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Extended 'Stop and Search' Powers in Australia: A challenge for relations between police officers and citizens

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Extended 'Stop and Search' Powers in Australia: A challenge for relations between police officers and citizens

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Introduction

This paper will provide an investigation, both theoretical and empirical, into the use of 'stop and search' powers in Australia. It will provide a detailed analysis of the legislation, its impact and the implications surrounding 'stop and search' powers in Western Australia and, in part, Victoria and the United Kingdom. The Commonwealth Heads of Government Meeting (Perth, October 2011) has also provided a unique opportunity to study a range of special policing laws and potential problems.

Background

In 2009, the Victorian Government passed laws giving police new powers to search anyone (including children) in designated areas, without any suspicion of wrongdoing. Under the Summary Offences and Control of Weapons Acts Amendment Bill 2009, any area can be designated a "weapons search area" if violence has occurred there in the previous 12 months or violence or disorder is likely to occur.

Then Premier John Brumby had argued that violent knife attacks had spiraled out of control in places such as London and other large cities around the globe. "We need to nip this problem in the bud... We've got kids as young as 10 or 11 who have been picked up carrying knives that they intend to use on someone. So we've got to send a message" (cited in Austin, 2009).

The Barnett Government's 'stop and search' legislation has also attracted much scrutiny. Similar to circumstances in Victoria, a wide range of data had been used in this debate as evidence of the supposed increase in violent crime in WA. Minister for Police Rob Johnson stated that "I have said from the outset that these laws are a priority for me and they remain so. Police are now well advanced in progressing this

legislation." (see Johnson 2009a). The Government strategically focused much of the debate on giving police the power to combat delinquency, knife 'culture' and related problems, such as the abuse of alcohol that had been surfacing in the popular nightclub suburb of Northbridge. Nonetheless, in reality, based on the legislation, police would be able to invoke the power to 'stop and search' targeted people wherever they choose.

Introduced in October 2009, the Criminal Investigation Amendment Bill sought to amend the Criminal Investigation Act 2006 to extend police search powers. The Bill was seen as a response to the "increasing concern from the government, police and community in relation to the proliferation of weapons and increasing amount of violence and antisocial behavior in entertainment precincts" (Johnson 2009b). The laws would give police unrestricted powers to stop and search anybody they choose in specified areas at specified times. Police would not have to justify their actions under the requirement of reasonable suspicion of criminal activity - until now an entrenched safeguard in traditional laws. Instead, the safeguard of reasonable suspicion would be stripped from the process (see section below). The laws would apply for up to 12 months in prescribed areas, but ultimately the Police Commissioner - with the approval of the Police Minister - would be able to designate areas where the powers could be used for up to two months.

In October 2010, the Western Australian Legislative Council Standing Committee on Legislation's report into stop and search laws stated that "after considering [the Bill], a majority of the Committee (comprised of the Hon. Mia Davies MLC, the Hon. Dr Sally Talbot MLC, and the Hon. Alison Xamon MLC) could find no justification for the Bill". Out of the 21 submissions to the committee, there was only

one submission in favor of the random search powers – from the WA Police Union. In November 2010, WA's five upper house National MPs effectively killed the proposed Bill by refusing to support the police push for reform. The decision resulted in a rare break in ranks from their government partners, the Liberal Party, who were relying on National party support to get the laws successfully through parliament. Widespread concerns included a lack of procedural oversight, potential breaches in human rights and that arbitrary stop and search powers might be improperly used by police officers (Standing Committee On Legislation 2010, i).

Commonwealth Heads of Government Meeting 2011

In January 2011, WA Police Union president Russell Armstrong stated police would need enhanced powers to stop and search people during the Commonwealth Heads of Government Meeting (CHOGM). CHOGM was held in Perth in October 2011. WA Police Minister Rob Johnson (2011) stated that, given the possibility of protests and disruptive behavior, police would need extra powers during the course of the international event to deal with crime and antisocial conduct. Labor frontbencher Margaret Quirk added that the opposition would support stop and search laws to ensure "world's best practice security" as long as they replicated NSW police powers laws that had been adopted for the duration of the APEC summit in 2007 (cited in AAP, 2011). Interestingly, the 'one-off' APEC laws she referred to had again been resurrected and repackaged for Pope Benedict XVI's visit to Sydney in 2008.

