

## CHANGES TO POLICE STOP AND SEARCH LAWS IN WESTERN AUSTRALIA: WHAT DECENT PEOPLE HAVE TO FEAR

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### Abstract

The Western Australian Government has proposed new stop and search laws in what it claims is a response to increased violent crime in the State. Despite Government rhetoric, being an ordinary law abiding citizen does not afford protection against police targeting or invasive searches. Public searches of individuals by police have the potential to be invasive, embarrassing and degrading. Furthermore, dispensing with the requirement that police form a suspicion based on reasonable grounds opens the door for arbitrary and discriminatory searches. Thus, law-abiding members of minority groups and the most vulnerable in society are susceptible to disproportionate targeting based on biased judgements and stereotyping. And given that the available evidence does not support the claim that our communities will be safer as a result of these increased police powers, their introduction seems all the more repugnant.

### I INTRODUCTION

‘Police officers tell me that they have a *right* to stop anyone in a public place, without having a reason, I think I have a *right* not to be stopped’.<sup>1</sup> This statement reveals the fundamental conflict between the need for the police to be able to stop and search to conduct criminal investigations and the right of individuals to be allowed to go about their business without interference. Of course everyone, including the police, has the right to stop a person and ask questions, but the person stopped has the right to ignore such questions and walk away. Police only need special powers where they want to go beyond asking questions or they want to encourage answers by imposing sanctions against a person for failing to respond to questions. According to current legislative provisions in Western Australia (‘WA’), police cannot stop and search an individual without their consent or without reasonably suspecting them of possessing something relating to an offence.<sup>2</sup> The requirement for consent or reasonable suspicion provides protection for the ordinary person against arbitrary interference with their right to privacy. This right to be free from arbitrary interference is under threat by a proposed amendment to s 69 of the *Criminal Investigation Act 2006* (WA). If enacted the amendment will allow police to stop and search people in designated areas without having a reasonable suspicion that they possess an item related to an offence and without requiring the consent of the person. In defence of this proposal it has glibly been claimed that people who are law-abiding have nothing to fear from extensions of

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<sup>1</sup> C Reich, ‘Police Questioning of Law Abiding Citizens’ (1966) 75 *Yale Law Journal* 1161, 1162.

<sup>2</sup> *Criminal Investigation Act 2006* (WA) ss 68 and 69.

police powers.<sup>3</sup> This article sets out to show what is being proposed and why even the decent citizen has reason to fear such changes.

## II THE PROPOSED CHANGES

Traditionally, police could only stop and search a person where they have a reasonable suspicion that the person has something in their possession related to an offence. However, recently in response to concerns that crime was getting out of control, especially in entertainment districts, the power for police to stop and search was extended in WA. Police may now stop and search a person without a reasonable suspicion in public areas designated by a senior police officer for not more than 48 hours.<sup>4</sup> A search of the person, and any vehicle they are in charge of, can only be conducted with the consent of the person. However, if the person refuses consent they can be ordered to leave the designated area<sup>5</sup> and where a person refuses to comply, the order may be physically enforced.<sup>6</sup> Even though this already significant extension of police powers is rarely<sup>7</sup> used there is currently a proposal in the Criminal Investigation Amendment Bill 2009 to further extend this power.

The proposal provides police with increased powers to search people and vehicles that are in public places within prescribed or declared areas, without the consent of the person and without the ordinary circumstances of reasonable suspicion.<sup>8</sup> Clause 5 of the Bill, which inserts s 70B into the *Criminal Investigation Act 2006*, provides that the Commissioner of Police (or Deputy or Assistant Commissioner), with the approval of the Minister, may declare an area in which police officers can exercise the powers contained in s70A. The declaration may remain in force for no longer than a period of two months and whilst a written record of the declaration must be made and notice given to the public through publication in the Government Gazette, failure to publish does not invalidate the declaration. The fact that these powers can only be used in a public area for a limited time, designated as such by the Commissioner and approved by the Minister, is considered by the government to be sufficient safeguard in the absence of consent and reasonable suspicion.

