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SENATE

STANDING COMMITTEE FOR THE SCRUTINY OF
BILLS

Reference: Search and entry provisions in Commonwealth legislation

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SENATE
STANDING COMMITTEE FOR THE SCRUTINY OF BILLS
Tuesday, 22 June 1999

Members: Senator Cooney (*Chair*), Senators Coonan, Crane, Crossin, Ferris and Murray

Senators in attendance: Senators Cooney, Crane, Crossin, Ferris and Murray

Terms of reference for the inquiry:

Review of the fairness, purpose, effectiveness and consistency of right of entry provisions in Commonwealth legislation authorising persons to enter and search premises.

WITNESSES

- ALDERSON, Mr Karl John, Principal Legal Officer, Criminal Justice Branch,
Attorney-General's Department 1**
- JOHNSON, Ms Laurel Eva, Assistant Secretary, Criminal Justice Branch,
Attorney-General's Department 1**

Committee met at 8.03 p.m.

**ALDERSON, Mr Karl John, Principal Legal Officer, Criminal Justice Branch,
Attorney-General's Department**

**JOHNSON, Ms Laurel Eva, Assistant Secretary, Criminal Justice Branch, Attorney-
General's Department**

ACTING CHAIR (Senator Crane)—Thank you for coming tonight. Perhaps you could begin by outlining any matters you see as relevant to the inquiry and we can then move to questions. I now invite you to make an opening statement and then we shall ask you some questions.

Ms Johnson—I will defer to Mr Alderson who is the head of our scrutiny section of the Criminal Justice Branch.

Mr Alderson—In accordance with your suggested approach, Senator, what I thought I would do is, firstly, explain briefly who we are and why we are here, and, secondly, run through what we see as some of the key issues on entry and search powers. I will then tie those in to some comment on what we said in our submission about reviewing those taxation entry powers. First of all, I will start with who we are. In the 1970s there was a proliferation of Commonwealth legislation, including powers for public servants and offence provisions. There were considerable discrepancies between the different provisions and there was not somebody sitting down and saying, ‘Does this all make sense?’ There was a thing called Commonwealth criminal law policy established and we administer that. For example, when there is a proposal for new Commonwealth legislation to give entry and search powers to public servants we look at that proposal and see whether it is consistent with Commonwealth criminal law policy. I guess that policy and the principles that underlie it are drawn from a number of sources, including some earlier reports. There was a review of Commonwealth criminal law chaired by Sir Harry Gibbs, and also some of the principles that the committee itself has enunciated feed into the issues we look at.

In terms of the principles that we think about when a proposal is put forward for entry powers in Commonwealth legislation, I guess the primary one is thinking about what is the prerequisite for officers being allowed to enter premises. There are a few different options that we look for, different ways that are considered acceptable benchmarks for somebody being able to enter premises. The first is consent, that the occupier has actually consented to entry. I must admit that when I first came into this area I found that a bit curious: why would you spell out entry by consent in legislation, because officials can enter by consent without legislation? I think the reasoning is that if you put consent provisions in legislation you can actually then regulate the way those powers are used, for example require those officers to hold an identity card and that sort of thing; I guess that is the reasoning behind that. There is also a category of implied consent—for example, on premises where meat is slaughtered and where meat inspectors enter the idea is that as part of the government’s licensing arrangements those firms that wish to be licensed accept that as part of that these inspectors will have to be allowed on to premises to check things like that.

Moving away from the consent category to where you are actually exercising powers, the next category is entry by judicial warrant. What we generally look for is that to enter premises you have a warrant issued by a magistrate—there may be some cases where you would involve a judge, but the benchmark is that a magistrate has issued the warrant. Aside from those major categories, there are then some special cases—categories like national security, serious dangers to public health, that sort of thing—where it is accepted that there are special and emergency circumstances where, for example, it may be appropriate for a minister or a departmental secretary to authorise entry to premises. So that is the first thing we look for, that prerequisite.

The second major thing we look for, which is something that is generally not controversial once we point it out, is the identity pass mechanism. This requires that if officers are to be allowed to enter premises, firstly, the legislation should not allow any person to enter premises. You should have a defined category of officers who can have appropriate training and know the legislative requirements. They should carry a photographic identity card which they should display, either on request or as a mandatory requirement of entering the premises.

In the situation of entry by consent, one issue which crops up quite regularly—but I do not quite understand why—is a question of: if you have allowed someone into your premises by consent and then you refuse to cooperate with that person, should you be guilty of an offence? The position we take is no, because it is inherent in the notion of consent that if you have the power to refuse entry to your premises you should also have the right to say, ‘I no longer want you to be on my premises. I want you to leave. Come back when you’ve got a warrant.’ There is some Commonwealth legislation that says you can allow people in by consent but then if you do not cooperate you commit an offence. But our view is that those provisions are somewhat anomalous and we certainly do not favour their replication. In fact, in the Privacy Commission’s submission to this committee, which we have had a look at, there is a reference to a provision of that kind, I think in the Aged Care Act.

Another important distinction when we are talking about what kinds of powers are merited for authorised officers to enter premises is the distinction between criminal offences and monitoring warrants. There are two different kinds of warrant allowed essentially under Commonwealth legislation and it can be difficult to see where the two are coming from without a bit of background. The more traditional type is the ‘suspected offence warrant’ which is what police have, that once they have information that they think an offence is being committed, or has been committed, then the magistrate can allow them to go in and search for evidence of that offence. That is the hundreds-of-years-old traditional type. The newer type of warrant is designed to cater to the needs of modern governments, that governments are subsidising and making payments and allowing concessions in a whole range of areas and they want to make sure that the government revenue is not being defrauded. So this notion of a ‘monitoring warrant’ has been introduced. Monitoring warrants are easier to obtain than the traditional warrant because you do not have to actually suspect an offence; all you have to show is that in order to monitor compliance with this legislation—say a customs legislation that allows for subsidies for certain goods—you can go in and audit the books of the company. Those warrants are easier to get, but the trade-off is that the powers allowed under them are more limited. You are only allowed to go in and

audit and inspect and check; you are not allowed to go in and start seizing things or arresting people on the premises as though you were a police officer investigating offences.

Just on the issue of warrants, we also have a series of guidelines about telephone warrants. When the idea of warrants by telephone was first introduced it was a very controversial notion, but I think it is widely accepted now. They are a good way to both achieve law enforcement objectives and preserve civil liberties in that the procedures that have been set up for making sure that the information in the application is true and that it is checked against the warrant that is actually issued appear to have worked in practice. Often when there is resistance to the idea of acquiring warrants it is a fear that by the time you get a warrant it is too late, but I think telephone warrant provisions allow you to move quickly but on a proper basis. There is certainly more detail to Commonwealth policy on entry powers but they were the main points I wanted to run through at this stage.

