SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

TWELFTH REPORT

OF

2006

Entry, Search and Seizure Provisions in Commonwealth Legislation

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWELFTH REPORT OF 2006

The Committee presents its Twelfth Report of 2006 to the Senate.

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LIST OF ACRONYMS

ACCC	Australian Competition and Consumer Commission
AFP	Australian Federal Police
A/G's	Attorney-General's Department
ALRC	Australian Law Reform Commission
ANAO	Australian National Audit Office
ASIC	Australian Securities and Investments Commission
ASIO	Australian Security Intelligence Organisation
ATO	Australian Taxation Office
AUSTRAC	Australian Transactions Reports and Analysis Centre
CBFCA	Customs Brokers & Forwarders Council of Australia
CJD	Criminal Justice Division
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
IPP	Information Privacy Principles
ISP	Internet Service Provider
NCA	National Crime Authority
OFPC	Office of Federal Privacy Commissioner

CHAPTER 1

INTRODUCTION

The role of the Committee

1.1 Determining the proper balance between private and public interests is a matter that confronts all spheres of government in Australia. Under contemporary legal and administrative structures this involves consideration of the form and content of the law, the manner in which it is administered and the manner in which conflicts under the law are resolved.

1.2 The Parliament must often consider the extent to which, in the public interest, private rights might be curtailed. The nature of the conflicting interests and the nature and extent of the intrusions and safeguards proposed should be explicitly considered by the Parliament in determining the final content of the law. The Senate Standing Committee for the Scrutiny of Bills was established to assist senators in considering such matters in legislative proposals (or 'bills') put before the chamber.

1.3 The Committee assesses bills against a set of accountability standards that focus on the effect of legislation on individual rights, liberties and obligations, and on maintaining proper safeguards in the delegation and exercise of legislative power. Where the Committee's terms of reference are attracted it may seek further information from the proposer of a bill. Any measure which appears to infringe upon these rights or liberties, or which appears to delegate legislative power inappropriately or allow it to be exercised without sufficient parliamentary oversight becomes the subject of a report of the Committee. In undertaking this task the Committee seeks to promote properly-informed decision making and improved legislative outcomes.

1.4 Generally, the Committee performs this role, bill by bill, in response to the legislation put forward by ministers and other senators and members, but occasionally the Committee will identify an area that invites deeper examination and seek a reference on the matter from the Senate. This enables the Committee to more broadly consider the principles involved in determining that area of the law, and also to look beyond the laws themselves to consider the manner in which they might be administered.[1]

1.5 In 1999 and 2000 the Committee undertook such an inquiry in relation to search and entry provisions in Commonwealth legislation. The current inquiry represents a follow-up to that original inquiry.

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1 See, for example, Scrutiny of Bills Committee, *Eighth Report of 1988: Appropriate Basis for Penalty Provisions in Legislation Comparable to the Productivity Commission Bill 1996; Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation.*

Background to the inquiry

1.6 On 10 December 1998, the Senate referred the following matter to the Committee for inquiry and report:

> A review of the fairness, purpose, effectiveness and consistency of right of entry provisions in Commonwealth legislation authorising persons to enter and search premises.[2]

1.7 The Committee's report was tabled on 6 April 2000.[3]

1.8 The core of that report was a set of principles with which the Committee concluded any statutory provisions for entry and search should comply. These principles were derived from the evidence presented to the inquiry and various historical and legal sources, as well as from the Committee's experience in considering legislation presented to the Parliament. In particular, the Committee drew upon information provided by the Commonwealth Ombudsman, the Acting Privacy Commissioner and the Commonwealth Attorney-General's (A/G's) Department.

1.9 The principles start from a presumption that people have a fundamental right to their dignity, their privacy and the security of their residences and other premises, among other rights. Intrusion upon those rights is warranted only in specific circumstances where the public interest is objectively served and should not occur without due process. From those high level principles the Committee determined a range of others governing, for instance, the granting of powers to enter and search; the authorisation of entry and search; the extent of the power granted; the manner in which the power is exercised; and the provision of information to occupiers.

1.10 The Committee uses these principles in considering whether new entry, search and seizure provisions in legislation might infringe upon personal rights and liberties. The full list of principles is set out in Appendix II of this report.

1.11 In its original report the Committee made 16 recommendations that were intended to ensure that these principles applied in relation to all relevant Commonwealth legislation and to the exercise of powers under that legislation. In particular, the Committee recommended that the principles should be included in stand-alone legislation, with the powers available to the Australian Federal Police (AFP) under the *Crimes Act 1914* being the 'high water mark' of entry and search powers. This would mean that agencies may have fewer powers than the AFP, but would not ordinarily have more. The Committee also recommended that existing entry and search provisions should be reviewed and amended to be consistent with the principles.

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2 *Journals of the Senate*, No. 15, 10 December 1998, p. 374.

3 Scrutiny of Bills Committee, *Fourth Report of 2000*: *Entry and Search Provisions in Commonwealth Legislation.*

1.12 The Government response to the report was tabled in November 2003. In many respects the tone of the response was positive. It indicated, for instance, general approval of the principles the Committee had set out. However, of the 16 recommendations, the Government accepted (or accepted in principle) only five recommendations and partially accepted another four. One further recommendation was noted. The Government did not accept six of the recommendations, including key recommendations aimed at ensuring that the principles are applied consistently across all Commonwealth legislation.

