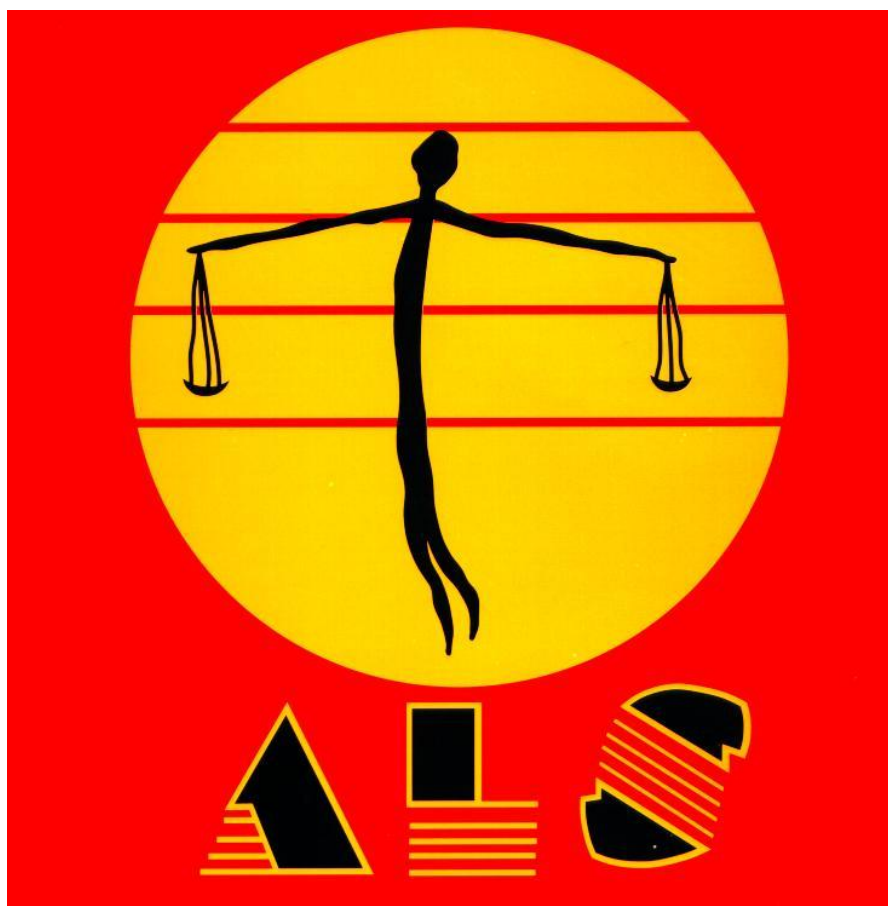


**ABORIGINAL LEGAL SERVICE OF WESTERN  
AUSTRALIA (INC.)**

**SUBMISSION TO THE LEGISLATION COMMITTEE  
LEGISLATIVE COUNCIL  
PARLIAMENT OF WESTERN AUSTRALIA**

**INQUIRY: CRIMINAL INVESTIGATION AMENDMENT BILL  
2009 (STOP AND SEARCH LAWS)**

**JANUARY 2010**



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## 1. Introduction and scope of the submission

The Aboriginal Legal Service of Western Australia (Inc.) (ALSWA) prepared this submission in response to an invitation from the Hon Michael Mischin MLC, Chair of the Standing Committee on Legislation Committee (Committee), after the Legislative Council referred the *Criminal Investigation Amendment Bill 2009* (the Bill) to the Committee for inquiry and report by 25 March 2010.

ALSWA was invited to provide a written submission on:

- matters relating to the scope, purpose, and structure of the Bill, and
- matters of interpretation of the Bill as drafted, or the likely or possible extent and application of its provisions.

ALSWA welcomes the opportunity to address the Committee to further explain and discuss our objections to the proposed legislation.