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<sup>3</sup> R Johnson, Minister for Police: 'Decent people have nothing to fear I can assure you'. ABC News, 'Stop and Search Laws Debated', Stateline WA, November 13, 2009, <<http://www.abc.net.au/news/video/2009/11/13/2742738.htm>>.

<sup>4</sup> *Criminal Investigation Act 2006* (WA), s 69.

<sup>5</sup> *Criminal Investigation Act 2006* (WA), s 69(3).

<sup>6</sup> *Criminal Investigation Act 2006* (WA), s 69(4).

<sup>7</sup> See K O'Callaghan, Commissioner of Police, Evidence to Standing Committee on Legislation, Parliament of Western Australia, Perth (10 March 2010) 7, <[http://www.parliament.wa.gov.au/Parliament/commit.nsf/%28Evidence+Lookup+by+Com+ID%29/27557C7105D858A2482576E80027E78F/\\$file/ls.cib100310.tro.001.ko.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/%28Evidence+Lookup+by+Com+ID%29/27557C7105D858A2482576E80027E78F/$file/ls.cib100310.tro.001.ko.pdf)>.

<sup>8</sup> Criminal Investigation Amendment Bill 2009 (WA), clause 5, ss 70A,70B.

### III WHY THE DECENT PERSON HAS NOTHING TO FEAR

#### A *The need for extended powers*

According to the Commissioner of WA Police, the proposed laws are a necessary response to the increased incidence of weapon seizures from people entering the entertainment precinct of Northbridge.<sup>9</sup> In line with this sentiment police also made a public display of the 85 weapons seized between June 2009 and November 2009 from persons they reasonably suspected of committing an offence or acting suspiciously.<sup>10</sup> However, rather than support the claim that police need extend powers this admission and these figures suggest that the existing laws are resulting in frequent apprehensions of persons carrying items that potentially endanger the public. It should also be noted that police are making these seizures without even needing to make extensive resort to the extended powers that were granted in 2006. In fact, between 2007 and 2009 the powers in s 69 *Criminal Investigation Act 2006* (WA) have only been used on ten occasions.<sup>11</sup>

Furthermore, it is unlikely that these existing extended powers will yield significantly more weapons even if more extensively used. Research in Victoria, where police were granted similar powers,<sup>12</sup> shows that only 35 weapons have been seized and nine charges laid after 1,300 people were searched under the new stop and search laws.<sup>13</sup> Similarly, in the UK, where such extended powers have existed since 1994 it has been found that: 'In fact, there is very little relationship between knife crime and the number of searches under section 60.'<sup>14</sup> It seems then that police really do not need a further extension of stop and search powers. There is simply insufficient evidence that searches without reasonable suspicion will necessarily lead to an increase in weapon seizures.

Thus, rather than being based on inadequate existing police powers the call for the proposed changes appear to be embedded more in police and public frustrations in the legal process. In fact the view is commonly held that reasonable suspicion is an impediment to successful charges by the Department of Public Prosecutions. According

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<sup>9</sup> Karl O'Callaghan, 'Police search powers are needed' *The West Australian* (Western Australia) 16 November 2009, 21.

<sup>10</sup> Nick Taylor, 'Weapons seized in police raids', (2009) Perth Now, <<http://www.perthnow.com.au/news/western-australia/weapons-seized-in-police-raids/story-e6frg143-1225796542596>>.

<sup>11</sup> O'Callaghan, above n 7. For details of use see <[http://www.parliament.wa.gov.au/Parliament/commit.nsf/%28Evidence+Lookup+by+Com+ID%29/27557C7105D858A2482576E80027E78F/\\$file/Is.cib.100310.tabled+paper.001.police.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/%28Evidence+Lookup+by+Com+ID%29/27557C7105D858A2482576E80027E78F/$file/Is.cib.100310.tabled+paper.001.police.pdf)>.

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

<sup>13</sup> C Vedelago, 'Police search powers on a knife edge', *The Age*, (Victoria) 28 July 2010, <<http://www.theage.com.au/victoria/police-search-powers-on-a-knife-edge-20100515-v5iz.html>>.

