

STOP AND SEARCH WITHOUT REASONABLE SUSPICION

Is WA becoming a police state?

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In response to fear that violent crime is getting out of control, especially in entertainment districts, there is currently a Bill before the Western Australian Parliament which will allow police to stop and search without the consent of the person and without reasonable suspicion in designated areas. This article explores the reasons for the proposed extension of police powers in WA¹ and argues that the powers are unnecessary, that the legislation contains inadequate safeguards, that it is likely to lead to the targeting of certain groups in the community and that it could undermine public confidence in the police.

The requirement of reasonable suspicion

The power for police to be able to stop and search is widely regarded as an essential investigatory tool of modern policing.² Stop and search is, however, also a potential flash-point because it clashes with the right of the individual to have their privacy respected and to be free to go about their business without interference. Legislation therefore needs to 'balance the need for an effective criminal justice system against the need to protect the individual from arbitrary invasions of his privacy and property'³ by determining the conditions on which it may be justified to interfere with a person's rights. Hitherto, this has been done by accepting that a person should not be stopped and searched unless a police officer has reasonable grounds for suspecting that the person has something in their possession or control which is relevant to an offence.⁴ Section 4 of the *Criminal Investigation Act 2006* (WA) ('CIA'), for instance, explains that

a person reasonably suspects something at a relevant time if he or she personally has grounds at the time for suspecting the thing and those grounds (even if they are subsequently found to be false or non-existent), when judged objectively, are reasonable.

A suspicion is 'more than a mere idle wondering whether [something] exists or not; it is a positive feeling of actual apprehension or mistrust'.⁵ The element of reasonableness is designed to ensure that facts exist 'which are sufficient to induce that state of mind [ie suspicion] in the reasonable person'.⁶ This requirement should then eliminate or, perhaps more realistically, reduce arbitrary searches and searches based on stereotypes, generalisations and solely personal factors, such as a person's race, age and appearance.⁷

Dispensing with reasonable suspicion

The CIA had already modified in WA the basic position that a person should only be stopped and searched where the police have a reasonable suspicion that the person possesses something relevant to an offence. Under s 69 of the CIA, police can stop and search a person or vehicle in a public place even where there is no reasonable suspicion that the person has anything relevant to an offence. The public place in which this power applies must have been declared in writing to be such a place by a senior officer for a period of no more than 48 hours because the officer is of the opinion that the power is necessary to safeguard a particular public place or people in that place.⁸ A safeguard here, in place of the requirement of a reasonable suspicion, is that a person can refuse to consent to a search. However, this is a relatively weak safeguard because in the case of a refusal a person can be denied access to the affected area.

Not satisfied with this rebalancing of investigatory powers against rights to liberty and privacy, the Liberal-National government has now introduced a Bill into the WA Parliament which proposes to extend police stop and search powers even further.⁹ The Criminal Investigation Amendment Bill 2009 will remove the provision that a person can refuse to consent to a basic search and extend the time period in which these extra powers can be used.¹⁰ Rather than limit the period of the declared area to 48 hours, the Bill will allow the Commissioner of Police (or Assistant/Deputy Commissioner) with the approval of the Minister to declare an area for up to two months. The declaration should be in writing and published in the Government Gazette but non-compliance with this requirement does not affect the validity of the declaration.¹¹ The Minister for Police suggested, in the second reading speech, that the Criminal Investigation Amendment Bill 2009 (WA) contains adequate safeguards because the place must be a public one, thus eliminating the possibility of searches of private residences, and because only a basic search may be conducted (which can include the use of a metal detector, a pat-down search and the requirement of removing outer clothes).¹²

Two main arguments are put forward in support of the proposed extension of police powers. The first argument is the need to combat the increase in violent crime involving weapons:

The Government is introducing this Bill in response to an increasing concern by government, police and the