The next point is the issue we raised in our submission, which concerns the breadth of powers available under taxation legislation. One reason that they do not comply with Commonwealth criminal law policy is that they date back decades, long before there was such a thing, and since then, because Tax already has those powers, the argument that we have accepted is that the tax officers need comparable powers to those they are already exercising when new legislation is created. But I think that the committee does provide a good opportunity to look at them—not on a case by case basis as we do, but overall.

The provisions we have drawn attention to allow tax officers to enter premises without a warrant. There is a procedure for getting authorisation from the Commissioner of Taxation but there is no independent authorisation requirement. The powers are phrased extremely broadly in terms of the ability to go in by day or night, inspect anything on the premises and so forth, and there is no identity card requirement in that legislation either. Tax has already made a submission to the committee. Tax have arguments as to why they say they are necessary, but I guess we view them as it is at least a worthy topic of review as to the scope of those powers in comparison to other Commonwealth legislation.

They were the main points I wanted to run through at this stage. Was there anything you wanted to add, Laurel?

Ms Johnson—No, that was comprehensive.

Mr Alderson—We have had a look at the other submissions that have come in and there is more detail we could give you, but rather than ramble on we will finish there and see if there are any questions.

ACTING CHAIR—Why don't we run through what you have given us so far, clear that up, and then we can move to your views on the submissions or anything that you wanted to raise with it. Maybe in between that we can do some general questions if we wish. I would just like to get a couple of points clarified. You mentioned in the defined requirements an identification card. Is there a provision anywhere in terms of if it is a consent entry or by warrant that there has to be a tape recording of what is said and what goes on there? Is that a requirement or is that something that may or may not happen? What is the situation with that in terms of the information and what are the rights of the individual? If that is the case,

can you answer in terms of whether or not they could have access to what was recorded in the discussion that occurs?

Mr Alderson—To my knowledge there is no provision in Commonwealth legislation for the tape recording of searches. I guess a proposal like that would have to be weighed up from two perspectives: on the one hand the potential benefits to the occupier of the premises and the person being searched in terms of an objective record of what is being done, and, against that, the potential privacy concerns that things may go on to the tape that the occupier of the premises would not want to have on tape. I guess that is an issue that would need to be looked at. At present there is no provision of that kind. The area where there are requirements for tape recording is when a person is being questioned in relation to a Commonwealth offence; in that case there are tape recording requirements. So, under Part 1C of the Crimes Act, the questioning and interrogation provisions, if in the course of a search it becomes apparent that somebody may have committed an offence you would then come under those provisions and the recording requirements would come in from that perspective.

ACTING CHAIR—So if a search had been organised, or by consent, and the people doing the search asked whether or not the whole thing could be recorded and the person being searched said no, that would be their legitimate right to do so?

Ms Johnson—That is right.

ACTING CHAIR—So any recording of what happened then would be by dual consent of the two parties?

Mr Alderson—That is a difficult question. There is nothing, I believe, to regulate that in legislation. We would be falling back on common law, and common law treats police and public servants in the same category as ordinary citizens. It would probably depend on something like the state listening device legislation—I think that legislation encompasses things like tape recording things without consent. So I am not entirely sure what the rules would be. If someone expressly objected to the recording, it may be that the recording would be prohibited by state legislation.

ACTING CHAIR—That leads me to a follow-on question then: if in fact a recording was kept without seeking the consent of the individual, it could in fact be a breach?

Ms Johnson—It could be inadmissible in evidence unless the person concerned desired themselves to have it in evidence.

ACTING CHAIR—Would it be the responsibility of the searcher to inform them? People being searched often feel very intimidated, particularly if it comes from out of the blue, which most of them do. If they are not informed that they have the right to say no, where does that leave the situation?

Ms Johnson—Well, nowhere, because there is no obligation on the police or the person executing the warrant to inform them of that right.

ACTING CHAIR—Well, that in effect is a weakness.

Mr Alderson—I am not sure actually. It depends on the detail of the listening device legislation, but if it had not been objected to I believe there would be no illegality in taping. If you then went to prosecute the person on the basis of what was on the tape, it would be a matter for the court whether it thought it was fair to exclude it.

ACTING CHAIR—But if the individual is not informed of their rights—and there would not be many individuals who knew what their rights were in a situation like that—then it would at least be challengeable, would it not?

Mr Alderson—It would be challengeable in terms of seeking to say, ‘You can’t use that evidence.’ Yes, I think it would be challengeable.

ACTING CHAIR—In terms of listening devices and what have you, would it be difficult for you to give us a run-down on a state by state basis of what the law is in each state?

Mr Alderson—We should be able to.

ACTING CHAIR—If you could do that I think it would assist the committee in some of the issues that we have been talking about and some of the issues that I have raised. Could you expand a little more on a telephone warrant and the circumstances in which it is likely that a telephone warrant could or would be used?

Mr Alderson—The normal test in the legislation is to say that the person to whom the application is addressed, normally a magistrate, has to be satisfied both of the normal grounds for issuing the warrant and also that there are circumstances of urgency such that it is necessary and appropriate to grant the warrant over the telephone. If it was, say, the traditional ‘suspected offence warrant’, they would be looking to see that there are reasonable grounds to suspect that on those premises there is evidence of an offence and that there are those circumstances of urgency. Normally that concept of urgency is not further defined in the legislation; it is left as a matter for the magistrate to assess whether the justification is there.

Senator CROSSIN—Mr Alderson, could you just explain to me how that actually works in practice? I need a warrant and the emergency is such that I can just telephone a magistrate?

Mr Alderson—Yes.

Senator CROSSIN—How do I then prove—

Ms Johnson—The legislation normally sets down rules for what has to be recorded and the records have to be kept and checked against one another to make sure that the person seeking the warrant and the magistrate have the same version.

Senator CROSSIN—Okay, so what do I use as proof that I have a warrant to enter your premises or to search your premises?

Mr Alderson—That has been one of the—

Senator CROSSIN—And related to that is what constitutes such an emergency that I cannot wait to go down to a magistrate and pick up that piece of paper?

Ms Johnson—It could be a remote situation where a magistrate is some hours or days trip away. It could be out of normal business hours, there could be a threat to the life of a person or the threat of destruction of evidence or something.

Senator CROSSIN—So what do I use then as proof to show people I have a warrant or to prove I have a warrant?

Ms Johnson—Sometimes there are fax facilities that can be used as part of the telephone warrant procedure. Otherwise it is a matter of recording and the person just has to believe it and has the opportunity later on to check that it was—

Senator CROSSIN—I can actually record the authorisation and then play that to the person?

Ms Johnson—Usually the legislation would require you to record it.

Mr Alderson—That certainly is an issue. I guess that was one of the concerns when telephone warrants were introduced—that you do not have that signed piece of paper.

Ms Johnson—Or stamped.