<sup>14</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 18 January 2010, col 73 (N Gerrard).

to Rob Johnson, WA Minister for Police, the proposed amendments are needed to combat smart defence lawyers from arguing against the lawfulness of stop and search based on insufficient reasonable grounds.<sup>15</sup> The question here is whether it really is the case that lawyers are frustrating police searches by successfully challenging their lawfulness. There are no statistics available pertaining to the number of failed charges due to lack of reasonable suspicion,<sup>16</sup> and only one case has been identified where this requirement caused difficulties.<sup>17</sup> In the one case cited by the Minister as an example of where the current legislation is causing problems, the decision to dismiss the case due to lack of reasonable grounds was overturned by the court of appeal.<sup>18</sup> The existing legislation therefore provides for adequate police search powers that work effectively while observing due process. More fundamentally, there is nothing wrong with the defence challenging the legality of searches where this is in doubt. It is the role of the defence to defend people with the means afforded to them by law and to uphold their client's right to freedom from unreasonable police searches.

### B Promotion to the public

Draconian measures to deal with street crime may only give the appearance of decisive action<sup>19</sup> and the illusion of greater control over criminal activity. The WA Minister for Police contends that confining stop and search powers to a declared area at designated times makes the proposed amendments less draconian than those proposed by previous governments which were not limited temporally nor to designated areas.<sup>20</sup> However, this does not detract from the fact that the proposed powers represent a significant erosion of a citizen's right to protection from arbitrary invasions of his or her privacy.

Just as proposed in previous stop and search legislation, the amendments empower police to search anyone without the protection of requiring a reasonable suspicion or, at least, consent. At present, reasonable suspicion protects citizens from being stopped based on demographics, or on previous convictions alone. Rather, there must be accurate information leading police to 'reasonably suspect' a person of an offence. Section 4 of the *Criminal Investigation Act 2006* (WA) explains that 'a person reasonably suspects something at a relevant time if he or she personally has grounds at

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<sup>15</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 11 November 2009, 8867-8868 (R Johnson).

<sup>16</sup> Giz Watson, *Submission to the Legislation Committee - Criminal Investigation Amendment Bill*, 15 January 2010, Legislation Council Parliament of Western Australia <<http://acpxp002.corpnet.customs:8080/ProgressMessages/Sub+05++Hon+Giz+Watson+MLC.pdf?proxy=10.4.9.38&action=complete&index=67&id=409784520&filename=Sub+05+Hon+Giz+Watson+MLC.pdf>>.

<sup>17</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 November 2009, 8993 (R Johnson).

<sup>18</sup> ABC News, 'Stop and Search Laws Debated', *Stateline WA*, 13 November 2009 <<http://www.abc.net.au/news/video/2009/11/13/2742738.htm>>.

<sup>19</sup> PAJ Waddington, 'Slippery Slopes and Civil Libertarian Pessimism' (2005) 15 *Policing and Society* 353, 363.

<sup>20</sup> ABC Radio, 'WA Government defends stop and search laws' 24 November 2009 <<http://www.abc.net.au/pm/content/2009/s2752251.htm>>.

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.’ The element of reasonableness is designed to ensure that facts exist ‘which are sufficient to induce that state of mind [i.e. suspicion] in the reasonable person’.<sup>21</sup> The codes of practice of the *Police and Criminal Evidence Act 1984* (UK) give more detailed guidance to the UK police on the meaning of reasonable suspicion:

There must be an objective basis for that suspicion based on facts, information, and/or intelligence which are relevant to the likelihood of finding an article of a certain kind ... Reasonable suspicion can never be supported on the basis of personal factors. It must rely on intelligence or information about, or some specific behaviour by, the person concerned. For example, ... a person’s race, age, appearance, or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other, or in combination with any other factor, as the reason for searching that person. Reasonable suspicion cannot be based on generalizations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity. A person’s religion cannot be considered as reasonable grounds for suspicion and should never be considered as a reason to stop or stop and search an individual.<sup>22</sup>

It is clear then that the requirement of a reasonable suspicion is designed 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’<sup>23</sup> by ensuring that police have an objectively justifiable reason to stop and search. This requirement should ideally reduce stops based stereotypes and generalisations or on personal factors, such as a person’s age or race, without something more to justify the suspicion.<sup>24</sup>

