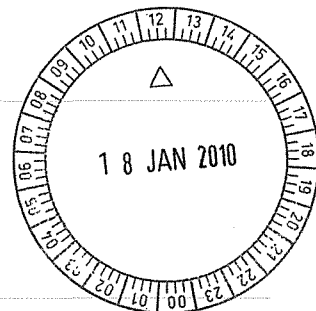




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Submission from **Ms. Adele Carles MLA, Member for Fremantle**, to the Legislation Committee - **Criminal Investigation Amendment Bill 2009**

18 January, 2010

Members: Hon. Michael Mischin MLC
Hon. Dr Sally Elizabeth Talbot MLC
Hon. Mia Jane Davies MLC
Hon. Helen Margaret Morton MLC
Hon. Alison Marie Xamon MLC

I welcome the decision by the Legislative Council to refer the *Criminal Investigation Amendment Bill 2009* to a Legislation Committee, and appreciate the opportunity to make a formal submission to detail my opposition to the Government's proposed stop and search laws.

From the outset, the Greens (WA) have argued that this legislation is fundamentally flawed. Moreover, it is not needed in Western Australia, where police are able to stop and search people where there are reasonable grounds of suspicion to do so.

Neither the Government through its Police Minister, Rob Johnson, nor the Opposition through its spokeswoman, Margaret Quirk, have provided any evidence that the laws as they stand are not working.

I refer to my comments in the Legislative Assembly on **Wednesday 11 November 2009**, where I argued that the 'stop and search' powers are unprecedented and unwarranted.

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Hansard excerpt (Wednesday 11 November, 2009)

MS A.S. CARLES (Fremantle) *We do not support legislation that removes safeguards for civil liberties, that marginalises disadvantaged groups even further and that ultimately may cause more problems than it seeks to solve. An unintended consequence of this bill is that it may lead to more offences being committed. We can easily imagine the scenario of innocent people resisting being searched and the episode escalating into a mandatory detention issue if a scuffle or fight ensues.*

This bill is unprecedented in Australia. No statistics or research has been provided to justify these changes. I fear that, once this becomes law, it will be impossible to wind it back because of the bidding wars we see on which government can be the toughest. It will take a very courageous government to wind it back once it is in place.

The Government's arguments in the Legislative Assembly in support of the legislation have at best been unconvincing. They have centred around giving police the power to combat the problems in hotspots, particularly Northbridge. When the laws were announced in October, Premier Colin Barnett argued that the existing legislation was being used by defence lawyers to frustrate cases in the court. Disturbingly though, the government has been unable to produce a single case where this 'technicality' has thwarted a criminal prosecution.

For the benefit of the Committee, I include some information from a study published by the Australian Institute of Criminology entitled, "What Australians Think About Crime and Justice: Results from the 2007 Survey on Social Attitudes" which I raised in Parliament in response to the Police Minister, Hon. Rob Johnson, on 11 November 2009:

A key finding of the study was that a large majority of the public have inaccurate views about the occurrence of crime and the severity of sentencing. Consistent with previous Australian and international research, the Australian public perceives crime to be increasing when it is not; it overestimates the proportion of crime that involves violence and underestimates the proportion of charged persons who go on to be convicted and imprisoned.

Another key finding in the study was that fear of crime is associated with decreased confidence and more punitive attitudes in the criminal justice system. I will continue to argue that we should be passing laws based on evidence, not misconceptions.

The section of the Criminal Investigation Amendment Bill 2009 that I take particular exception to is the proposed new section 70A(4). It is at the heart of the Bill and provides the additional powers to search.

It is this section that permits a police officer to undertake a basic search of a person and his or her vehicle. It lacks any of the usual limitations on this type of search power that are built in to legislation to safeguard the citizens of Australia. There is no search warrant requirement, the reasonable suspicion test has been abandoned and there is no requirement for there to be the consent of the person to be searched or, alternatively, to give the person the opportunity to leave the place rather than undergo a search.

This section 70A(4) effectively allows police to search anyone they like for whatever reason they like, regardless of any biases or prejudices they may have in reaching that decision. There is no opportunity for the person to refuse this. Further, because the declaration is published only in the Government Gazette and it is not invalid if the Commissioner fails to publish it, people will not realistically be able to avoid the prescribed areas where these powers are to be exercised.

I am particularly concerned about the effect of this legislation on the vulnerable and marginalised in our community. For example, the effect on minors; there is nothing in the legislation that requires a parent or guardian to be present when children are to be searched.

Of equal concern is how Indigenous people may be targeted. I believe they will bear the brunt of this search power. Women may be unnecessarily harassed by police, gay men may be the focus of police attention because they are gay men, or particular ethnic groups may be targeted. Without the test of reasonable suspicion, the police risk searching people on a discriminatory basis which is an erosion of our fundamental right to go about our own business without being harassed.

Moreover, there are serious questions raised about police accountability in how these searches are to be conducted including:

- The power of police auxiliary officers to conduct these 'stop and searches' as I referred to in Parliament on 11 November, 2009 (Hansard, 11 November 2009, 9.02pm)
- The failure of any record keeping and analysis of who will be targeted by Police for search. In the UK, where records have been kept of similar search powers, the data reveals that people from ethnic minority backgrounds have been targeted by Police, demonstrating that the search powers are being used in a discriminatory manner.
- The failure of independent scrutiny of the operation of these laws
- The fallibility of police officers – police do make errors like everyone else

Members of the Opposition voiced their concerns during debate in the Legislative Assembly. The member for Armadale, Alannah MacTiernan MLA (ALP), called this legislation "the most troubling piece of legislation (she) has seen in (her) 16 years as a member," (Hansard, 10 November 2009, 10.14pm), the member for Forrestfield, Mr Andrew Waddell MLA (ALP) said "it was the most fundamental single attack on civil liberties", (Hansard, 10 November 2009, 10.27pm), and the Member for Maylands, Ms Lisa Baker MLA (ALP) said she was "pretty horrified", (Hansard, 10 November 2009, 11.07pm).

Prominent community members have now spoken publicly to record their opposition to the legislation. Leading barrister Malcolm McCusker has called it "a real erosion of the freedom and liberties that our forefathers fought for", the WA Children's Commissioner Michelle Scott said she feared police would use the legislation to target young people, particularly Aboriginal young people, while civil rights campaigner and former Fraser government minister Fred Chaney said "this sort of thing certainly can occur in an African dictatorship or Eastern Europe, but I don't think any country we identify with as a democratic civilized country would have such a law".

I draw the Committee's attention a case handed down on the 12th January 2010 by the European Court of Human Rights in Strasbourg in relation to the UK Government's stop and search powers. The Court ruled earlier this month that 'stop and search' powers of police acting under Britain's *Terrorism Act 2000* violated the right to respect for private and family life. The judgement read that the search powers were "neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse" and were thus not "in accordance with the law". (European Court of Human Rights, Strasbourg, Application no. 4158/05). It is likely that the search powers contained in the *Criminal Investigation Amendment Bill 2009* would fail the same common law tests.

In my view this legislation is draconian, unprecedented and unwarranted. We, as Parliamentarians, should be passing laws based on evidence, not on misconceptions. I respectfully urge that you recommend that the *Criminal Investigation Amendment Bill 2009* be rejected in its entirety, as it is fundamentally flawed legislation.

Yours sincerely,



Adele Carles MLA

Member for Fremantle

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