ALSWA has grave concerns regarding the introduction of the Bill that proposes to increase police powers to stop and search people in prescribed or declared areas without their consent or the ordinary circumstances of forming a reasonable suspicion that the search is necessary. These extremely wide powers will have a disproportionate effect on vulnerable groups such as Aboriginal and Torres Strait Islander (Aboriginal)<sup>1</sup> peoples and inevitably impact on our already over-burdened Western Australian court and prison systems, increase the risk of police misconduct and constitute grave breaches of fundamental human rights.

The following submission will briefly refer to the work of ALSWA, matters relating to the scope, purpose and structure of the Bill, interpretation of the Bill, including the Bill's impact on Aboriginal peoples and how the proposed new powers breach Australia's international human rights obligations.

## 2. About ALSWA

ALSWA is a community based organisation that was established in 1973. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law as well as human rights law and policy. Its services are available throughout Western Australia (WA) via 17 regional and remote offices and one head office in Perth.

ALSWA is a representative body with 16 executive officers<sup>2</sup> elected by Aboriginal peoples from their local regions to speak on law and justice issues.

ALSWA is a legal service provider solely for Aboriginal peoples living in WA and makes submissions on that basis.

Submissions are prepared by ALSWA in consultation with the Chief Executive Officer, Director of Legal Services, Executive Officer, Lawyers and Court Officers. All Court Officers are Aboriginal people and represent Aboriginal people in the Magistrates Courts and the Children's Court under section 48 of the *Aboriginal Affairs Planning Authority Act 1972* (WA).

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<sup>1</sup> ALSWA refers to Aboriginal peoples and Torres Strait Islander peoples as Aboriginal peoples in this submission.

<sup>2</sup> There are two Executive Officers for each of the former 8 ATSIC regions (Metropolitan, Central Desert Region, Murchison/Gascoyne Region, Southern Region, Pilbara Region, Goldfields Region, West Kimberley Region and East Kimberley Region). They are elected by Aboriginal peoples every three years.

Each regional office has a Court Officer who provides an understanding of local issues. In more remote areas, Court Officers are often the only local permanent legal service dealing with all aspects of the legal system.

### 3. The Criminal Investigation Amendment Bill 2009

The Bill extends police powers to stop and conduct a ‘basic search’<sup>3</sup> on people or vehicles, without the need for the person’s consent nor does the police officer need to hold a reasonable suspicion that it is necessary to conduct the search for the purposes of safeguarding the place or people entering the place.<sup>4</sup>

For the reasons outlined below, ALSWA strongly opposes the introduction of the Bill.

<b>Recommendation 1:</b> The Bill be withdrawn by parliament.
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#### 3.1 Purpose of the Bill

The Bill was introduced “in response to an increasing concern by government, police and the community in relation to the proliferation of weapons and the increasing number of incidents of violence and antisocial behaviour in entertainment precincts.”<sup>5</sup>

ALSWA acknowledges the importance of protecting the community from violence and antisocial behaviour. There is a lack of objective evidence of the extent of this behaviour or any exploration of alternative measures to reduce or manage this behaviour in WA. The Second Reading Speech and Explanatory Memoranda fail to make any clear statement about seeking to actually reduce antisocial behaviour by exploring why it is occurring and how it can most effectively be reduced or managed. The Minister for Police instead accepts the occurrence of antisocial behaviour and suggests that increased police powers that will breach our fundamental human rights are the *only* way to respond to increasing community concerns.<sup>6</sup>

There is no evidence that increased police powers are the most effective mechanism for reducing violence and antisocial behaviour.

There is no evidence to support why the Bill should remove the test of reasonable suspicion when police exercise the proposed increased powers to stop and search people. ALSWA notes that national anti-terrorism laws are the only other laws that dispenses with such fundamental protections of civil liberties.<sup>7</sup> Protecting the nation from threats of terrorism is radically different to community concerns about antisocial

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<sup>3</sup> Which includes using a metal detector, removing the outer layer of clothing and carrying out a ‘frisk search’, *Criminal Investigation Act 2006* (the CIA Act), ss 63 and 70, and the Bill Clause 5.