The Western Australian Minister for Police has given assurance to the community that sufficient safeguards exist to prevent police from randomly searching ordinary citizens.<sup>25</sup> However, so called safeguards against random and undisciplined responses are not included in the legislation but are instead left to standard police procedures.<sup>26</sup> Any police contact not based on reasonable grounds paves the way for arbitrary targeting. In seeking to diminish the impact that removing reasonable suspicion will have on random searching, the community have been advised that targeting will be based on statistics and intelligence.<sup>27</sup> However, stopping and searching based purely on the fact that a person belongs to a certain demographic, even if this demographic has been associated with high crime rates, is not acceptable. If police are going to target based on statistics and intelligence then the use of stop and search powers will not be

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<sup>21</sup> *George v Rockett* (1990) 170 CLR 101, [1990] HCA 26, [4].

<sup>22</sup> *Police and Criminal Evidence Act 1984*, Code A, [2.2].

<sup>23</sup> *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.

<sup>24</sup> See E Colvin, and J McKechnie, *Criminal law in Queensland and Western Australia* (Butterworths, 5<sup>th</sup> ed, 2008) [24.11].

<sup>25</sup> Western Australia, *Second Reading Speech*, Criminal Investigation Amendment Bill 2009, Legislative Assembly, 14 October 2009, 8024 (R Johnson).

<sup>26</sup> ‘Stop and Search Laws Debated’, above n 18.

<sup>27</sup> See O’Callaghan, above n 7.

random and the police will be forming a reason to stop the individual, in which case there should be objective grounds for that decision. If not we are opening the door to discriminatory policing and therefore there is every reason for decent citizens who belong to a certain group associated with a high crime rate to fear disproportionate targeting by police.

In order to allow scrutiny of the operation of such extended powers in WA and to ensure police force accountability, Janet Woollard MLA proposed that monitoring requirements be included in the WA Bill.<sup>28</sup> This proposal was, however, flat-out rejected by the Minister for Police.<sup>29</sup> Yet, to achieve the close monitoring that is necessary under stop and search legislation,<sup>30</sup> police should record full details of those searched and searches that lead to a charge. This would identify those who are searched repeatedly and identify whether there is disproportionate targeting of minority groups.

#### IV WHY THE DECENT PERSON HAS EVERYTHING TO FEAR

##### A Threat to Civil Liberties

Widening the reach of the law in order to provide police officers with increasing powers is risky and progressively erodes civil liberties.<sup>31</sup> Certainly, there is a risk of setting a precedent for exclusions in other legislation. Already the requirement that police have a reasonable suspicion before they stop and search a person has been eroded by s 69 *Criminal Investigation Act 2006* (WA), which allows these powers to be used with a person's consent in designated areas. Observations are that attrition occurs in increments, and leads to fewer protections as is the experience in the United Kingdom ('UK') with anti-terrorism laws.<sup>32</sup> Section 44 of the *Terrorism Act 2000* (UK) allows the Home Secretary to authorise stop and search without reasonable suspicion in any area of the UK for any time period.<sup>33</sup>

Currently, the law protects against arbitrary searching by virtue of consent and reasonable suspicion whereas the proposed amendments go beyond the general liberties of the ordinary person and increase the risk of unwarranted privacy violations. Liberal backbencher Abetz, however, finds such incursion on the rights of the individual 'is a

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<sup>28</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 November 2009, 8956 (J Woollard).

<sup>29</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 November 2009, 8956 (R Johnson).

<sup>30</sup> Alan Davenport, 'Stop and Search: Lawfulness of Extended Powers. R (on the application of Gillan and Another) v Commissioner of Police for the Metropolis and Another [2004] EWCA Civ 1067' (2005) 69 *The Journal of Criminal Law*, 25-28, 27.

<sup>31</sup> Waddington, above n 19, 356.