Mr Alderson—In fact, I think the Australian Federal Police in their submission to the committee have suggested that a lot of magistrates are construing that strictly and actually requiring things to be exchanged by fax and so forth. As Laurel suggested, in that case at least you have a written document.

ACTING CHAIR—In today's age it should not be difficult, but 15 or 20 years ago it could have been.

Ms Johnson—We did not have them 20 years ago; they are reasonably recent.

ACTING CHAIR—Are there any further questions?

Senator CROSSIN—You mentioned earlier in your statement about entry by public servants. Can you just clarify for me what you meant by that? Is that the inspectors and the like or people from the tax office?

Mr Alderson—The terminology normally is 'authorised officer or inspector'. The term 'public servant' is a bit narrow because it is either police or there are some powers for Defence Force personnel or persons employed under the Public Service Act.

Senator CROSSIN—In what instances would a minister or a departmental head authorise entry into premises?

Mr Alderson—Very rarely. The example I am thinking of was actually referred to in the Privacy Commissioner's stuff: there is one provision relating to national security where a minister can grant authorisation, I believe. In terms of a departmental secretary, the only two I can think of—and I do think these are somewhat anomalous—are the Migration Act, which allows the secretary of the immigration department to issue search warrants in relation to offences against the Migration Act, and, although it is not a warrant procedure, these tax powers refer to authorisation by the tax commissioner.

Senator CROSSIN—So they are extremely rare instances?

Mr Alderson—Yes.

ACTING CHAIR—As a follow-up to that question, would you be able to provide the committee with those areas in legislation where a warrant can be provided or executed by a minister or somebody in the department? I believe, for example, there are provisions in some of AQIS's operations where a warrant can be granted—I might be wrong on that but I do not think so—and also in terms of smuggling of prohibited animals, birds, reptiles and that sort of thing, which comes under the AQIS thing. Do you have on a database somewhere all of the various provisions, whether in fact it can be at a departmental or a ministerial level, and the sort of circumstances around which that would occur?

Mr Alderson—We can do that because to my knowledge there are very few. It is possible there will be some in very old legislation that might be difficult to identify, but we can certainly give you a list of those we can locate.

ACTING CHAIR—I am not asking you to spend a million dollars or thousands of hours, but even if it is a matter of going to each department and saying, 'You give us your legislation,' I think it would be a more efficient task for you to do than for us to try and do.

Ms Johnson—The Internet is a wonderful thing.

ACTING CHAIR—Yes. That would certainly be very useful to the committee in terms of this particular inquiry.

Mr Alderson—Certainly.

ACTING CHAIR—Do you know if in fact there are any state provisions which allow for officials from departments or state ministers to invoke warrants through that same system?

Mr Alderson—No, I am afraid I do not know, although I would suspect, certainly in terms of senior state officials, there would be powers. I would suspect that in state legislation there are powers conferred on senior public servants but I am afraid I do not know that.

ACTING CHAIR—I will ask the committee secretary to write to the various attorneys in the various states because part of our role is to bring consistency between federal and state legislation, as well as looking at provisions in that. I think that would be a useful exercise for us to do.

If I could put another question that I had: how precise does a warrant have to be in terms of what is being looked for?

Mr Alderson—I guess that depends on whether we are talking about the criminal offence type warrant or the monitoring warrant. The criminal offence type warrant requires greater specificity. It depends on the provisions, but essentially you have to identify the evidence that you say is on the premises and the offence to which it relates because that is providing the justification for the authorisation. So you are identifying not specific items, but a description of what it is you say is on the premises that justifies the search. With monitoring warrants you do not have to identify what it is you are looking for in terms of subject matter; the power is confined by once you get on the premises you are only allowed to look for material which is relevant to compliance with the legislation to which the monitoring relates.

ACTING CHAIR—At this stage I do not have any more questions in terms of that part of the presentation.

Senator CROSSIN—I do not have any more either.

ACTING CHAIR—Maybe we could now ask if you would give us an overview of what you looked at in terms of those submissions, what you have looked at that you would like to make some comment on. I should have mentioned at the start that this is a preliminary hearing from you and we might call you back at some later stage and ask questions that have come to us out of the evidence. If we could get you to look at that and then I would like to present to you some general questions which have been prepared by the secretariat. Some of the questions may be able to be taken away and replied to in writing. We will deal with them as we go through. Can you just give a general overview of what you see as the key points from the department's point of view and we might ask some questions. Once again, we are just asking you for a summary of the key points rather than going into a lot of detail. If we want detail, we will expand on it. I think you will find that easier and more interesting.

Mr Alderson—I will just go through and make a couple of brief comments on each of the submissions in numerical order. The first submission is ours and I do not need to comment further on that. There was a submission from the Australian Family Party—

Senator CROSSIN—Sorry, will we leave questions on your submission to later?

ACTING CHAIR—I thought we would just run over the submissions and then we will come back. I am quite easy about how we do this. Would you like to deal with their submission first?

Senator CROSSIN—I have a couple of questions on their submission, mainly clarification for me.

ACTING CHAIR—Okay, let us do it that way. I am relaxed about whatever way you do it; it does not worry me. Senator Crossin wishes to ask some questions on your submission.

Senator CROSSIN—Mainly it just goes to an explanation of the Australian Taxation Office free access entry powers. I might have it wrong here but does that simply mean that the commissioner can actually authorise or delegate one of the officers to enter a premises?

Mr Alderson—Yes.

Senator CROSSIN—That is known as free access, is it? Is it in any other bills or just with the tax—

Mr Alderson—These provisions are unique to tax legislation.

Senator CROSSIN—Why then is it different when it comes to tax laws; why is the commissioner able to authorise an entry provision?

Ms Johnson—Because it is a historical factor. I think the protection of the revenue used to be considered of paramount importance and civil rights were not as prominent back in 1901 as they are now.

Senator CROSSIN—Okay, that is all I had about that. I just wanted to clarify those two matters.

ACTING CHAIR—If we can now just go to your overview of all the submissions, including your own if you want to emphasise any particular point in that particular area. Here is our proper chairman, Senator Cooney, and also Senator Murray is joining us. Welcome.

Senator COONEY—Senator Crane is going to keep chairing.

ACTING CHAIR—For your information, what we have dealt with so far are three forms of entry: consent to entry, magistrates' warrants and telephone warrants. We have asked a few questions on that and if you want to we can go back to that later. Please proceed.

Mr Alderson—I was just referring to the second submission from the Australian Family Party. Essentially that submission criticises the breadth of the powers available to officials to enter premises and says they should be seriously restricted. Our point of view is that across Commonwealth portfolios there are genuine and legitimate needs to be able to effectively administer legislation and ensure that money is being spent properly, that laws are being complied with, so I believe there is a need for significant powers. We see the key to protecting civil liberties as trying to frame those in an appropriate way so the appropriate checks and limitations are built in.

