deprivation of liberty, a detention for its duration. Of course, there are some circumstances where the power to search is necessary, but to give police the power without requiring that they articulate the reason it is necessary –(ie.i.e. the basis of their reasonable suspicion) is handing police permission to violate rights ~~with-out~~without a clear reason for doing so.

### ***Freedom from Discrimination and Arbitrary Interference***

In addition to these breaches of human rights, these powers of search can be used in an arbitrary way under the current legislation. This will no doubt result in searches being carried out due to a police ~~officers~~officer's 'hunch' or based on their own prejudices and assumptions. Furthermore they do not come with any checks or balances. The most concerning element of this proposed bill is that it dispenses with the need for reasonable suspicion.

SCALES firmly believes that reasonable suspicion is an absolutely necessary check on police action. If an officer is going to conduct a search, they must at least turn their mind to whether or not there is enough evidence to support a reasonable suspicion that a search is necessary. This is a legal test which requires that there is more than simply prejudice and assumption because the person searched looks young, aboriginal or homeless or they speak to the officer in a way the officer does not like.

It has been argued that a search is a minor infringement on individual rights and, in the interests of increased safety, it should be allowed. However, SCALES believes that such searches are not a minor infringement on individual rights, the actual experience of vulnerable groups in their interaction with police shows that what begins as a minor interaction can quickly escalate into charges being laid, even when they had committed no crime and nothing has been found to justify the search. In addition, it is common for our clients, particularly those that are homeless, to be search up to 10 times per day. In these circumstances it becomes a major breach of human rights.

In addition, SCALES has concerns that often searches can lead to great breaches of human rights. For example, in some cases a person can be charged with hindering police or assault public officer precisely because they are trying to assert their human rights or establish a reason for a search by an officer. This is obviously even more likely in circumstances which see search being undertaken with no reasonable suspicion.

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<sup>1</sup> *Gibson v Ellis* (1992) 59 SASR 420 as quoted in Blagg and Wilkie, "Young People and Policing in Australia: the Relevance of the UN Convention on the Rights of the Child," [1997] Australian Journal of Human Rights 6.

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This would have huge implications for a person being searched and could lead to potential criminal records and/or imprisonment of people who would otherwise have never come into contact with the court system. This issue is particularly pertinent in Western Australia where assault public officer carries a mandatory prison sentence.

In addition, there is evidence from other jurisdictions that these laws are ineffectual; in the UK the statistics on the use of a similar power demonstrate as few as 0.6 per cent of stop and searches in 2007/8 resulted in the discovery of the targeted objects or weapons<sup>2</sup>.

### **Impact on vulnerable groups**

Through our work SCALES sees the impact of the interaction between police and the public, particularly young people, the homeless and aboriginal people. While SCALES recognises that the majority of police conduct themselves in a professional and compassionate way, there are still serious issues which result in these vulnerable groups being over-policed or dealt with in a discriminatory way.

Some people, including those groups mentioned above are very visible within public space, they use public space because they do not own or have access to more private spaces in which to congregate, or because of cultural reasons or (in the case of the homeless) simply because they have no choice. Because they are highly visible within public space they are more likely to be approached by police. SCALES's concern is that police searches will increase as a result of this legislation; in Britain use of similar powers grew almost fourfold, from 33,177 times in 2004 to more than 117,200 in 2008.<sup>3</sup>

There is substantial literature on the ways in which young people and others from these vulnerable groups are policed within public spaces.

*Young people, particularly those from Indigenous, migrant and ethnic minority backgrounds, those deemed to be street present, homeless or in some way marginal to society, have disproportionately higher levels of contact with the police than other social groups.<sup>4</sup>*

SCALES's experience concurs with the research in this area, and specifically that research that has been done in the West Australian context. A report written in 1995 on the interaction between police and young people found that many young people who have committed no crime are stopped and spoken to by police. This can then result in a search taking place, and often in

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<sup>2</sup> Statistics quoted on the Liberty website <http://www.liberty-human-rights.org.uk/> accessed on 15 January 2010

<sup>3</sup> European Court of Human Rights, *Gillian and Quinton v the United Kingdom* (Application no. 4158/05) <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=860909&portal=hbkm&source=externalbydocnumber>

<sup>4</sup> H Blagg and M Wilkie, "Young People and Policing in Australia: the Relevance of the UN Convention on the Rights of the Child" *Australian Journal of Human Rights*, Austlii, 1998.

conflict resulting in the young person being charged with offences such as hindering police, disorderly conduct, obscene language and finally resisting arrest.<sup>5</sup>

There is substantial literature looking at the social circumstances which lead to these groups' high visibility within public space. Some point to the individualisation of risk<sup>6</sup> and the commodification of 'safety'<sup>7</sup> which can then be 'sold' to those with market power. One way in which security can be sold is to target those considered a risk and visibly 'police' them or remove them from the space<sup>8</sup>. SCALES would like to point out that targeting these groups in order to increase the perception of safety simply draws upon a negative construction that already exists. These vulnerable groups, as they are constructed within our society, are ready-made targets for government wishing to make an area *appear* safer, cleaner and more orderly.