<sup>32</sup> *Ibid.*

<sup>33</sup> Although it must be noted that the European Court of Human Rights has recently 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. *Gillan and Quinton v The UK* [2009] ECHR 28, [87].

small price to pay for the safety and the security of our people.’<sup>34</sup> He comments that ‘the greatest threat to democracy is anarchy’ and in support of his point quoted his mother speaking of why there was support for Hitler in Germany:

... the streets were not safe. It was anarchy, so Hitler provided security to get people to follow him. People want security more than their liberty. That is the point.<sup>35</sup>

With all due respect, this is *not* the point. Western Australia is not on the verge of anarchy and cannot in any way be compared to the situation in Germany during the Weimar Republic.<sup>36</sup> Apart from being an ill-advised, extreme and inaccurate comparison this viewpoint follows the Orwellian logic of protecting the liberties of the populous by taking them away.<sup>37</sup>

With the emphasis firmly on making the community safer the potential invasiveness of these powers has also been downplayed. The WA Premier Colin Barnett has stated that police would only do a ‘very superficial’ search of people they suspected were carrying weapons or drugs.<sup>38</sup> Similarly, Rob Johnson, the Minister for Police, assures that the search will be ‘non-intrusive’ and may include having a metal detector run over a person’s body.<sup>39</sup> He notes that: ‘People tell me that they do not mind that sort of search because it is non-intrusive.’<sup>40</sup> Claims that the stop and search laws are invasive are swept away by the WA Minister for Police because a removal of clothing and frisk only occur once the metal detector reveals signs of a weapon.<sup>41</sup>

There are two points to be made in relation to these statements. Firstly, they diffuse attention from what is actually being changed. The power to conduct a basic search is not being altered by the proposed amendments; police remain at liberty, to search a person. What has been altered is the requirement that police have an objective reason to search the person. Secondly, marketing the search as a quick once-over with a metal detector principally serves to assuage the concerns of the general public. A public search is an invasion of privacy, and can be a humiliating and degrading experience. Even a ‘once over’ with a metal detector in the context of a night out with family and/or peers has the capacity to cause an individual a deal of embarrassment. Further, given

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<sup>34</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 November 2009, 8683 (P Abetz).

<sup>35</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 November 2009, 8683 (P Abetz).

<sup>36</sup> Mr Abetz did later state that he was not endorsing Hitler, but was highlighting the importance people place on security. ABC ‘Hitler cited over stop and search laws’, *ABC News* (online), 11 November 2009 <<http://www.abc.net.au/news/stories/2009/11/11/2740160.htm>>.

<sup>37</sup> AC Grayling, *Liberty in the age of terror. A Defence of Civil Liberties & Enlightenment Values* (Bloomsbury Publishing, 2009) 101.

<sup>38</sup> Amanda Banks ‘Jail for refusing police search’, *The West Australian* (online), 25 November 2009 <<http://au.news.yahoo.com/thewest/a/-/breaking/6512852/jail-for-refusing-police-search/>>.

<sup>39</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 November 2009, 8953 (R Johnson).

<sup>40</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 November 2009, 8953 (R Johnson).

<sup>41</sup> ‘Stop and Search Laws Debated’, above n 18.

that most people carry keys, wear a belt etc, a high proportion of people are likely to be subjected to further more invasive searches.

The effectiveness and success of the legislation relies on the assumption that the 'decent' person will submit to public stop and search for the greater good of the community. However, this underestimates the potential for ordinary law-abiding citizens to feel humiliated by the stop and search and thus for conflicts to arise by such persons seeking reasons for being stopped and refusing to comply. Here it must be remembered that although the analogy is often drawn to walking through a metal detector in an airport<sup>42</sup> this is not an appropriate comparison to draw. At the airport everyone must walk through a metal detector and there is no reason for a person to wonder why they have been asked to do so. In contrast, these stop and search powers will be used not universally; they will be used selectively. As A MacTiernan MLA, points out:

It is quite different from what happens at the airport. If the member can imagine, a person might be walking along the street and be singled out, grabbed and pushed up against a wall and have jacket and shoes taken off and a search done in full view of potentially hundreds of people in the streets of Northbridge, Armadale or Fremantle or wherever it may be.<sup>43</sup>

This selective use therefore has the potential to cause conflict where an ordinary law-abiding citizen feels unfairly targeted. As noted by the Scrutiny Panel of the Metropolitan Police in the UK, aside from the shame and humiliation associated with searches, disproportionate stop and search practices can also cause people to feel a diminished sense of belonging, fear, insecurity, disempowerment, anxiety, intimidation, helplessness.<sup>44</sup> Extending police powers may therefore decrease confidence in the police and have a high social cost.