The third submission was from the New South Wales Farmers Association—

Senator CROSSIN—Sorry, can we ask questions as we go?

ACTING CHAIR—I am easy. There are not that many of us here that we are going to get into trouble tonight, so if you wish to ask questions as you go, do so.

Senator CROSSIN—In your view are there any examples where the warrant powers are too wide, or, in your knowledge of where they exist, they are fine and do not need to be limited or minimised?

Mr Alderson—Our function is normally not to review existing legislation but just to look at proposals as they come to us. There certainly are cases where proposals come to us and an agency says, ‘We need this, this, this and this.’ We will look at that and say, ‘What is the justification for that?’, or at times we will say, ‘Hang on, are you sure you need all this?’ and it will be wound back to what is really necessary, but I could not refer you to any provisions on the statute book.

ACTING CHAIR—In terms of this, one thing that I should raise here is that it is very important if you are giving a personal view that you identify that it is a personal view. You are giving a government policy position, are you not, in terms of this particular thing, and that tended to be a personal question. Maybe it was not meant to be, but it was ‘in your view’. I just make that particular point.

Mr Alderson—To take up that point, there is almost a deliberate conflict set up in that Commonwealth criminal law policy is meant to stand as a check and a coordinating influence on the rest of government, so I think that is a relevant point. If you are happy to move on, the next submission is from the New South Wales Farmers Association. That submission seemed to me to be primarily directed at New South Wales legislation and legislation applying to rural and regional areas in New South Wales. That is something that we do not really have any knowledge of so I am not able to comment on that.

ACTING CHAIR—Just for the benefit of Senator Murray and Senator Cooney, earlier on I suggested that because of our linkage back to legislation between the states we as a committee should write to the various state attorneys and ask them if they could give us a run-down on what the provisions and the scope are there, and what they can do under state legislation.

Mr Alderson—A few agencies have written to the committee to explain the way they exercise their powers and to justify their existing powers. With some of those I just went and looked at whether the existing provisions do comply with Commonwealth criminal law policy and there were just a couple of minor points to emerge from that. The National Registration Authority referred to the fact that it administers the Agricultural and Veterinary Chemicals Code Act and that is one of those acts that says that, even if you have entered premises by consent, if you then fail to cooperate you are guilty of an offence. As I explained to the other senators earlier, as a general proposition Commonwealth criminal law policy is that if you are legitimately exercising coercive powers and someone fails to cooperate it is appropriate for that to be an offence, but if you are in premises only with

somebody's consent then it ought not be an offence for that person to fail to cooperate because they ought to have the right to terminate the consent that they have given.

The Commonwealth Ombudsman has made some detailed representations about the administration of various provisions. We are not ideally placed to comment on some of those aspects, although one of the provisions they refer to—which is one of the ones we will mention in our memo to you on provisions that allow authorisation by a departmental secretary—is section 251 of the Migration Act, which is a provision of that kind and which also does not require an identity card for officers entering premises.

The submission from the Privacy Commissioner—

ACTING CHAIR—Before you continue, I should have mentioned that I have asked the witnesses if they also would give us a list of various legislation which exists that can identify reasonably easily where ministers or officials have the power to issue a warrant.

Senator MURRAY—As we are progressing, and tell me if you have covered this, are you dealing in these remarks with what can be done, the consequences and penalties, how and so on, who can do it, because the 'who' is often as important as the 'what'. I will draw your attention to the Criminal Amendment (Forensic Procedures) Bill where because of the intrusive nature of the powers being granted to the police there is a cut-off point below which you cannot have people doing things—it was senior constable or sergeant or something of that sort, I think. You could not have somebody below that, and also below a certain age. Are you covering that aspect in your remarks as well?

Mr Alderson—I have not gone into detail on that. The forensic procedures legislation is a specialised situation, although that certainly is a relevant issue from the point of Commonwealth criminal law policy. For example, under customs legislation there are requirements that certain powers only be exercised by people given special training and so forth. I guess that is a live issue but it is not something that I had prepared—

Senator MURRAY—Perhaps, through the chair, I would like to put on notice that you will have a look at that. As an example, we think lots of powers are appropriate for judges to have but not for anybody else. So are there any policies against each of these categories of search and entry which are limited as to the nature of the person that can exercise them, in terms of rank or age or gender or whatever it is?

ACTING CHAIR—I was not as specific as you, Senator Murray, but I certainly asked that. You have clarified it a lot more. Thanks very much.

Mr Alderson—I probably only have a couple of additional comments to run through. The first was to comment on the Privacy Commissioner's submission. There is a Commonwealth criminal law policy and a Commonwealth privacy policy and they are sometimes directed at different objectives and focus on different issues. Notwithstanding that, however, a lot of the points in the Privacy Commissioner's submission are consistent with Commonwealth criminal law policy and I think that a lot of the issues the Privacy Commissioner has raised really are the same kinds of issues that I raised earlier in my introductory comments.

The last two, the Australian Securities and Investment Commission and the Australian Quarantine and Inspection Service, have referred to reviews that they have recently gone through, or are going through, to try to clarify and improve their legislation and make it fairer. In the case of the Australian Securities and Investment Commission, it is now administering a lot of different acts that previously had quite different powers and it has tried to identify one appropriate model. I think it is an appropriate model and requires a warrant issued by a magistrate to try and bring those powers into line, which I think is a desirable objective. I guess harmonisation generally is a good idea but, particularly if there is an agency performing overlapping functions, we would see it as desirable to try and bring the different powers available to that agency into line, not in terms of a common denominator but in a way that sets out the appropriate safeguards and limitations of the kind that I mentioned earlier. That is probably all that I can usefully comment on the other submissions at this point.

ACTING CHAIR—Ms Johnson, do you wish to add anything or raise any new material?

Ms Johnson—I might mention that in the Ombudsman submission many of the comments related to how the powers are exercised. They were not particularly criticisms of the legislation, but the way in which magistrates or police used the powers that were provided to them. I do not know whether that is relevant to your terms.

ACTING CHAIR—It certainly is from the point of view that, if after hearing all the evidence and the witnesses we form an opinion, for example, that they are operating in an inefficient way or an unsatisfactory way, that could be very relevant. We might go to questions now. Senator Crossin.

Senator CROSSIN—I am interested in just working through some of the possible questions that were given to us because I think some of those—

ACTING CHAIR—There are some very relevant questions there. We will leave that until last. Senator Murray, do you have any questions?