REFERENCES

1. For discussion of other extensions of police powers in NSW see Greg Martin, 'No Worries? Yes Worries!' (2010) 35 *Alternative Law Journal* 163.
2. Rebekah Delsol and Michael Shiner, 'Regulating stop and search: A challenge for police and community relations in England and Wales' (2006) 14 *Critical Criminology* 242.
3. *George v Rockett* (1990) 170 CLR 101, [1990] HCA 26, [4]. This comment was made in relation to the conditions for granting a search warrant.
4. *Criminal Investigation Amendment Act 2006* (WA) s 68. Such restrictions also apply in other jurisdictions but the focus of this article is WA.
5. *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 303.
6. *George v Rockett*, above n 3, [4].
7. The discriminatory use of stop and search powers in the UK has been discussed by, for instance, Christina Pantazis and Simon Pemberton, 'From the "old" to the "new" suspect community' (2009) 49 *British Journal of Criminology* 646; Ben Bowling and Coretta Phillips, 'Disproportionate and discriminatory: reviewing the evidence on stop and search' (2007) 70 *Modern Law Review* 936; P A J Waddington, Kevin Stenson and David Don, 'In proportion' (2004) 44 *British Journal of Criminology* 889.
8. CIA s 69(1)(c).
9. The Criminal Investigation Amendment Bill 2009 (WA) was referred to the Standing Committee on Legislation on 26 November 2009 which was due to report on 25 March 2010. The Committee requested an extension due to the controversial nature of the Bill and an extension was granted to 17 June 2010. The Committee has yet to report.
10. Criminal Investigation Amendment Bill 2009 (WA) c 5 (to insert s 70A into the CIA).
11. Criminal Investigation Amendment Bill 2009 (WA) c 5 (to insert s 70B(5) into the CIA).
12. Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 October 2009, 8024 (Rob Johnson, Minister for Police).

community in relation to the proliferation of weapons and the increasing number of incidents of violence and antisocial behaviour in entertainment precincts.¹³

The Commissioner for Police notes that the number of offences involving weapons has risen exponentially from 428 in 1999 to 2511 in 2008–9.¹⁴ Thus, the purported aim of the new power is to discourage people from carrying weapons in public areas. In this regard, it has been claimed that the current search powers under s 69 of the CIA are inadequate because a person who refuses to give consent to being searched can simply leave the prescribed area.¹⁵

The second argument is that this change is necessary to combat 'slick defence lawyers' from challenging the lawfulness of a search on the basis that there were no reasonable grounds. These powers, it has been suggested, would then reduce the wasting of time and resources 'often spent arguing whether the officer can justify the grounds for their suspicion' which leads to the result that 'some offenders get off on a technicality related to the reasons for the search taking place'.¹⁶

The extended powers are unnecessary

Whether or not violent crimes have actually increased in WA,¹⁷ the real question is whether the extension of police powers is necessary and likely to be effective in combating the carrying and use of weapons. The answer to this question seems to be no. There is no evidence that these powers will be effective in combating violent crime. Indeed, evidence from other jurisdictions which have introduced similar legislation to allow police to stop and search without reasonable suspicion suggests that these powers have not been effective.¹⁸

It is striking that even though the UK has allowed police similar extended powers since 1994 there has been no evidence produced to establish that these powers have led to a reduction in violent crime. In this regard, Bowling has noted that 'such *suspicionless* searches rarely result in arrest'¹⁹ and that '[t]here just simply is no robust evidence showing that they have contributed in any way to the reduction of knife crime'.²⁰ Similar opinions have been expressed in the UK Parliament: 'In fact, there is very little relationship between knife crime and the number of searches under section 60.'²¹ Fitzgerald has examined the use of stop and search powers in London and concludes that:

The [London] boroughs that are making the greatest use of Section 60 searches are not necessarily getting a better result than the boroughs that are resisting the pressure and are using it far less.²²

Indeed, Fitzgerald has commented that: '[t]here has only been a...one per cent yield for prohibited weapons.'²³ More recently, Victoria legislated to give the police similar powers.²⁴ There it has been found that only 35 weapons have been seized and nine charges have been laid after searching 1300 people under these new stop and search laws.²⁵

