



The Fight Against 'Stop and Search' Laws

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The Barnett Government's proposed 'stop and search' legislation has attracted much scrutiny in recent months. *Search for Your Rights*, a Perth-based advocacy group, has grave concerns about the legislation. By eroding protections often taken for granted, such legislation can fundamentally change citizens' interactions with police and the legal community. The government's proposals overthrow the fine balance between personal autonomy and public safety encapsulated in the concept of reasonable suspicion, undermining civil rights held by every Western Australian citizen.

The Law Reform Commission of Western Australia recognises that in all aspects of police powers, the legislature must balance two competing considerations, both of great importance: "on the one hand, the need to give the police wide enough authority to ensure that criminals are caught, and on the other, the right of citizens to go about their business without unnecessary interference."¹

The *Criminal Investigation Amendment Bill 2009* (WA) proposes to introduce significant changes to what are known colloquially as 'stop and search' powers in Western Australia by removing the requirement for 'reasonable suspicion' on the part of a police officer. Thus, a police officer will be permitted to stop and search a person or persons who are in a 'prescribed area' without any grounds.

Courts have long recognised that "so far as searches are concerned... [police officers] should appreciate that they involve an affront to the dignity and privacy of the individual"² and as such, "the citizens of this country should not have their freedom interfered with"³ except in special circumstances. Police powers to detect and detain criminals through searches have necessarily been balanced against these civil liberties. For centuries, this balance has been found in the requirement that the police hold a 'reasonable suspicion' of the individual before searches can be carried out.

The 'reasonable suspicion' requirement in Western Australia

Currently, the law provides that a person can be searched if a police officer "reasonably suspects that a person has in his or her possession or under his or her control any thing relevant to an offence".⁴ Essentially, the individual police officer is subject to an external check on their discretion. The

¹ The Law Reform Commission of Western Australia, 'Discussion Paper on Police Act Offences' (1992) WALRC 85, para 18.2

See generally E Campbell & H Whitmore *Freedom in Australia* (1st ed 1966) 30-33; K L Milte & T A Weber *Police in Australia* (1977) 59 -62.

² *Lindley v Rutter* [1981] QB 128

³ *Brazil v Chief Constable of Surrey* [1983] 1 WLR 1155

⁴ *Criminal Investigation Act 2006* (WA) s 68



requirement of reasonable suspicion also stems from a fundamental principle of our criminal justice system: innocence until guilt is proven.

It is worth restating that the existence of the reasonable suspicion requirement does not entail being 'soft on crime'. It has not been demonstrated that this requirement has interfered in any convictions in Western Australia. It should also be noted that the court can accept evidence collected during a search irrespective of whether the search was conducted on reasonable suspicion.⁵ The requirement does, however, allow a person to complain about a wrongful search, an option that will be lost if police powers are left undefined.

The *Criminal Investigation Amendment Bill 2009* proposes to remove this external check, leaving police with the unmitigated power to search any person at any time without any cause or reason.

The 'stop and search' power in the UK: A comparative analysis

The 'stop and search legislation' introduced in the United Kingdom under the *Terrorism Act 2000* (UK) provides an illuminating comparison with the government's current proposals. The legislation's ineffectiveness was evidenced by the extremely low translation from searches to arrests. Statistics in the *Guardian* (UK) state that of those stopped and searched under the extended search powers in 2009, just 0.2 – 0.5% were arrested.

Troublingly, the UK laws have also been damaging to civil society, with police officers admitting that the extended search powers damaged community relations.⁶ Lord Carlile, an independent reviewer of terrorism legislation, stated confirmed that the 'stop and search' powers were overused and caused alienation in some communities.⁷ Critics say that these laws have alienated British Muslims in particular⁸, and figures demonstrate that black people in the UK are seven times more likely to be stopped than whites.⁹ Fears that the proposed Western Australian laws will disproportionately affect minority groups here – in particular, Aboriginal and Torres Strait Islander people and Muslim communities – are not unfounded.¹⁰ Given Indigenous people are overrepresented in the legal system; Indigenous Australians

⁵ Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 November 2009, 8827-8868 (Dr J Woollard MLA, Mr P Watson MLA, Mr R Johnson MLA)

⁶ Vikram Dodd, 'Police to severely curtail use of stop and search powers' *Guardian Newspaper*, 6 May 2009, <http://www.guardian.co.uk/uk/2009/may/06/police-stop-and-search-reform> at 29 May 2010.