Senator MURRAY—I have a general question. It has always been a fact that powers which affect civil liberties have been confined, as far as possible, to one set of people who exercise those powers, such as judges or police or whatever. It seems to me that the search and entry provisions are unusual in being spread across a wide number of jurisdictions—you do not have lots of people who have the powers of the police, for instance, and so on. Even with regard to taxation matters there is a trend emerging worldwide to concentrate all revenue collecting activity in one body so that revenue collecting functions are being taken away and put within a central tax body, as with sales tax and VAT and so on and so forth, which in a number of foreign jurisdictions are spread out. My question to you really would be, and again I think you would need to take it on notice, do you think it is possible that by the very nature of these functions they could be consolidated into an area of activity by a fewer number of institutions which would do the same work? For instance, in the corporations world we now just have one trade practices authority where I think there were three bodies, we have one ASIC where there were a number, et cetera, et cetera. I just

wonder if the trend on search and entry to a fairly wide provision in a number of jurisdictions is capable of being limited?

Mr Alderson—That is a difficult question for us to answer, even on notice, simply because that is ultimately a decision for the government. At present the kinds of functions that require entry powers really go right across the portfolios in terms of agriculture, customs, health, environment, and a move to try to bring different elements together would really be a matter as to how the government structured its portfolios and agencies.

Senator MURRAY—Perhaps not, you see, because we as a society—and that is true of the Western democratic world—have long accepted that areas of civil liberty sensitivity should, as far as possible, be confined to one group, and I have given you an example of judges and police. Yet in this area, which has real civil liberty consequences, it is relatively loosely managed. I just wonder if that has grown as a practice rather than something which is generally acceptable. In other words, if you or I are faced with a policeman at our door, our reaction to the policeman is entirely different to that of somebody else claiming that same authority because we recognise and understand and react to the appropriate powers that we believe police to have. One of the difficulties, as I understand it—and the chair would be able to tell me—is that numbers of people exercising search and entry provisions are not regarded by the person who is affected as in fact having appropriate legitimacy or the institutional authority which resides with, for instance, a policeman or even a customs officer.

Ms Johnson—Most of them would be officials of a regulatory authority monitoring compliance with government legislation. I think that they would probably be exercising their powers in relation to business type premises and in a context where probably the people knew very well what legislation governed their activities and how compliance was monitored.

Senator MURRAY—Let me express it to you from a different direction, if I may. The governments have quite properly given the minister for small business the brief to limit the paperwork and all the points of contact that small business have to have for all their various activities, so they try and keep the numbers of forms and the number of places they have to go to for interaction with institutions down to as few as possible. I wonder if it does not fall within that same kind of direction, namely that you would rather deal with one institution or person or authority than multiple authorities if they all have to do a regulatory activity, but I do not know how practical that is. A small business person might, for instance, have trade practices people calling on him or her, tax people, customs, police, ABS, the statistics people. Are there any other suggestions?

ACTING CHAIR—Or the weevil inspectors.

Senator MURRAY—There could be anything up to 10 or 12 who they might legitimately need to respond to but one person calling would be more acceptable and would have probably a greater focus at the time.

I give you again the example of the tax changes overseas: instead of before where a VAT person would visit and an income tax person would separately visit and a customs

person would separately visit and all that, now one person comes and checks the income tax, sales tax, VAT, customs, the whole lot and does a one-stop shop. That again is really an inquiry of you as to whether it is appropriate for the advisers to the government to start to think about whether you can consolidate these powers, some of the lesser powers, in a less disaggregated way?

Ms Johnson—I tend to agree with Karl that it is major policy issue for government to consider and if appropriate ask officers to implement.

ACTING CHAIR—Could I answer there, because I think Senator Murray accepts that in fact it is a broader policy issue, but could I ask you if you could direct the substance of that to the Attorney-General?

Ms Johnson—It is similar to a single entry point to the bureaucracy.

Senator MURRAY—It is. My reasoning behind that question is that when the advisers are faced with the prospect of drafting legislation, do they look at something which deals with powers and say, 'Why should you have these powers? I'd rather keep them all in one body and you just delegate it to that body which has always had that power,' or do you create a new set of people who have to be trained and understand the limitations and terms of civil liberties and what they can or cannot do?

Ms Johnson—One view that I can think of is that many of these regulatory schemes are extremely complex and you would probably need a person who is very familiar with the scheme to do the monitoring of compliance. It may well be difficult to get one body of people that can encompass the whole range of expertise required to do that task.

Senator CROSSIN—But you are talking about consistency as to who can do it.

Senator MURRAY—Perhaps what I am asking is that you identify the problem for us, in other words you take a notional small business and say, 'If the maximum number of people who could legitimately search and enter the premises covered the various acts, how many would that be?'. On a farm it might be, say, 20. I do not know.

ACTING CHAIR—Can I just come in here and reinforce this question, because it is a policy question. We do have the blessing of the Attorney in terms of this inquiry; he gave us his opinion that it was necessary for some of these things to be looked at. It would be very useful to this committee to propose that question to him and he will make a decision then as to whether he wishes to answer it, or whether he can answer it, in terms of the broader policy question concerned. The other thing that it raises, and I refer, as I have done in this committee before, to the powers of a weevil inspector who can go in and search a pantry—and I am talking about Western Australia now—without a search warrant. They can even break into the house to discover whether or not there are weevils in there. There was quite a heated cry about it back in Western Australia some years ago; I do not know whether that has been done. I also understand that there is something like 100 different types of inspections that can occur in Western Australia, hence my questions earlier on about the state jurisdictions and some consistency. A consistent complaint you get about some of these activities is that the actual person who does the search—for whatever it might be; rabbits,

saffron thistle or whatever—is not actually trained and has no skill. He might know the law but he has no skills in handling the process of approaching people—I should not say ‘he’—and of handling a search and warrant provision. I do not think you would get it down to one person but, if there was some consolidation in terms of that, you might be able to get it down to one authority with a number of people trained in the skills to do that. I think that is a fundamental point behind your question.

Senator MURRAY—Yes.

ACTING CHAIR—If you could address that to the Attorney and he can decide whether or not he comes back to us.

Senator MURRAY—Essentially what I have moved from is ‘who’, because that relates to the training and the capabilities of the person, to the ‘how many’. To assess that I would have thought you need to identify four or five cameo types of big business—a farm, a small business, a school, whatever—and say, ‘How many people are likely to have the powers to search and enter there on the basis of different regulatory authorities?’ If, as an example, it did come to a hundred, as Senator Crane has outlined, I would suggest that that is starting to verge on dangerous because you cannot control appropriately, I would not have thought, the training and the background if you spread those powers so wide. Maybe that is a misjudgment on my part.

ACTING CHAIR—I have to say that over the years, going back to my Farmers Federation days, we certainly used to get consistent complaints about the attitude of some inspectors who came on to the place. There was a particular example of an inspection that was being done as to whether the property owners or pastoralists were handling their taxation requirements as far as shearers and that were concerned. This was a transitional period where people were being educated. People would come and they would jam their foot in, particularly if only the wife was home, and say, ‘No, I don’t want you here until my husband comes home,’ and they refused to go. There were all those sorts of things that occurred and came up. I think it is something that could be addressed or needs addressing in the context of what we are trying to do.