### **Failure in other jurisdictions**

Just a matter of days ago the European Court of Human Rights in Strasbourg ruled that police stop and search powers under UK terrorism laws and very similar to the proposed amendments are illegal. The judgment said:

*The court considers that the powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse.*

The Court accepted evidence that said that the incident of searches under these powers had quadrupled and that they had been used in a discriminatory way, with a higher chance of being search if you were non-anglo-celtic.<sup>9</sup>

Most importantly, there is no evidence that these powers have been successful in fighting violent assaults or terrorism, with less than 0.6 % of the searches resulting in the discovery of any prohibited items<sup>10</sup>.

### **Specific issues with the proposed legislation**

While SCALES opposes the introduction of the proposed legislation altogether, for the reasons outlined above, there are some specific issues we have with it in its present form.

### **Section 70A**

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<sup>5</sup> H. Blagg and M Wilkie, *Young People and Police Powers*, Australian Youth Foundation, Sydney, 1995

<sup>6</sup> A.Furlong & F.Cartmel *Young People and Social Change: Individualisation and risk in late modernity*, Open University Press, Buckingham, 1997.

<sup>7</sup> P. Crane & M.Deer, "Young people, public space & new urbanism", *Youth Studies Australia* v.20, n.1, 2001.

<sup>8</sup> R. White, "Hassle-Free Policing and the Creation of Community Space" *Current Issues in Criminal Justice*, vol. 9 no.3 March 1998, pp.312-324. (at p.316 and 317).

<sup>9</sup> <http://www.independent.co.uk/news/uk/politics/tories-will-change-law-to-cut-use-of-stopandsearch-1866109.html> accessed the 17th of January 2010.

<sup>10</sup> <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-right.shtml> accessed on the 17th of January 2010.

Which gives police powers to search *any* person in a prescribed area, even when the police officer has not formed a reasonable suspicion that the person is carrying anything criminal or dangerous is problematic because:

- **There are no limits on the area that can be prescribed.** This is particularly concerning given that it has emerged that under similar laws in the UK, coverage had been successively permitted for the entire district covered by London's Metropolitan Police
- **The prescribed area can remain so for 12 months.** This timeframe is completely excessive, and demonstrates that it is not intended to be used for particular events or risks but rather as a way of allowing arbitrary search powers more broadly.

### **Section 70B**

Which gives police powers to search *any* person in a declared area, without the need for reasonable suspicion is problematic because:

- **The only limit on the area is it be 'reasonably necessary'.** In our view this is too broad and does not sufficiently consider the rights of the public to be free from arbitrary interference with their privacy.
- **The delegation of the power to declare an area.** Could result in various people declaring a number of areas, this added to the lack of limits on the areas could result in large areas being subject to these powers.

Furthermore, we have the following concerns with the legislation in general:

- **The lack of limits on the age or the person searched** means that these laws could be used to search children. In the UK, police have admitted that searches were carried out on children as young as two years old.<sup>11</sup> This is particularly concerning given that West Australian authors Harry Blagg and Meredith Wilkie have noted that:  
*in any contact with a police officer, the child depends on the conduct of the officer for the enjoyment of their rights and relies on the officer to fully respect those rights and is at the mercy of any officer who chooses to infringe or violate those rights. We therefore place the full burden for respecting the child's rights and for protection the children from rights violations on the officer dealing with the child.*<sup>12</sup>

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<sup>11</sup> <http://www.telegraph.co.uk/news/newstoppers/politics/lawandorder/6034508/Police-stop-and-search-children-as-young-as-two.html> Accessed on 15 January 2010.

<sup>12</sup> Blagg and Wilkie, "Young People and Policing in Australia: the Relevance of the UN Convention on the Rights of the Child", [1997] *AJHR* 6

- **The lack of the reasonable suspicion requirement** means that the powers are far too broad, vague and arbitrary and will be prone to be applied in a discriminatory and disproportionate way against some of our most vulnerable community members.

### **Conclusion**

SCALES asks that the Committee consider the negative impact such laws would have on justice in Western Australia. Far from providing increased safety, these laws will diminish the human and civil rights of Western Australians. It will have a disproportionate impact on those more vulnerable and street present such as the young, aboriginal and homeless. Most importantly, it would fundamentally change the nature of our society. Reasonable suspicion has long been an important element in the balance between public order and personal liberty. In our view, existing laws amply provide the power to conduct a search on a person if police have concerns or suspect they are a danger. The removal of that safeguard, in our view, tips the balance too much and topples us towards totalitarianism.

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