Aside from the fact that evidence suggests that this power is likely to be ineffective at combating weapon usage the extension is unnecessary because police

in WA already have more than adequate powers. Searches permitted under s 69 of the CIA, with the consent of the person in designated areas, is sufficient to stop weapons entering designated areas because a person who refuses to be searched can be barred entry into the area. There is no need to give police further powers, especially considering there have only been ten occasions between 2007 and 2009 where use has been made of the power in s 69 CIA.²⁶ More fundamentally, however, as Bowling points out, stop and search powers cannot in principle be justified on the grounds that they deter criminal activity.²⁷ This is because,

[i]t is part neither of the letter nor the spirit of the law that random stops and searches could or should be used as a way of deterring citizens from carrying drugs, weapons, or other "prohibited articles".²⁸

Yet, even if it could be accepted that this might be an appropriate reason for the extension of the function of stop and search powers, the evidence noted above suggests that these powers are not necessarily effective. Furthermore, any possible deterrent effect must be balanced against the harm that such coercive searches could do to society.

Finally, there is scant evidence for the assertion that this extension of powers is necessary to overcome clever lawyers getting their clients off charges. Notably, when the Minister for Police was asked in Parliament by Alannah MacTiernan MLA what evidence there was of this assertion, only one case was put forward.²⁹ There may well be few successful challenges because the threshold of reasonable suspicion is not high; it only calls for 'something more than mere idle wondering'³⁰ and that facts exist which could support this suspicion. The main value of this requirement therefore is not that it sets a high threshold before a person can be stopped and searched but, rather, that in demanding the formation of a reasonable suspicion the police must direct their attention to whether there are objective facts which give rise to a reason to stop and search the person. Taking away this requirement means that the police can stop and search for no reason or for reasons which they need not disclose, opening the door to arbitrary and discriminatory searches.

The extended powers are dangerous

The Minister for Police aims to reassure the public that they have nothing to fear from these powers. Firstly, it is argued that the search will only be a basic one. Although as noted above, this can include having a metal detector run over a person's body, requiring the removal of outer clothing and a frisk. The Minister for Police finds this unproblematic:

I cannot see any reason why people would be stressed to have a wand waved over them. We do it all the time. At the moment we have sniffer dogs. Do people get stressed because a sniffer dog comes near them and sniffs their legs and their ankles and the bags that they are carrying? I do not think so. We have bags that are searched. When a person comes out of a supermarket, he or she is compelled to show the contents of his or her bag, if asked to do so. There are metal detectors, as I have already said, in many areas.³¹

13. Ibid.

14. Western Australia, Evidence to Standing Committee on Legislation, Parliament of Western Australia, Perth, 10 March 2010, 4 (Karl O'Callaghan, Commissioner of Police).

15. Ibid, 5 (Russell Armstrong, General President, WA Police Union).

16. Colin Barnett and Rob Johnson, 'Greater police search powers to fight drugs and violence' (Media Statement, 11 October 2009) <mediastatements.wa.gov.au/Pages/default.aspx?Itemid=132600> at 27 July 2010.

17. Number of reported assaults fell since 2006-7 from 22 873 to 22 708 in 2007-8 and 22 706 in 2008-9; total of offences against the person fell from 34 302 in 2006-7 to 34 021 in 2008-9. See, WA Police, *Annual Report 2009* (2009) 37. Reported offences should be placed in context of population growth: Perth grew by 52 200 people (3.2%) in 2008-09 and over five years to June 2009 there was an average annual growth rate of 2.5%. See, Australian Bureau of Statistics, <abs.gov.au/ausstats/abs@.nsf/Products/3218.0~2008-09~Main+Features~Western+Australia?OpenDocument> at 27 July 2010.

18. Police have extended powers in the UK. See, *Criminal Justice and Public Order Act 1994* (UK) s 60 and *Terrorism Act 2000* (UK) s 44. See also in Victoria, *Control of Weapons Act 1990* (Vic). Details of these powers are discussed following.

19. Ben Bowling, 'Zero Policy', (2008) 71 *Criminal Justice Matters* 6. Arrest figures are worst in relation to stops under s 44 of the *Terrorism Act 2000* (UK) with only around 1 in 400 stops leading to an arrest in connection with terrorism.