⁷ Lord Carlile of Berriew QC, Report on the Operation in 2007 of the Terrorism Act 2000 and of Part I of the Terrorism Act 2006, Parliament of the United Kingdom, June 2008, para 121.

⁸ Ibid.

⁹ Alan Travis, '70% rise in number of black and Asian people stopped and searched' *Guardian Newspaper*, 17 June 2010, <http://www.guardian.co.uk/law/2010/jun/17/stop-and-search-police> at 26 July 2010; these figures are taken across searches conducted under a variety of police powers in the UK.

¹⁰ These fears were expressed in a number of submissions to the legislation committee, including: Written submission to the Legislation Committee, Parliament of Western Australia, 25 January 2010, (John Bedford, Acting Chief Executive Officer, Aboriginal Legal Service of Western Australia Inc) Written submission to the Legislation Committee, Parliament of Western Australia, 22 Jan 2010 (Yvonne Henderson, Commissioner for Equal Opportunity)



and migrants suffer racial discrimination. A law which has the potential to further alienate these communities and damage their relationship with the police is deeply counterintuitive. More generally, unconstrained stop and searches erode the relationship between police and the community, and undermine the legitimacy of the police force.¹¹

Recently, the European Court of Human Rights ruled on the implementation of the UK legislation. The court held that the exercise of a power to stop and search without reasonable suspicion violated the right to privacy enshrined in the European Convention on Human Rights. This right has been universally recognised in other conventions including the International Covenant on Civil and Political Rights (to which Australia is a signatory), the African Charter on Human and Peoples Rights and the American Declaration of the Rights and duties of Man. The European Court of Human Rights emphasised in its decision that search powers must be exercised on grounds of reasonable suspicion.

The Court further considered the importance of additional legal safeguards against abuse. For instance, the UK legislation allowed for specific areas to be made 'prescribed areas' for a period of 28 days. This was deemed unsatisfactory. In Western Australia, police officers will be able to search a person or persons without 'reasonable suspicion' in any 'prescribed area(s)'. These areas are to be designated by the Police Commissioner (or an Assistant Commissioner), with the approval of the Minister for Police, for up to six months before the decision will be subject to review. Compared to the UK legislation – itself unsatisfactory – this is a significantly weaker safeguard.

The call for increased police powers in Western Australia: can it be justified?

Recent years have seen an increasing and almost hysterical concern regarding the safety of certain areas in Perth, particularly Northridge.¹² Much data has been thrown around in this debate as evidence of the supposed increase in crime.¹³ However, the Western Australian Police Crime Statistical Notes observe that caution should be exercised when interpreting and using offence statistics, as:

“any variation may not necessarily reflect an actual increase or decrease in the incidence of an offence type (or in total offence numbers), but rather variations resulting from reporting and recording changes.”¹⁴

Indeed, the more successful the police are at targeting crime, the more crime the statistics reflect:

“it should be noted that pro-active policing and educational strategies, such as encouraging the community to report incidents of domestic violence and sexual assault, and targeted policing

¹¹ B Bowling and C Phillips, 'Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search' (2007) 70(6) *The Modern Law Review* 936, 939.

¹² *ibid*

¹³ eg. Western Australia, Parliamentary Debates, Legislative Assembly, 10 March 2010, 554-555 (Mr R Johnson MLA)

¹⁴ Crime Statistical Notes', (2010) Western Australian Police, <http://www.police.wa.gov.au/ABOUTUS/Statistics/CrimeStatisticalNotes/tabid/1212/Default.aspx> at 29 May 2010



strategies, such as increased and concentrated police activities associated with detecting illicit drugs, may have a significant impact on the number of offences recorded.”¹⁵

The data should also be read in the context of a substantial increase in population in Perth over the last decade, with the Perth City (central metropolitan district) increasing by 12.8% in 2008-2009 alone.