### B *Disproportionate targeting and its application to WA Stop and Search*

The requirement of reasonable suspicion provides police with an objective standard with which to undertake their duties fairly and without discrimination. Discrimination on the basis of a person's characteristics may be in breach of article 26 of the *United Nations International Covenant on Civil and Political Rights*. Worryingly, the Amendment Bill does not contain a requirement that regulations detail how police are to use these additional powers and what their responsibilities are.<sup>45</sup> Therefore, the question

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<sup>42</sup> See, for instance, Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 November 2009, 8668 (P Abetz); see also E Ripper, referring to comments by C Barnett, the Premier of WA, *Parliamentary Debates*, Legislative Assembly, 12 November 2009, 8991.

<sup>43</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 November 2009, 8668 (A MacTiernan).

<sup>44</sup> Metropolitan Police Authority, *Report of the MPA Scrutiny on MPS Stop and Search Practice*, 2004.

<sup>45</sup> In fact R Johnson, Minister for Police, stated that a proposed amendment which would require 'guidelines setting out the obligations, responsibilities and manner in which powers are to be exercised by police officers ... are to be prescribed by regulation' would not be accepted by the government. Amendment moved by M Quirk, Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 November 2009, 8982 (M Quirk). Amendment rejected, 8989.



is raised: On what basis will decisions be made if there is no longer a requirement for reasonable suspicion and searches will not be universal? Research from Australia and overseas indicates that police profiling is often based on generalisations and negative stereotypes that are in part attributable to ethnic bias in police decision making.<sup>46</sup> Certainly this bias has been shown to influence police targeting in the UK where a correlation exists between arrest profiles and the likelihood of strip search. Demographics were found to increase a persons' vulnerability to strip searching, in particular males of ethnic origin.<sup>47</sup> Further a report of the UK Ministry of Justice has found that in 2008/09 a black person was 7.2% more likely and an Asian twice as likely as a white person to be stopped and searched by police.<sup>48</sup>

It is not only those from ethnic minorities which have something to fear, children in particular are likely to find a public search humiliating and embarrassing and yet there are no special provisions such as a requirement of parental consent under the proposed amendments.<sup>49</sup> The lack of protection afforded by the proposed changes could contravene article 18 of the United Nations *Convention on the Rights of the Child* ('CROC') which asserts a child should not be subject to arbitrary interference with his or her privacy. The police minister may cite weapons and violence as being the reason families avoid entertainment precincts such as Northbridge, however invasive searching of adults and children is unlikely to increase the attractiveness of the area.

### C *Ineffective and potentially unlawful*

Research in the UK has not shown that extended police powers are effective at combating violent crime. Indeed, it has been commented that 'such *suspicionless* searches rarely result in arrest'.<sup>50</sup> Furthermore, '[t]here just simply is no robust evidence showing that they have contributed in any way to the reduction of knife crime.'<sup>51</sup> In fact rather than being simply ineffective such extra powers may actually be harmful. When laws appear not to target genuine offenders this has the strong potential to alienate and cause distrust and resentment among the public, in particular ethnic minorities. 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

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<sup>46</sup> Harry Blagg and Meredith Wilkie, 'Young People and Policing in Australia: the Relevance of the UN Convention on the Rights of the Child' (1997) 3(2) *Australian Journal of Human Rights* 134.

<sup>47</sup> Tim Newburn, Michael Shiner and Stephanie Hayman, 'Race, Crime and Injustice? Strip Search and the Treatment of Suspects in Custody' (2004) 44 *British Journal of Criminology* 677.

<sup>48</sup> Ministry of Justice, *Statistics on Race and the Criminal Justice System 2008/09* (June 2010), 22. <<http://www.justice.gov.uk/publications/docs/stats-race-and-the-criminal-justice-system-2008-09c1.pdf>>.