Ms Johnson—These days, particularly if people are carrying an identification, as we say they should, there would be an avenue of complaint to the Ombudsman.

ACTING CHAIR—Yes, I understand all that and I understand things have improved a lot from that; I am using the extreme of some years ago to emphasise a point. But nonetheless, particularly for a woman with young kids on an isolated property, having somebody who has not been trained and shows some aggression puts the fear of God through them when they should not have to be concerned about some of these activities. Senator Murray.

Senator MURRAY—I think that explores the problem and you can see what we are faced with. We are faced, as a committee which looks at every bill that comes to the Senate, with an instinct that these powers are too dispersed and that it has not yet come to the attention of the government that there may be better ways to deal with them.

Ms Johnson—Perhaps that issue may have something to do with the qualifications of the people who exercise the power and the criteria looked at by the people who authorise people and the training—

Senator MURRAY—That is right. I want to draw your attention to the policeman example, because most people have enough experience with the police to know what to expect, but the difficulty with say 20 or 100 notional people who come on to Senator Crane's farm is that they have different powers and they have different recourse to the law. With some of the laws the onus of proof is on you. With some it is on them. With some they need a warrant; some they do not. The consequence of that is it is difficult for the citizen to have an expectation of what their general rights are. If you do not have an expectation of what your general rights are, there is the potential for the abuse of those rights by somebody who wishes to exercise their authority a little more harshly than otherwise they would.

Senator CROSSIN—That goes to consistencies: are there consistencies as to search and entry versions across the legislation?

Ms Johnson—It also goes to what Senator Crane was saying at the beginning about how people know when the search warrant is being executed that they have a right to refuse to have a tape recording made.

Senator CROSSIN—When the legislation comes before you is there some kind of consistency check run or do you just comment on each one as it comes without reference to some sort of model form of words?

Mr Alderson—There is a model and essentially we have a checklist of what entry and search provisions it ought to contain. I touched on some of the important points without going into detail. I guess our objective is that over time there would be increasing harmonisation of provisions, that as new provisions are enacted or as old provisions come up for amendment they be brought into line with a consistent format, in part to address the point that if authorised officers are coming to your home it be clear exactly what their powers are, and that their powers be limited in appropriate ways.

Senator CROSSIN—So is that checklist like a set of principles, steps or something like that?

Mr Alderson—I guess it is an amalgam of things. For some things what we do is take what we consider to be the best precedent. For example, with monitoring warrants we have traditionally taken the Imported Food Control Act 1992. Because of the way that act sets out the steps that have to be taken and sets out the powers, it has been accepted from the point of Commonwealth criminal policy as an appropriate balanced model. So every time a new proposal comes up for a monitoring warrant it is checked against that precedent and if it departs we would put to the agency how it ought to be brought into line.

Senator CROSSIN—Does this cover the powers that people in the legislation have to confer the warrant, as well as those who are exercising the warrant?

Mr Alderson—Yes, both.

Senator CROSSIN—What about safeguards? Is there a checklist or any sort of consistency when it comes to safeguards of the search and entry provisions?

Mr Alderson—The first step is who can authorise this entry and what is the prerequisite for entry, and I guess the precedent for that is consent or warrant. The second step is who can authorise and the precedent that we pursue is magistrates. We then look at what are the grounds. It is no good requiring a magistrate if grounds don't have to be established. So there are precedents in the checklist in terms of grounds. The precedent there is that it should be limited to officers of the relevant agency administering the legislation; that an officer who is to be able to enter premises should be formally authorised in writing by the head of that agency to exercise the power; that they should have to carry on to the premises recent photographic identification; and that once on premises the legislation should specify the powers that they can exercise. We resist those powers being framed too broadly. For example, under the monitoring warrant provisions it has traditionally been considered inappropriate that you be able to seize material and remove it from the premises pursuant to a monitoring warrant. So, yes, right through the whole stage from authorisation to execution, and in the case of judicial warrants, how long you can hold on to seized material—the standard is 60 days unless court hearings are pending. So, yes, there is a whole series of benchmarks.

ACTING CHAIR—I think we might move to this list of questions that we have here. Senator Crossin, would you like to lead off?

Senator CROSSIN—I think I have probably covered a few.

ACTING CHAIR—There are quite a few that have been covered. If you think you would like to give us a written response to some of these we can give you a copy of them. If that is a better way to go when we go through the questions, please do so.

Senator CROSSIN—I have a question which might not go to these, but where is the line in the sand between your powers of search and entry and a person's privacy?

Ms Johnson—In effect, it is in the legislation. These days we consult widely before legislation even gets to the parliament and the Privacy Commissioner has his say about draft legislation.

Senator CROSSIN—For example, as a citizen how do I know where the buck stops if someone is coming to enter and search my premises?

Ms Johnson—There and then on the spot? I believe that is the problem that Senator Crane raised before: people do not know.

Senator CROSSIN—But if there is a warrant—

Ms Johnson—They can look at it, they can read it, they can see—

Senator CROSSIN—And if someone is coming to search for weevils, or if they are coming to search because they suspect I might have marijuana stashed somewhere—

ACTING CHAIR—Whatever.

Senator CROSSIN—Where does the privacy stop for me—

Ms Johnson—If you see them breaking into your furniture and things.

Senator CROSSIN—Jumbling around my personal items or—

Ms Johnson—I think that generally in practice your remedy is post hoc rather than at the time: you find out later what your rights were.

ACTING CHAIR—Let me ask you a follow-on question to that. I understand, and correct me if I am wrong, that one right everybody has if there is a search warrant is that they can ask to have legal representation, or would be advised to do that. I would like you to comment on that and how somebody in an isolated situation can exercise that right to have legal representation—for example, my place: my legal people are 625 kilometres away in Perth. If they came to me or my neighbours, can we say, ‘Go away and come back when my lawyers arrive’?

Mr Alderson—The traditional approach to that has been that rights to a lawyer and things like that come into play when you are suspected of an offence and you are into the actual procedure leading to charging someone with an offence—

ACTING CHAIR—But you have those rights. If someone turns up with a search warrant, in what areas do you have the right to say, ‘Before you go one inch further I want my lawyer here.’

Ms Johnson—I do not think they have but I do not have the Crimes Act here.

Mr Alderson—It may—

ACTING CHAIR—Can you check where that comes in and does not come in, whether or not they do have that right?

Mr Alderson—My understanding is that under most legislation there is not a right to have a lawyer present during a search.

Senator MURRAY—Do you know of any provisions for search and entry which include the requirement that, on presenting a warrant, the officer concerned must also present a leaflet or whatever it is outlining the rights pertaining to that particular warrant?