<sup>4</sup> The Bill, Clause 6.

<sup>5</sup> R. Johnson, Minister for Police, Second Reading Speech, “Criminal Investigation Amendment Bill 2009”, Legislative Assembly, Hansard p. 8024b, 14 October 2009.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Anti-Terrorism Act (No.2) 2005* expanded the federal, State and territory police powers to stop, question and search persons for the purposes of investigating and preventing terrorism. The Federal Attorney-General can declare a ‘prescribed security zone’ if the Attorney considers that this will help prevent a terrorist act or help respond to a terrorist act. The police can use their stop, search, questioning and seizure powers on anyone in the prescribed security zone, regardless of whether the police officer has a reasonable suspicion that the person has committed, is committing or is planning to commit a terrorist act.

Australian Human Rights Commission, ‘A Human Rights Guide to Anti-Terrorism Laws’ accessed 21/01/10 [http://www.hreoc.gov.au/legal/publications/counter\\_terrorism\\_laws.html#4\\_3](http://www.hreoc.gov.au/legal/publications/counter_terrorism_laws.html#4_3)

behaviour in Perth's entertainment precincts. ALSWA submits that measures to deal with antisocial behaviour and violence in WA do not require the same measures for dealing with terrorist threats.

Antisocial behaviour and violence in the community are community issues requiring community solutions. Any solutions must be respectful of the rights of community members to use public places peacefully, non-violently and without being subjected to criminal offences. The lack of community consultation to address these issues focuses solely on a short-sighted police-only response.

Any proposed action to protect the public should:

- Be targeted at the specific problem identified (i.e. alcohol fuelled violence);
- Be evidence-based and justified;
- Only limit human rights to the extent strictly necessary to address the problem; and
- Be based on consultation with interested and experienced groups as to the smartest and best way to address the issue.

**Recommendation 2:** That the government make publicly available the evidence of violence and antisocial behaviour in each entertainment precinct to enable an objective assessment and increased understanding about antisocial behaviour and where it occurs, including in comparison to crime rates in the rest of WA.

**Recommendation 3:** That the government provide evidence that increased police powers are effective in reducing violence and antisocial behaviour.

**Recommendation 4:** That the government provide funding for independent research to determine priority areas for crime reduction based on evidence of antisocial behaviour, and provide a range of options for taking action to reduce crime and protect the community.

**Recommendation 5:** That the government establish a consultative process to consider how to best address concerns about antisocial behaviour in the community.

### 3.2 Structure of the Bill

The Bill is structured with five clauses that amend, delete and introduce new sections to the *Criminal Investigation Act 2006* (WA) (the Act). The structure of the Bill is clearly outlined in the Explanatory Memoranda and is therefore not necessary for ALSWA to elaborate further as we are more concerned with the scope and matters of the Bill's interpretation.

### 3.3 Scope of the Bill

The scope of the Bill is dangerously wide in terms of the geographical area, the duration for which the powers can operate, the number of searches that can be carried out, and to whom the Bill applies.

The Bill provides for the increased police powers to operate in "designated areas," which are simply stated in the Regulations.<sup>8</sup> This means for example, the Regulations may

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<sup>8</sup> The Bill, Clause 4.

state that Northbridge entertainment precinct is a designated area. The proposed laws would then operate in Northbridge at any time and for any period.

The Bill then also provides that the Commissioner for Police can declare any other area for which the laws would apply for a maximum of two months, so long as the Minister approves it and the declaration is published in the Government Gazette.<sup>9</sup> There are no other limits or procedures for making such a declaration, such as being based on evidence of high levels of antisocial behaviour.

The lack of procedural safeguards for determining designated and declared areas are far-reaching, excessive and arbitrary. There is no requirement in the Bill that declared areas be based on evidence of higher crime rates or intelligence that crime is likely to occur, nor is there any reasonable time limit to stop the powers being used at any time in these places.