In February 2011, the WA government introduced legislation into parliament giving police officers special powers to monitor, search, and exclude targeted protesters during CHOGM. On July 2011, these new laws were passed in State Parliament. The CHOGM Special Powers Act gave police and other authorized people increased security powers such as the ability to stop and search people in designated security areas, and to close roads. Further, the new law provided for police officers to examine anyone, including juveniles, suspected of wanting to harm people and facilities associated with CHOGM. Under the act, police would also be able to order people to walk through an electronic screening device or to have their

belongings X-rayed. And police would have the power to search vehicles or vessels, order people to provide their personal details and set up check-points and road blocks around isolated security areas.

The 'reasonable suspicion' requirement

It is worth noting that the statutory basis for stop and searches by the police in the UK is contained in the Police and Criminal Evidence Act 1984, which provides that the police can stop and search any individual if they have reasonable suspicion that a crime has been, is being, or is about to be committed. Section 60 of the Criminal Justice and Public Order Act 1994 and section 44 of the Terrorism Act 2000 also allowed officers to use stop and search where there is a threat of public disorder or to prevent acts of terrorism. However, it is this 1994 and 2000 legislation that denoted a departure from traditional requirements that police demonstrate 'reasonable suspicion' on the part of the individual officer.

Similarly, under the Barnett Government's proposed stop and search legislation, police in WA would no longer require having a prerequisite of reasonable suspicion before searching someone within a designated area.

It is this basic facet of the legislation which has caused concern in the broader community. The inclusion of reasonable suspicion requires police to justify and validate their behavior when searching individuals. The notion that public officers should have to explain the basis for their conduct is in many people's eyes a key element of accountability in government. Such accountability is especially important in the area of security, since the wielding of force should always be publicly justifiable, whether it involves searching, detaining, or charging people. If a public officer cannot justify the exercise of force, or related provisions such as the searching of mobile phones and laptops, the public is entitled to question whether increased police powers and invasions of the privacy of citizens are legitimate.

CHOGM as a justification for permanent laws

One of the concerns raised by opponents of expanded stop and search powers, was that the special legislation enacted for CHOGM would lead to demands for such powers on a permanent

basis. This view was expressed by opposition MLC Kate Doust, who stated that her support for the legislation was conditional on it remaining a unique and exceptional circumstance (Doust 2011).

Section 83 of the CHOGM legislation required the police commissioner to complete a review of the operation and effectiveness of the Act within three months of its expiry date. A report based on this review would be completed within one month and handed to the Minister, who was required to table it in parliament. Accordingly, the report, entitled "Report on the Operation and Effectiveness of the Commonwealth Heads of Government Meeting (Special Powers) Act 2011" was tabled in WA's state parliament on 22 March 2012. In it the police argued that the laws had played a major role in the success of CHOGM and that they should be enacted permanently. In addition, the report argued that there were "no major incidents, minimal disruption to the public and, importantly, the safety, security and dignity of CHOGM invited guests was maintained" (WA Police 2012). In total, there were 72 people searched and 6 arrested in CHOGM-related incidents.

There were however, several media reports at the time, where members of the public complained that they had been treated unfairly. One activist, Sean Gransch, was charged with breaching an exclusion notice and entering a security area. Mr Gransch claimed that due to his exclusion he was unable to continue his employment, which required him to work in exclusion zones, building the stage for the CHOGM closing event (Robertson 2011) In another report, a university student claimed that she had the home of her partner's parents raided without explanation, had her phone and other belongings confiscated, and that she could not attend her university, or catch public transport in the city (Searchforyourrights 2011) Other activists who were suspected of criminal behavior but released without charge, complained of similar unfair treatment (Trenwith 2011).

Whilst the CHOGM report claimed that they "exercised the special powers provided by the Act in a judicious, responsible and least restrictive manner" (WA Police 2012), the incidents above do suggest that this assertion and other key ones like it will remain contested. The report, whilst informative and noteworthy, should not provide an automatic basis for the

permanent extension of stop and search powers, as its author suggests.

Potential Problems

Despite police advocacy, a number of critics have expressed concerns about the broader WA stop and search legislation. In the eyes of The Law Reform Commission of Western Australia, the legislature must balance two competing issues - both of vast consequence: "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".