Mr Alderson—No. I do believe there is a requirement of that kind under the New South Wales Search Warrants Act but I am not aware of any provision of that kind in Commonwealth legislation. It is the same problem you have alluded to previously in that,

because there are so many provisions out there, there may be particular provisions that have attached to them requirements of that kind, but as a general rule I do not believe there are.

Senator MURRAY—If you can arrive at harmonisation, at limiting these things relatively and apply consistency, one of the things we hope will arise from this is that you would be able to have a single advice sheet that you could give to anyone and it would say that, with respect to this, you do or do not have the right to do the following things—how you may behave, how you may not behave and so on. Otherwise you are always relying on the interpretation and the training of the person exercising the warrant to advise you of your full rights. I think that would be unlikely, frankly. This is another question on notice: is there being developed anywhere some model whereby the presentation of a warrant is accompanied by the presentation of a short rights statement that applies to that warrant?

Senator CROSSIN—Senator Murray, are you talking about information that would not be provided by the Ombudsman or the Privacy Commissioner or even legal aid centres?

Senator MURRAY—I am talking about at the time of the serving. As Ms Johnson said, most of the follow-up of these things is after the event—post hoc, I think, was the word you used—whereas you want that to happen at the time of the event.

ACTING CHAIR—What rights you have at the actual time, whatever it is, regardless of their status, or what rights they have, and any areas in law which actually grant that certain things must be done in—

Ms Johnson—And that they must be told of their rights.

ACTING CHAIR—Yes. Senator Cooney, you wanted to ask a question.

Senator COONEY—Yes. There are a couple of problems. The policing authorities would say, ‘We don’t want to give them warning because we don’t want them to flush the document down the toilet or burn the thing so we have to come in and grab things before they’re destroyed’. If the person has not done anything wrong it is a dreadful intrusion and that is the sort of balance that you have to make. I suppose what we are asking is: do you know of any accountability structure? Normally what happens is that the policing authority will go down to a judge or a magistrate or somebody and swear out the affidavit, the judge or the magistrate looks at it and then signs the warrant and that is usually the end of the matter. There is no real check on whether that was a true affidavit and whether the person’s rights have been invaded.

Ms Johnson—Not unless it comes out in the course of court proceedings in argument over admissibility of evidence.

Senator COONEY—Yes, but usually it does not. How do you know what was in the warrant?

Senator MURRAY—Or even what was said because, as far as I know, in most cases the swearing of the warrant by the officer is not recorded in the transcript.

Senator COONEY—It is an affidavit. It has been cleared.

Senator MURRAY—But when the judge or magistrate asks questions about it that is not recorded so you would not be able to tell whether somebody had told fibbies or not.

Senator COONEY—Are those anti-Anton Piller orders? I know that was years and years and years ago; are they still around?

Mr Alderson—Yes, but they are more a civil—

Senator COONEY—They are, but it is the same sort of principle. What you do is say, ‘Unless we send the troops down to gather the information, it is going to disappear’, but there you have more a check on it. You will then go off and have the civil contest. Can you think of any comparable position where criminal law is concerned?

Mr Alderson—I guess the comparable position is that, if you obtain a search warrant by telephone or fax in circumstances of urgency, there are requirements in the legislation that both the magistrate and the police officer record the terms of the warrant and that they then be later brought together to check that there is no discrepancy. Is that the kind of issue?

Senator COONEY—Yes.

ACTING CHAIR—In terms of the follow-up and the questions that Senator Murray asked on the rights of the individual, most legal things are written in such a way that to the lay person they are gobbledygook; you cannot understand what they mean. I have had many examples in which people have come into my office and said, ‘We’ve got this. It’s a legal document. What the hell does it mean?’ and then invariably because of the types of language used you have to go to a lawyer to get it put into English. My concern there is, if somebody turns up and shows this piece of paper for a warrant—and there is a certain amount of fear in all this particular process—that people do not really understand the detail of what is being done. Of course, they know that, as somebody has turned up—whether it be an inspector, a policeman or an officer of the department—they have come to do XYZ, but they do not really understand what the details are. This is where I think it is incredibly important that there be some form of explanation of the rights of that individual, even if it is just to fax it to your lawyer or somebody who might know and get an explanation of it. One of the things that we need to know as a committee is: what are the rights under the various legislation and how is the individual informed of those particular rights? That goes to whether, if you consolidate it into a search division, we can then deliver a standard form—or whatever you want to call it—which could be handed to people and they could sit down for 10 minutes and read it and get a grasp of what the hell is going on.

Mr Alderson—I guess there is an answer that focuses on the law and then a broader answer about procedures. The answer that focuses on the law is that the rights of the individual in legislation tend to come more from limits on the powers conferred on authorised officers rather than explicit rights contained in the legislation. In terms of explicit rights, I think the major one would be the right to see somebody’s identity card. In the case of, say, a police seizure, the rights would be that you have the right to get the material back after a reasonable period, and so forth. In terms of a broader answer and working towards

what procedures could be put in place to clearly explain to people their rights, different agencies would have different answers. Some agencies would say, 'We have training procedures in place. We have internal procedures about the way we go about these searches,' and I guess we are not well placed to put the case for them or to defend their position in terms of—

Ms Johnson—Is not the point though that you want to know how the person gets to know what the limitations are on the powers of the person that—

Senator MURRAY—Let me be precise, if I may. There would be a standard number of rights which the ordinary person would expect that they might have access to, so the questions to be asked against your whole range of legislation which confers these powers are: which ones give you the right to be silent and to avoid self-incrimination; which ones give you the right to have a witness present; which ones give you the right to have a lawyer present; which ones give you the right to record the proceedings by a tape recorder or in some other form; which ones give you the right to refuse the process about to be undergone; which ones give you the right to have an inventory given to you of whatever is to be taken away, a proper identification of it; which ones give you the right to query the identification of the officer concerned and the authority that gave them that warrant—

ACTING CHAIR—I do not want to stop you writing this down, but this will all be recorded in *Hansard*.

Senator MURRAY—I am just going through in my head, and I am sure my colleagues could add to it, but those are questions I think the ordinary individual would ask and it directly relates to your market. It is about limiting the power of the authority, not about your own rights. Essentially, it is about what rights you have to resist the process or to moderate the process. I think for us in this committee it is that kind of checklist we would like eventually to see being put to the person in a simple form which would answer all those questions: with respect to this warrant, you have these rights. The more harmonisation you have, of course, the more possible it becomes to have a standard.

ACTING CHAIR—I should say that Senator Ferris, another member of our committee, has just arrived. Welcome, Senator Ferris.

Senator FERRIS—Thank you very much.

Senator MURRAY—Does that expand it appropriately?