Calls for increased police powers entail accepting limits on the universal civil rights enshrined in international conventions. Fortunately, we live in a society free enough to consider small infringements of our civil liberties reasonable. However, instances such as the brutal bashing of a civilian by on-duty Constable Andrew McLeod¹⁶, the arrest of a good Samaritan in Subiaco for refusing to produce identification¹⁷ and a general increase in complaints for police brutality (175 in 2007; 202 in 2008; and 201 in 2009), have led former officers to warn of the fallibility of the police force.¹⁸ It is necessary to have some limits on police powers, as well as protection from and recourse against their abuse.

Search for Your Rights believes that the removal of the reasonable suspicion requirement will undermine the core principle of presumed innocence and unfavourably shift the balance between police powers and civil liberties. Further, we believe that the legislation will be ineffective in reducing crime and, indeed, counterproductive.

Conclusion

Opposition to ‘stop and search’ legislation in Western Australia is growing: twenty out of twenty-one submissions to the parliamentary committee opposed, it with criticism coming from the Law Society of Western Australia, the Commissioner for Children and Young People WA, the Australian Association of Social Workers, the Commissioner for Equal Opportunity, the Street Law Centre, and the Aboriginal Legal Service of Western Australia, among others. The concerns expressed by so many sectors of civil society indicate strongly that the proposed laws, which undermine all of our liberties, must be taken seriously and met head-on.

Who are Search for Your Rights and where do we get our support?

Search for Your Rights started as an online campaign on the social medium *Facebook*. Its Facebook members, who number 2344 as of May 2010, are predominantly young people – somewhat inevitable given the social networking demographic. However, the protection of civil rights is not a cause confined to young people, and *Search for Your Rights* is not so restricted. One of the benefits of an online base

¹⁵ *ibid*

¹⁶ N Cox, ‘Police officer’s assault ‘disturbing’ – Acting Police Commissioner’ *Perth Now*, 18 February 2010, <http://www.perthnow.com.au/news/police-officers-assault-disturbing-acting-police-commissioner/story-e6frg12c-1225831832938>, at 29 May 2010

¹⁷ K Campbell and L Elliot, ‘Charge of failing to produce ID to police beaten’, *The West Australian*, 23 April 2010, <http://au.news.yahoo.com/thewest/a//mp/7102912/charge-of-failing-to-produce-id-to-police-beaten/> at 29 May 2010

¹⁸ R O’Connell, ‘Fears of Rise in Police Brutality’, *The West Australian*, 9 April 2010, <http://au.news.yahoo.com/thewest/a/-/newshome/7038767/fears-of-rise-in-police-brutality/>, at 29 May 2010



of core supporters is the ease through which events and campaigns can be organised. Facebook has allowed *Search for Your Rights* to rally volunteers and organise extensive leafleting of around 2-3000 homes a week for more than 3 months. Volunteers letterboxed throughout the metropolitan area, undoubtedly reaching a wider demographic. These volunteers are coordinated easily and rapidly through email and Facebook without any need for time-consuming or expensive central meetings.

The immediate nature of contact through the internet also allows rapid responses to events, such as the Westpoll on “stop and search” powers. Upon notifying the *Search for Your Rights* Facebook group of this poll, there was a change within two hours of the results. The poll went from 50/50 voting to 60% against the ‘stop and search’ powers, and only 40% in favour. Interestingly, the *West Australian* newspaper did not publish these results.¹⁹

The other benefit of an online campaign is that supporters are easily able to follow its progress and members of the public are able to inform themselves of the laws in one location:

www.searchforyourrights.org.

¹⁹ Roy Morgan poll, ‘Do you support the proposed police stop and search laws?’
<http://post.polls.yahoo.com/quiz/quizresults.php>