20. ABC Television, 'WA set to introduce new stop and search laws', *The 7:30 Report*, 11 June 2010 <abc.net.au/7.30/content/2010/s2924379.htm> at 27 July 2010.

21. United Kingdom, *Parliamentary Debates*, House of Commons, 18 January 2010, col 73 (N Gerrard).

22. BBC News, 'Met police stop and search powers "not effective"', 25 January 2010 <http://news.bbc.co.uk/2/hi/uk_news/england/london/8479124.stm> at 27 July 2010.

Stop and search is ... also a potential flash-point because it clashes with the right of the individual to have their privacy respected and to be free to go about their business without interference.

This response is alarmingly glib and underplays the level of intimidation (or, indeed, resentment) that people may feel in being stopped and searched by the police. Even being subjected to a basic search can be humiliating and alienating. Removing outer clothes in public might be especially humiliating where, for instance, a person is directed to remove headwear worn for religious reasons.

Being stopped by the police always has the potential to be a flash-point because a person's privacy and liberty are interfered with; tensions are likely to be even higher when no grounds are presented for why the person is being stopped. This is especially the case where searches are selective rather than universal; as is the case, for example, in an airport where everyone must walk through a metal detector. In such a scenario, a person has less reason to question why they are being stopped and whether they are being unfairly targeted. All these concerns are compounded by the fact that the proposed legislation contains no guidelines on when and how these powers are to be used and the Minister for Police has made clear that any proposed amendment providing that 'guidelines setting out the obligations, responsibilities and manner in which powers are to be exercised by police officers ... are to be prescribed by regulation'³² would not be accepted by the government.

There is a real danger that coercive arbitrary searches could undermine community confidence in the police. As commented by Bowling: 'Each time a person is unjustifiably stopped and searched it undermines respect for the police, drains public confidence, causes resentment, and severs the link between the citizen and the law'.³³ Similar views have been expressed in the WA Parliament: 'A police force can operate only if it has the confidence and support of the broader community. This legislation will undermine that support'.³⁴

The key question here, of course, is what would amount to an unjustifiable search? Given that there is no clear evidence that these powers will significantly improve the ability of the police to combat weapons usage this invasion of a person's right to liberty and privacy could be argued to be unjustified. More worryingly, without clear guidance on when these powers can be used and without the requirement for reasonable suspicion there is a danger that people will be stopped on the basis of personal factors, generalisations and stereotypes. Research in the UK has demonstrated a link between the use of stop and search powers and race and ethnicity. The Metropolitan

Police Authority Scrutiny Panel found that 'the stop and search rates of Black people in London increased by 30% between the years 2000/01 and 2001/02; for Asian people by 41%, while for White people it increased only by 8%'.³⁵ The Panel reached the conclusion that: 'Institutional racism — as reflected in the policies, priorities and practices (or lack thereof) of the Metropolitan Police Service — continue to be dominant factors in both permitting and causing disproportionality in stop and search rates'.³⁶ More recent figures show little change with a report of the UK Ministry of Justice finding that in 2008–2009 a black person was 7.2 per cent more likely and an Asian person twice as likely as a white person to be stopped and searched by police.³⁷ Increasing police powers could have a similarly disproportionate effect on certain ethnic and racial groups in WA or, indeed, any group subject to stereotyping and generalisations.

The WA Parliament should be particularly mindful of the potential impact of these powers on the relationship between police and young Indigenous people. As Blagg notes,

[s]tatistics on Aboriginal youth involvement on the criminal justice system seem scarcely believable. In Western Australia, by age 18 around 80% of Aboriginal youth will have had contact with the system.³⁸