As such, some critics have argued that WA (and Victorian) police already have sufficient powers to maintain public order and safety without the use of stop and search powers. The WA Law Society's Hylton Quail pointed out that police already have extensive powers to stop and search, and that events like CHOGM are no justification for removing the requirement for reasonable suspicion before police make a search (cited in Banks 2010). Others have countered that such new powers to stop and search anybody, without a search warrant, can have unforeseen consequences for particular groups (see below). The idea of disproportionality in stop and search refers to the extent to which police powers have been used against different groups of people 'in proportion' to the demographic profile of the general population. In short, stop and search legislation has a track record of creating a disproportionate affect on marginalized groups - an outcome that might continue to strain community relations with police and therefore lead to a greater sense of insecurity and anxiety (Bowling and Phillips 2007).

The broader challenges regarding the perceived legitimacy of stop and search powers have also found application in sociological/psychological studies about the relationship between citizens and the law (see Darley et. al. 2003). Perceptions of fairness and unfairness of outcome, as opposed to the threat of sanction for disobedience, can drive people's willingness to obey or disobey the law. In other words, legitimacy derives from the beliefs and feelings people hold about the normative appropriateness of government structures, officials, and processes. Of central importance is the belief that rules and regulations are entitled to be respected

(and accepted) by virtue of who made the decision and how it was made. According to such a perspective, people's support for police and compliance with the law is based on a normative belief that the police exercise legitimate authority to make certain decisions (see Tyler 2006). Or as Kelman (1969, 278) has argued, "...it is essential to the effective functioning of the nation-state that the basic tenets of its ideology be widely accepted within the population". In the case of the stop and search powers proposed for WA, the removal of "reasonable suspicion" carries with it the removal of a key justification for arbitrary searches, thereby contributing to public skepticism regarding fairness of application.

Procedural justice refers to police decision-making that is viewed by individuals as fair, objective and trustworthy. Tom Tyler (1990), in his seminal work *Why People Obey The Law*, states that people obey the law because they trust in the legal system and the checks that courts provide on police powers. Therefore, if police appear to be getting illegitimate powers, there is less likelihood that people will obey the law. Subsequent studies have strongly supported the argument that procedural justice, and the character of legal authority, continues to shape reactions to legal rules and policies (see Tyler and Huo 2002, Tyler and Degoey 1995). Criminologists such as Marian Fitzgerald (1999) have previously claimed that 'stop and search' powers in locations such as the UK lacked adequate safeguards and that minorities might be unfairly targeted. In contrast, studies of community efforts to combat crime and urban disorder have demonstrated that the police can benefit from the active cooperation of people in specific neighborhoods (Sampson and Jeglum-Bartusch 1998).

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

A central stated aim of both WA and Victorian policy initiatives is to prevent individuals or groups from carrying and using weapons in entertainment precincts (see Standing Committee On Legislation 2010, 170).

The stop and search legislation introduced in the United Kingdom can provide a useful comparison with Australian proposals and practices. For example, in a recent review of stop and search powers to prevent knife violence in

the UK, research has indicated that, in locations with a high level of searches by police, knife crime had actually increased (Travis, 2010). A similar study concluded that knife carriage is an offence commonly carried out by young people out of an impulse to protect and guard themselves – behavioral patterns that are fuelled by fear and a sense of insecurity (Bondy et. al. 2005, 112).

Simultaneously, research in the UK has shown that extended police powers are not automatically effective at assisting convictions for violent crime. It has been commented that "...such suspicionless searches rarely result in arrest" (Bowling, 2008). Concerns over the legislation's limited efficacy and potential shortcomings in the UK have been 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 2011, just 0.2 – 0.5% were arrested (Dodd 2011). At the same time, the stop and search legislation introduced in the UK, under the Terrorism Act 2000, provides an instructive comparison to some of the core issues that police and policymakers are likely to encounter here when dealing with stop and search powers. In particular, it has been claimed that the powers have been disproportionately used against peaceful protesters and ethnic minorities (Bowling and Phillips, 2007). Again there have been specific concerns in both WA and Victoria that vulnerable groups like homeless centres and refuges could be targeted under the new legislation (Standing Committee on Legislation 2010, 170).