<sup>49</sup> 'Stop and Search Laws Debated', above n 18. See also Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 November 2009, 8664 (M Quirk).

<sup>50</sup> B Bowling, "Zero Policy" (2008) 71 *Criminal Justice Matters* 6. The arrest figures are worst in relation to stops under s 44 *Terrorism Act 2000* (UK) with only around 1 in 400 stops under s 44 leading to an arrest in connection with terrorism.

<sup>51</sup> Professor B Bowling speaking on ABC, "WA set to introduce new stop and search laws", *7:30 Report*, 11 June 2010, <<http://www.abc.net.au/7.30/content/2010/s2924379.htm>>.

severs the link between the citizen and the law.<sup>52</sup> 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.’<sup>53</sup> Findings indicate that positive experiences and satisfaction are based on being given a reason and where reasons for the stop and search are not provided, people feel unfairly targeted.<sup>54</sup> The UK government has had to concede that the damage caused to community relations has outweighed the benefits and as feared, the powers have been misused and ethnic minority groups disproportionately targeted.<sup>55</sup> Prophetically, the European Court of Human Rights recently declared the extended stop and search powers in s 44 of the *Terrorism Act 2000* (UK) to be a violation of Article 8 of the *European Convention on Human Rights*.<sup>56</sup> Personal autonomy was considered undermined by police powers that require submission to a coercive search in a public place. These powers were judged to be too widely drawn and lacking adequate safeguards.<sup>57</sup> In aspects resembling those proposed in WA, the UK law has been declared unlawful. This could lead to the expectation that the WA laws would be considered to breach Article 17 of *International Covenant on Civil and Political Rights* (‘ICCPR’), to which Australia is a signatory.

## V CONCLUSION

The weight of evidence indicates that there is little, if any, need to alter existing laws in relation to police powers to stop and search in WA. Figures relating to weapon seizures indicate that current laws based on reasonable suspicion are working well. There is no clear evidence that police need extra powers in WA, nor is there evidence that such powers have led to reduced crime levels in those jurisdictions which have extended police powers.

More fundamentally, the suggestion that decent people have nothing to fear is a misrepresentation. Being an ordinary law abiding citizen does not afford protection against police targeting or invasive searching. Public searching has the potential to be invasive, embarrassing and degrading. Furthermore, dispensing with the requirement that police form a suspicion based on reasonable grounds opens the door for arbitrary and discriminatory searches. Thus, law-abiding members of minority groups and the most vulnerable in society are susceptible to disproportionate targeting based on biased judgements and stereotyping.

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<sup>52</sup> B Bowling, ‘Zero Policy’, (2008) 71 *Criminal Justice Matters* 7.

<sup>53</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 November 2009, 8837 (B Wyatt).

<sup>54</sup> Joel Miller, Paul Quinton and Nick Bland, ‘Police Stops And Searches: Lessons From A Programme Of Research’ (2000) Police Research Series Papers 127, *Home Office Policing and Reducing Crime Unit*, 1-6.

<sup>55</sup> Vikram Dodd, ‘Police to severely curtail use of stop and search powers’ *The Guardian* (online), 6 May 2009 <<http://www.guardian.co.uk/uk/2009/may/06/police-stop-and-search-reform>>.

<sup>56</sup> *Gillan and Quinton v The UK* [2009] ECHR 28.

<sup>57</sup> *Gillan and Quinton v The UK* [2009] ECHR 28 [87].

The legality of the proposed laws is also debateable. Although not applicable in Australia the ruling by the European Court highlights the unacceptable nature of laws that strip away the freedoms of the ordinary person. Removing reasonable suspicion and consent is tantamount to removing all legal protections afforded to a person under stop and search laws and cannot be substituted by limitations relating to designated areas and time restrictions. These additional safeguards do nothing to protect the individual from unfair targeting, or arbitrary searching. Rather the proposed changes open the door to intrusive, coercive searches that impinge on civil liberties in ways that are unacceptable and ultimately, unnecessary.