These figures alone should be sufficient to give the government pause to consider the potential impact of stop and search laws on this already indefensible situation. The danger is that Indigenous youth will be unfairly targeted by these powers because '[t]heir extreme visibility and membership of a problem group, marks them off as targets for heavy street policing'.³⁹ Furthermore, these powers are designed for use in 'symbolic locations', such as the entertainment district of Northbridge, 'where the presence of Aboriginal youth becomes a signifier of potential disorder and raises public anxiety' with the result that 'the police are called in to sort out the problem'.⁴⁰ Already, Indigenous people more frequently have other discretionary police decisions made against them; for instance, the decision whether to issue a move on order.⁴¹ While representing around 3.5 per cent of the population of WA,⁴² Indigenous persons made up 55.2 per cent of those issued with a move on notice between May 2007 and October 2007.⁴³ The situation is similar in Queensland where 27.9 per cent of people given move on directions in 2007, and 23.5 per cent in 2008, were Indigenous.⁴⁴ These extended powers have the potential to cause a further decline in the already fraught relationship

23. ABC News, 'Is stop and search successful?', 15 February 2010 <abc.net.au/local/stories/2010/02/15/2819790.htm> at 27 July 2010.

24. Under s 10G of the *Control of Weapons Act 1990* (Vic) police may search a person without reasonable suspicion within an area designated by the Chief Commissioner for not more than 12 hours (s 10D and s 10E).

25. Chris Vedelago, 'Police search powers on a knife edge', *The Age* (Melbourne), 28 July 2010.

26. Evidence to Standing Committee on Legislation, Parliament of Western Australia, Perth, 10 March 2010, 7 (Karl O'Callaghan, Commissioner of Police).

27. Bowling, above n 19, 7.

28. *Ibid.*

29. Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 November 2009, 8993.

30. *Queensland Bacon Pty Ltd v Rees*, above n 5, 303.

31. WA, *Parliamentary Debates*, above n 12, 8990 (Rob Johnson, Minister for Police).

32. WA, *Parliamentary Debates*, above n 29, 8982 (Margaret Quirk, MLA). See also, 8989 (Rob Johnson, Minister for Police).

33. Bowling, above n 19, 7.

34. Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 November 2009, 8837 (Ben Wyatt, MLA).

35. Metropolitan Police Authority, *Report of the MPA Scrutiny on MPS Stop and Search Practice* (2004), 6 <mpa.gov.uk/downloads/stop-search/stop-search-report-2004.pdf> at 27 July 2010.

36. *Ibid.* 10.

37. Ministry of Justice, *Statistics on Race and the Criminal Justice System 2008/09* (2010), 22, <justice.gov.uk/publications/docs/stats-race-and-the-criminal-justice-system-2008-09c1.pdf> at 27 June 2010.

38. Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (2008), 58.

39. *Ibid.* 59.

40. *Ibid.*

between Indigenous communities and the police and there is nothing in this proposed legislation that gives reassurance that Indigenous people will not unfairly suffer the burden of stop and search powers.

The extended powers contain inadequate safeguards

Given the concerns discussed above, an extension of police powers might be less objectionable if there were sufficient safeguards to ensure that such powers are used only exceptionally and that a system is in place to monitor whether these powers are being used fairly. In the UK, the power to allow police to stop and search without reasonable suspicion was introduced with the aim of preventing violence at sporting or other large-scale events, such as football matches.⁴⁵ Before a senior officer can authorise the use of powers in s 60 of the *Criminal Justice and Public Order Act 1994* (UK) ('CJPOA') they must have a reasonable belief that 'incidents involving serious violence may take place in any locality in his area' and that it is expedient to make the order to prevent such occurrences.⁴⁶ This order can remain in force for a maximum of 24 hours.⁴⁷ Similarly, in Victoria under s 10 of the *Control of Weapons Act 1990* (Vic) the Chief Commissioner (or their delegate) may designate an area for a period of up to 12 hours where police may stop and search without reasonable suspicion. Such an order can be made for an area only where the Chief Commissioner is satisfied that there has been previous violence or disorder with a weapon, or an event will be held in the area and there has been violence or use of weapons previously at this event, and there is a likelihood that violence or disorder will be repeated.⁴⁸ The order can also be made for an area where there has not been a previous incident, provided the Commissioner is satisfied that it is likely there will be violence or disorder in the area and it is necessary to designate the area so that police can use the extended powers to prevent or discourage violence or disorder.⁴⁹