ACTING CHAIR—I believe it does. Could you add the other things that we have raised previously, and some of it was repeated by you, and get that together and deal with those particular issues, and obviously if other issues come up during the process when we go into this we will forward them through to you. I think at this stage we have spent a fair bit of time on the subject and you have the gist of what we are looking at and trying to get on the table and the input the Attorney is prepared to put into this process. We might leave that particular aspect now, unless there are any burning questions. Maybe if we could just quickly run through these questions, a lot of which we have actually covered in the process. The first one says:

Is there a model (or standard) search and entry provision in Commonwealth legislation (or is that a question that would be better answered by the Office of Parliamentary Counsel)?

The second question is:

Is there a model or standard penalty provision for these provisions?

You have partially addressed that.

Mr Alderson—In our written answers we will be able to specifically identify benchmark provisions on those in terms of model entry and search powers.

Senator CROSSIN—What is the scrutiny for whether or not the search and entry provisions are in legislation or in a regulation and what is your preference?

Ms Johnson—They would almost always be in legislation these days because they are intrusive powers and not the kind of minor regulatory things that we put in regulations.

Senator CROSSIN—So, like with the ministers or department heads, again it would be very rare that the provisions are in regulations these days, or is it something you would not encourage?

Ms Johnson—Yes.

Senator CROSSIN—Okay.

ACTING CHAIR—Could I suggest to the committee that most of these questions have been addressed or partially addressed and you will be coming back with answers. If we actually gave these to you you could deal with that part rather than a lot of repetition and what have you. We have been going now for nearly an hour and a half and some of us probably have other things. Are you happy if we actually hand this over?

Senator COONEY—Hand the brief across.

ACTING CHAIR—With that, Senator Crossin, do you have any further questions you wish to ask?

Senator CROSSIN—No.

ACTING CHAIR—Senator Ferris?

Senator FERRIS—Thank you, I will read the *Hansard* and I do apologise for my late arrival.

ACTING CHAIR—Senator Murray?

Senator MURRAY—I was a little unhappy before but that has put on the table my concern.

ACTING CHAIR—Senator Cooney?

Senator COONEY—One other thing I would like you to do, and I know this is loading you up with work—and this question has perhaps been asked in a particular way but not the way I want—do you know whether there are any standards in the affidavits that are sworn out? What sort of persuasion does the person who is looking for the warrant have to produce to influence the judge or the magistrate to give the warrant? Do you know if there are standards?

Mr Alderson—There is a legal standard in terms of the grounds that have to be met. In terms of what evidence will persuade the magistrate, that is left to the magistrate.

Senator COONEY—There are some that judges only can give, and there was that controversy about whether Federal Court judges could give warrants—

Ms Johnson—Telephone intercept warrants.

Senator COONEY—And all that sort of stuff and who gives the warrants; would that be too much trouble? Do judges still do it?

Senator MURRAY—It has gone to the ATOs and—

Ms Johnson—I think the Family Court judges are actually doing that at the moment.

Senator MURRAY—It has gone to the AAT, Senator.

Senator COONEY—The other thing we could have, which I think you promised to put in, is the necessity felt by those who pursue a warrant for the need to search and to gather and the need, I suppose, to surprise almost, because what will be needed by the policing authorities is to say, ‘Look, if too much time is spent, important evidence might disappear’—as I said to you I think. Can you have a look at that and see what the policing authorities say, including the ATO and what have you? If this all gets a bit out of hand do not worry because we can get witnesses in.

Ms Johnson—I am not sure that I fully understood that last question. Did you ask: what were the obligations on the person issuing the warrant?

Senator COONEY—There are two questions. Firstly, the person who wants to take out the warrant is first of all going to have to produce a certain amount of evidence. Is there any idea of what sort of evidence that normally is. I think, Mr Alderson, you said that there was no particular body of evidence that would persuade but there has to be a degree of persuasion, I suppose, produced in the magistrate’s mind to issue the warrant. And then we are talking about the rights of people against whom the warrant has been executed. No doubt the policing authorities would say against that that there is a need to ensure that evidence is not disposed of and, therefore, there is a need to come down with some surprise, not to be too much about standing on ceremony. That is the sort of argument we are going to get.

Ms Johnson—It is the perennial balancing, is it not?

Senator COONEY—Yes, that is right. It would be interesting to see whether you have any material that talks about that. Clearly it is something where the tax man would say, ‘If we rang up Bill Smith and said we’re going to come down in 24 hours, it wouldn’t be worth going.’ That is what they would say. On the other hand, coming down like a wolf on the fold takes away people’s rights. As Ms Johnson says, you need to get some balance.

ACTING CHAIR—I just have one final question. Do you have any policy document which is used to advise other departments when they are preparing legislation or briefing counsel in terms of where there may be—for example, in a recent quarantine matter there were provisions made for search and entry and that is provided as a standard. Are there any other guidelines that are given or do we need to drag that to you through the minister? It would certainly help us if—

Ms Johnson—We usually write to them actually. We use our own resources to address their particular needs in a letter and we send them the letter. We have policy documents of our own but due to resourcing over the last few years they are not in a form that we would be able to hand out to people to use themselves. We use them but they are not coherent enough or well enough updated.

ACTING CHAIR—If there are not guidelines or a policy document in that sense, could you give us a standard letter which would indicate the sorts of issues that you would raise when you were briefing a department, or maybe you have a copy of one—

Ms Johnson—We could give it to you.

ACTING CHAIR—Yes, it would not go outside the committee.

Ms Johnson—We are willing to give it to you. Shall I give the chair this one?

Mr Alderson—Okay, yes. We have a document that we use for internal purposes. Our caveat is that the Attorney-General and Minister for Justice and Customs have not seen or approved this document because the Commonwealth criminal law policy was approved at a date in the past and there are always new provisions emerging and new problems which we respond to on a day-to-day basis and then brief the Attorney-General or—

Senator COONEY—Would you like to get that cleared?

ACTING CHAIR—Yes, would you like to get it authorised?

Senator FERRIS—That might be better.

Ms Johnson—Yes, all right.

ACTING CHAIR—You get it authorised. We can certainly take the document and put it into committee so that it is not published as a standard document.

Senator COONEY—I think you should go back and have a bit of a talk about that and, if you do not want to give it to us, it does not matter. The other thing I was going to suggest

is, if what we have said is confusing you, you can give the secretary a ring. If it starts getting to the oppressive stage, give him a ring and tell him that it is a bit beyond the path.

Ms Johnson—Yes, thank you.

Senator COONEY—Do that because—

ACTING CHAIR—But you have to wait 15 minutes before you phone.

Senator COONEY—But if it starts getting beyond a joke let us know and we will forget about it.

ACTING CHAIR—Ms Johnson, Mr Alderson, can I thank you on behalf of the committee. It has been very helpful and it has been a very good friendly, frank exchange. I thank Hansard for being here tonight—I do not know who your boss is but as far as I am concerned you can go home. I thank the members of the committee.

Senator COONEY—Particularly Senator Crane and Senator Crossin.

Committee adjourned at 9.33 p.m.