Of further concern is the lack of safeguards to in the Bill to stop police from repeatedly searching the same person or people in a designated or declared area, so that a police officer would be permitted to search someone 10 times for no reason whatsoever and without that person's consent. Similarly, the demographic scope of the Bill is unlimited without any restrictions or protections for children or other vulnerable groups.

**Recommendation 6:** That the government publish information about what evidence and other criteria are used to determine designated and declared areas.

**Recommendation 7:** That the government be required to consult with members of the community in areas that the Commissioner of Police is considering declaring, and that the process of consultation is detailed with the declaration when it is published in the Government Gazette.

**Recommendation 8:** That the government erect signage in designated and declared areas and engage in a community education campaign about the proposed laws so that members of the public are aware of their rights and responsibilities when entering such areas, including specific funding to ALSWA to provide culturally appropriate education to Aboriginal peoples.

**Recommendation 9:** That the Bill be amended to limit the operation of the proposed new laws in declared areas for a maximum of 48 hours at any particular time.

**Recommendation 10:** That the Bill be amended to include a limit on the number of times an individual can be searched in a 24 hour period.

**Recommendation 11:** That the Bill be amended so that it does not apply to persons under the age of 18.

**Recommendation 12:** That the Bill be amended so that police are required to issue a notice prescribed by regulation to every person stopped for the person of carrying out a search, which clearly states the following:

- a. Name and station of the police officer.
- b. Legal basis for the stop.
- c. The person's rights.
- d. The reason the person has been stopped and searched.

<sup>9</sup> The Bill, Clause 5.

- e. Why the police chose that person.
- f. What the police were looking for and indicate what they found (if anything).

**Recommendation 13:** That the Bill is amended so that police are required to consider whether the person identified to be searched may be suffering a mental illness and whether it is reasonable in the circumstances to carry out the search.

**Recommendation 14:** That the Bill is amended so that in the event that the services of an interpreter are not available, a police officer must consider whether the person identified to be searched is able to understand English and provide a notice in a form prescribed by regulation and setting out in a number of languages, including Aboriginal languages and in a culturally appropriate way, that person's rights and explain the purpose and nature of the search about to be conducted.

**Recommendation 15:** That police receive ongoing cultural awareness and other training about interacting with Aboriginal peoples and people with a mental illness and the way these peoples are likely to react to being stopped for no reason by police.

## 4. Matters of Interpretation

ALSWA is extremely concerned about the disproportionate impact the Bill will have on Aboriginal peoples, and the way in which the Bill breaches fundamental human rights.

### 4.1 Impact on Aboriginal peoples

Aboriginal peoples in WA have been disproportionately and detrimentally affected by government policies since colonisation through many acts and omissions including dispossession of traditional lands, lack of citizenship, economic and social marginalisation, limited access to services and protection and assimilation policies. The impact of these previous policies is still felt by Aboriginal peoples in contemporary society and many are born into disadvantaged and dysfunctional family backgrounds.

Aboriginal peoples are more likely to be on the streets and occupying public spaces in a different and more visible way to the rest of society for the following reasons:

- legacy of racist policies that denied Aboriginal peoples the right to own property causing a current lack of ownership and access to private spaces in which to gather;
- Cultural reasons, for example family obligations and commitments;
- in the case of homeless people, they do not have a choice; and
- in the case of young people, they may not have other suitable places for leisure and entertainment and like to be outdoors.

Aboriginal peoples are therefore more likely to be targeted by police in designated or declared areas and feel the effects of these oppressive laws more than mainstream society. This is particularly concerning in light of the already overwhelmingly high level of contact Aboriginal peoples and in particular young Aboriginal peoples have with the criminal justice system and the disproportionately high level of Aboriginal peoples in custody.<sup>f0</sup>

<sup>f0</sup> A total of 40% of the adult and 78% of the juvenile prison populations in WA were identified as Aboriginal during the week of 14 January 2010, <http://www.correctiveservices.wa.gov.au/files/Prison%20Count/ctn100114.pdf> at 21/01/10.