In contrast, there are few safeguards in the proposed WA legislation and therefore every reason to fear that these powers will be used unnecessarily and discriminatorily. The Criminal Investigation Amendment Bill 2009 (WA) contains no information guiding the Commissioner of Police on when it is appropriate to make a declaration and also no requirement that the Commissioner has a reasonable belief (that is, objective grounds for coming to the conclusion) that there is a need for the power to prevent violence. There is no requirement that regulations detail how police are to use such powers and what their responsibilities are. Also, in allowing an area to be designated for up to two months indicates that the extension of police powers is not designed to be an extraordinary measure to deal with specific threatening incidents as is the case in Victoria and the UK.⁵⁰

Finally, it should be noted that the European Court of Human Rights recently considered the stop and search powers under s 44 of the *Terrorism Act 2000* (UK) which allowed the Home Secretary to authorise

stop and search without reasonable suspicion in any area of the UK for any time period. The Court found that the power given to police under that Act, which referred to the search as being 'expedient' rather than necessary, were insufficiently circumscribed and lacked appropriate legal safeguards capable of protecting individuals against arbitrary interference of their right to privacy under article 8 of the European Convention on Human Rights.⁵¹ Article 17 of *International Covenant on Civil and Political Rights* ('ICCPR'), to which Australia is a signatory, provides for the right of privacy in similar terms to article 8 of the European Convention.⁵² The breadth of the powers proposed to be given to the WA police can therefore also be argued to amount to an unlawful interference with the right to privacy, as protected by the ICCPR.

Conclusion

Violent crime is a very real community concern and stop and search powers are an essential tool in combating the carrying of weapons. However, police in WA already have considerable powers to stop and search and there is little evidence that allowing a further extension to this power will lead to significantly more weapons being seized. Furthermore, the possibility that some violent crime will be deterred must be balanced against the harm that these powers could do to society. There is an unacceptable risk that without the requirement of a reasonable suspicion and without guidelines on how these powers are to be used decisions to stop and search will be based on generalisations and stereotypes which could undermine public confidence in the police. In the absence of clear evidence that these powers are necessary and are likely to be effective, Parliament would be well advised to reject this potentially dangerous extension of police powers.

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41. Ibid 98. See also, Troy Allard et al, 'Police diversion of young offenders and Indigenous over-representation' *Trends and Issues in Crime and Criminal Justice* (2010).

42. Australian Bureau of Statistics, *Experimental Estimates of Aboriginal and Torres Strait Islander Australians* (June 2006).

43. Western Australia, *Parliamentary Debates*, Legislative Council, 14 November 2007, 7055-7056. Ethnicity was only noted in relation to 49.4 per cent of move on notices.

44. Queensland Department of Communities, *Submission to Queensland Crime and Misconduct Commission Review of Police Move-On Powers* (2009) <cmc.qld.gov.au/data/portal/00000005/content/71010001243141117410.pdf.> at 27 July 2010.

45. *Terrorism Act 2000* (UK) s 44 also adds the power to stop and search without reasonable suspicion, discussed below.

46. CJPOA, s 60(1).

47. Ibid.

48. *Control of Weapons Act 1990* (Vic) s 10D.

49. Ibid.

50. Other Australian jurisdictions have also enacted legislation for one-off events; eg, *Major Events Security Act 2000* (ACT) and *Major Events Act 2009* (NSW). Of course, the danger is that police powers extended for one-off occasions creep into a permanent extension of police powers. For further discussion see, Martin, above n 1, 164.

51. *Gillan and Quinton v The UK* [2009] ECHR 28 [87].

52. Art. 17(1) ICCPR: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.' In Victoria, the Minister for Police noted in the Statement of Compatibility required by s 28 of the Charter of Human Rights and Responsibilities that there are issues of compatibility with provisions of the *Control of Weapons Act 1990* (Vic) and the Charter. Victoria, *Parliamentary Debates*, Legislative Assembly, 12 November 2009, 4018.