Certainly, issues emerging from the UK include the fact that despite hundreds of thousands of searches, no terrorism charges have resulted from the new powers. Disturbingly, it has been demonstrated that black and Asian Britons are between 5 and 7 times more likely to be stopped and searched under these powers than their white counterparts (Home Office 2007). Debates have predominantly focused on higher rates of stop and search as a result of a person's ethnicity, but the issue will be relevant to other social categories, such as age and class (Waddington et al. 2004). At the same time, in January 2010, the European Court of Human Rights had ruled the UK laws, known as Section 44, were too widely drawn and illegal (BBC News, 2010). In response, both the UK Government and police acknowledged some of the inherent problems

with stop and search and pledged to introduce a far more tightly prescribed control and oversight framework. Human rights lawyers responded by supporting government initiatives to try to move away from sweeping stop and search powers that had antagonized the public. Corinna Ferguson, who participated in the High Court challenge to Section 44, said "...it was a very blunt instrument that never caught a single terrorist but instead alienated ethnic minorities and peaceful demonstrators by its use" (BBC 2012).

Interestingly, in August 2011, there had also been a series of widespread riots and looting in major cities in the UK. Whilst the exact cause of these incidents is controversial, some have pointed to links between social unrest and the blunt application of 'stop and search' powers in the UK (Prasad, 2011). At the very least, there is strong evidence of a deteriorating relationship between police services and specific sections of the UK community for some time (Townsend, 2012).

Policy Relevance

In regard to policy relevance, it is unrealistic and unhelpful to demand that policing should be perfect. However, any development in policing and 'stop and search' should strive to work fairly, effectively and be conducted correctly according to the relevant legislation, while respecting basic human rights and building on public trust.

Many areas of police work are not subject to specific rules, regulations or policy guidance. Smith and Gray (1983) have described these areas of discretion as "policy vacuums". Rules tend to be general in character and exhibit problems of ambiguity and uncertainty of meaning. They can also be accidentally or even deliberately vague (Hart 1961). This causes problems in the exercise of police discretion, making conflicting perceptions of appropriate police work possible and even likely between police and citizens. Much policing is of the 'order maintenance' kind (Packer 1968). While the appropriateness of police responses to particular situations is open to different interpretations, its significance is exacerbated by disparities of power which typically characterize relations between police officers and citizens. The police officer has at his or her disposal the ability to embarrass, humiliate and even harm the citizen. Further while the introduction of various

policing innovations has been a significant first step, at the very least, it can be argued that expanded police powers must be followed by regular monitoring, and complemented by accessible and effective accountability mechanisms.

On the one hand, stop and search might play an important role in preventing and detecting crime. Alternatively, policing policy that erodes trust will also make co-operation harder, not just between police forces and the groups who are singled out, but also among the wider public. As a consequence, it is important to consider potential variations and/or alternatives to 'stop and search' legislation. Whilst there is no single initiative which will provide an easy solution to the variety of behaviour targeted by police, a wide variety of crime reduction strategies can offer a potential pathway forward in dealing with modern crime problems. One such measure could involve changing the physical environment where sites are considered unsafe or threatening, thereby encouraging more people to utilise specific spaces, and removing the impression that these areas are areas amenable to the incidence of crime (see Sutton et al. 2008, 119).

Further, once this is achieved, there may be a broadening of the types of people who use public space, thus encouraging urban vitality and the building of a sense of community (Levi 1998: 178ff). The efficacy of such measures can be built upon by providing appropriate levels of amenity, and higher levels of flow-through access (Sutton 2008, 119). Greater youth involvement in policy initiatives, particularly at local government level, could also facilitate solutions which are widely accepted amongst target groups (Sutton 2008, 120). More broadly, the provision of a more visible, friendly and responsive police presence has the potential to improve community perceptions of police whilst deterring criminal and associated activity (Criminal Justice Research Paper Series 1995).

Conclusion

Policing practices should embody justice, evenhandedness, equality, protection of human rights and usefulness in providing community safety. In broad terms, any future legislative reform proposals in WA and the permanent extension of the 'stop and search laws' will need to consider how issues of public trust and confidence are addressed, and explore the

complex relationship between 'stop and search' and crime reduction strategies, as well as investigate whether such powers would be used unfairly and/or waste public money.

In addition to the above observations, there remains an urgent need for a wider and more nuanced analysis of alternative law and order approaches aimed at eliminating the types of behavior targeted by 'stop and search'. Such approaches might include changing the physical environment in specific areas, encouraging traditionally marginalized demographic groups to access public space, ensuring greater youth involvement in policy initiatives and increasing police numbers in given areas. These and other alternatives should continue to be debated in order to assess the multifaceted range of options that can be available to policy makers.

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