Of further concern to ALSWA is the impact of the operation of the proposed laws with new mandatory sentencing laws for assaults on public officers causing injury.<sup>11</sup> Aboriginal peoples may feel justifiably aggrieved if they are approached by police and searched for no reason. Some may react violently and lash out causing injury to a public officer bringing them within the scope of mandatory sentencing and increasing already high rates of imprisonment.

**Recommendation 16:** That police officers receive ongoing cultural awareness that includes the reasons why Aboriginal peoples occupy public spaces, to avoid targeting and discrimination against Aboriginal peoples.

**Recommendation 17:** That data should be collected on the use of the powers as follows:

- a. Police officer's details
- b. Date, time and place of the stop and search.
- c. The reason for the stop.
- d. A police assessment of the ethnicity, and aboriginality of the person.
- e. Vehicle registration (if any).
- f. What the police officer was looking for (if anything).
- g. What the police actually found (if anything).
- h. Name or description of the person stopped (if the person doesn't give their name).
- i. Whether the person is homeless.
- j. Whether the person has a mental illness or physical disability.
- k. Gender of the person stopped.

Such data should be made available to the public every six months.

**Recommendation 18:** That the Bill be amended to state that the intent of establishing designated areas is not to profile groups in a discriminatory manner, i.e. young people or on the basis of race. The Bill should be amended to read: It is unlawful for the powers in this Act to be exercised in a manner that directly or indirectly discriminates against a person on the basis of their race, religion, age, poverty, disability, homelessness, gender or sexual preference. If a power has been exercised in a discriminatory manner any fines or charges resulting from that use of power should be void.

## 4.2 Australia's International Human Rights Obligations

The proposed extension of police powers to carry out searches on people without their consent or need for reasonable suspicion seriously breaches Australia's obligations under the *Universal Declaration of Human Rights* (UDHR), the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention on the Rights of the Child* (CROC). Australia is a party to each of these instruments, which means the Australian government, including the government in WA, has a duty to ensure that all people enjoy the rights set out in those instruments.

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<sup>11</sup> *Criminal Code Amendment Bill 2008* (WA) amended ss 297 and 318 of the *Criminal Code Compilation Act 1913* (WA).



### ***The right to privacy and freedom from arbitrary interference<sup>12</sup>***

The search of a person is an intrusion on a person's privacy, and is concerned with personal autonomy and dignity.<sup>13</sup> The proposed powers to search without consent or the need for reasonable suspicion constitutes a grave breach of the fundamental right to privacy and freedom from arbitrary interference.

### ***Freedom from discrimination<sup>14</sup>***

The proposed laws dispense with the need for police officers to hold a reasonable suspicion that a search is necessary for safeguarding the place or people entering the place. This means police officers can search any person in a public place for any reason, prejudice or assumption of the police officer. This may include searches of young people, Aboriginal peoples, homeless people, someone that speaks to the police officer in a way the officer doesn't like or someone that reminds the police officer of someone they don't like or whom they have a grudge against.

ALSWA notes the Corruption and Crime Commission has stated the proposed new powers will increase the risk of misconduct of police officers and result in an increase in complaints against police officers.<sup>15</sup>

### ***Right to liberty and bodily integrity<sup>16</sup>***

People would be detained by police for the purpose of the search being carried out, therefore amounting to a deprivation of liberty for no justifiable reason. Whilst it may be necessary to conduct a search in some circumstances, the extensive power to search without forming a reasonable suspicion that it is necessary to do so gives police permission to breach these rights for no clear reason.

### ***Right to presumption of innocence<sup>17</sup>***

The ability of police to search for no reason presumes all people are guilty rather than innocent and is therefore a breach of this important human right.

### ***Rights of the child<sup>18</sup>***

The best interests of the child should always be the primary consideration in all actions concerning children. There is no justification for police officers having the power to stop and search children where there is no reasonable suspicion they may be a threat to community safety. This type of contact with police can be traumatising for children and damage their perception of public authority. Children are afforded special protection of their right to privacy and freedom from arbitrary interference under international law, which is gravely breached by the proposed new powers.

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<sup>12</sup> UDHR article 12, ICCPR article 17, CROC article 16.

<sup>13</sup> Cameron, Minister for Police and Emergency Services, 'Summary Offences and Control of Weapons Acts Amendment Bill,' Statement of Compatibility, Hansard Parliament of Victoria, 12 November 2009, p 4021.

<sup>14</sup> UDHR article 7, ICCPR article 26.

<sup>15</sup> ABC News, 'CCC concerned about new police powers,' 25 November 2009, <http://www.abs.net.au/news/stories/2009/11/25/2753680.htm> accessed on 12/01/10.

<sup>16</sup> ICCPR article 9.

<sup>17</sup> UDHR article 11, ICCPR article 14.

<sup>18</sup> CROC articles 16 and 3.

***Freedom of movement,<sup>19</sup> Freedom of speech,<sup>20</sup> freedom of peaceful association<sup>21</sup> and the right to peaceful assembly***

The proposed laws mean that police could declare an area where they know a public protest may be planned, or where a music festival or concert has been organised. Police would then have the power to search anybody in the area, including protesters, innocent bystanders and music lovers, without reasonable suspicion or consent, thereby infringing these important rights.

**Recommendation 19:** That the Bill be amended to include procedures for handling complaints by members of the public subject to a search.

**Recommendation 20:** That the Bill be amended so that proposed new powers cannot be applied in response to public demonstrations or protests.

## **5. Conclusion**

The proposed increase of police powers to conduct searches in public places in designated or declared areas, without the person's consent or the normal requirement of police holding a reasonable suspicion that a search is necessary for safeguarding people in such places, go far beyond what is reasonable and necessary to protect the community from public violence and antisocial behaviour in WA. Indeed these types of powers currently exist for dealing with threats of terrorism, which ALSWA submits is vastly different to community safety needs in WA.

The proposed laws will disproportionately impact on vulnerable groups and constitute serious violations of Australia's obligations under international human rights law.

ALSWA urges the Committee and government of WA to withdraw the Bill. Failing its withdrawal, the recommendations outlined in this submission are necessary for attempting to safeguard the public from over policing and breaches of our fundamental human rights. Furthermore ALSWA suggests greater efforts are necessary for adopting an evidence based approach to understanding and tackling public violence and antisocial behaviour, which includes consulting the community about the most effective methods for dealing with these situations.

## **6. List of Recommendations**

**Recommendation 1:** The Bill be withdrawn by parliament.

**Recommendation 2:** That the government make publicly available the evidence of violence and antisocial behaviour in each entertainment precinct to enable an objective assessment and increased understanding about antisocial behaviour and where it occurs, including in comparison to crime rates in the rest of WA.

**Recommendation 3:** That the government provide evidence that increased police powers are effective in reducing violence and antisocial behaviour.

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<sup>19</sup> UDHR article 13, ICCPR article 12.

<sup>20</sup> UDHR article 19, ICCPR article 19.

<sup>21</sup> UDHR article 20, ICCPR articles 21 & 22.

**Recommendation 4:** That the government provide funding for independent research to determine priority areas for crime reduction based on evidence of antisocial behaviour, and provide a range of options for taking action to reduce crime and protect the community.

**Recommendation 5:** That the government establish a consultative process to consider how to best address concerns about antisocial behaviour in the community.

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- g. What the police actually found (if anything).
- h. Name or description of the person stopped (if the person doesn't give their name).
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Such data should be made available to the public every six months.

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**Recommendation 19:** That the Bill be amended to include procedures for handling complaints by members of the public subject to a search.

**Recommendation 20:** That the Bill be amended so that proposed new powers cannot be applied in response to public demonstrations or protests.