1.13 As the Office of the Federal Privacy Commissioner summarised:

> In short, there was agreement with the majority of the Report's principles but, the Government noted, the complexity and range of regulatory and enforcement functions required a flexibility that is incompatible with some of the Report's principles and recommendations.[4]

Conduct of the inquiry

1.14 In March 2004, the Committee sought and received from the Senate a reference for a follow-up inquiry, examining:

> (1) The Government's responses to the committee's *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation* and, in particular, whether there has been any resultant impact on the practices and drafting of entry and search provisions.
>
> (2) A review of the fairness, purpose, effectiveness and consistency of entry and search provisions in Commonwealth legislation made since the Committee tabled its Fourth Report of 2000 on 6 April 2000.
>
> (3) A review of the provisions in Commonwealth legislation that authorise the seizure of material and, in particular:
>
> (i) The extent and circumstances surrounding the taking of material that is not relevant to an investigation and the use and protection of such material; and
>
> (ii) Whether the rights and liberties of individuals would be better protected by the development of protocols governing the seizure of material.

1.15 The Committee advertised the inquiry in the press and on its web page and invited submissions from a range of people and organisations, including those agencies that made submissions to the Committee's original inquiry. The Committee received 16 submissions. The Committee also received a briefing from officers of the A/G's Department and held a public hearing in Canberra on 11 March 2005. A list of submissions and witnesses is at Appendix I.

4 Submission No. 15, p. 2.

Acknowledgement

1.16 The Committee thanks those agencies and organisations that made submissions to this inquiry and those who appeared before the Committee to give evidence.

Notes on References

1.17 References in this report are to individual submissions as received by the Committee, not to a bound volume. References to the Committee Hansard are to the proof Hansard. Page numbers may vary between the proof and the official Hansard transcript.

Structure of the report

1.18 In some ways this is an unusual reference – an inquiry into responses to a previous inquiry – but the Committee sees it as part of the continuing interplay between elements of the Parliament (the Committee, the Senate) and elements of the Executive (ministers, departments, departmental officers and legislative drafters). As with many other aspects of the Committee's work, the discussion here is about how to strike the right balance between competing interests while adhering to enduring fundamental principles.

1.19 In this report, the Committee does not intend to revisit the matters canvassed in the original report, except to the extent necessary to provide useful commentary on the Government response. The Committee considers that the principles outlined in that report remain a useful model for determining the balance between public and private interests where inherently intrusive powers of search and entry come into play. Certainly, the Committee will continue to refer to those principles where they are relevant to its consideration of new entry, search and seizure provisions. After the conclusion of this inquiry, the Committee may continue to pursue some of the recommendations which have not been accepted should the opportunity arise.

1.20 In this report, the Committee's focus is on the nature and impact of the responses to the Committee's original report and subsequent legislative and policy developments. The Committee is also interested in examining what improvements there have been in the level and quality of information available to the Parliament to assist in its consideration of relevant legislation. The report specifically considers recent developments in relation to provisions authorising the seizure of material that is unrelated to an investigation.

Chapter 2 - Government responses to the original report

1.21 The initial focus of this report is on the Government's responses to the Committee's original report and 'whether there has been any resultant impact on the practices and drafting of entry and search provisions'.

1.22 Chapter 2 of this report examines both the Government's formal response to the 2000 report and the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by the Minister for Justice and Customs in February 2004 (the Guide). The Guide was forwarded to the Committee shortly after its publication and was formally put before the inquiry by the A/G's Department in its submissions.[5]

Chapter 3 – Legislative developments

1.23 The second paragraph of the terms of reference requires the Committee to extend its commentary on search and entry provisions to include bills considered by the Parliament since the 2000 report. Chapter 3 of this report contains a summary of such legislation and a discussion of the issues raised. In addition to its examination of each bill against its core terms of reference, the Committee examined the 'fairness, purpose, effectiveness and consistency of entry and search provisions of each bill.' The Committee acknowledges the assistance of the Parliamentary Library in preparing material for this chapter.

Chapter 4 – Seizure provisions

1.24 The final paragraph of the terms of reference more formally introduces the related topic of seizure of material. The Committee considered the seizure provisions in its earlier report, but takes this opportunity to make explicit the application of many of the general principles developed in that report to provisions authorising the seizure of material.

1.25 In Chapter 4, the Committee discusses some significant legislative developments introduced in response to emerging technologies affecting the scope and impact of seizure powers. These developments have taken the law of entry, search and seizure into new territory and warrant further examination. The Committee's attention is particularly drawn to the question of the seizure of 'material that is not relevant to an investigation and the use and protection of such material.' The Committee also considered the merits of developing protocols to govern the seizure of material.

5 Submissions Nos. 1 and 12.

CHAPTER 2

GOVERNMENT RESPONSES

Introduction

2.1 The Government tabled its response to the Committee's original report[1] on 27 November 2003.[2] In it the Government noted that 'the Scrutiny Committee's views have figured prominently in the development and evaluation of Commonwealth criminal law policy over many years'. The Government also advised the Committee that it was in the process of revising its guidelines on entry and search powers. The Committee notes that those guidelines are now contained in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide)[3] which was issued by the Minister for Justice and Customs in February 2004.

Government response to the original report

2.2 In its response, the Government expressed support for the majority of the principles contained in the original report. Generally, the Government does not consider that some of the principles are appropriate to implement in specific circumstances. In particular, the examples in the response distinguish between warrants issued in relation to criminal proceedings and those issued for monitoring compliance with legislation.[4]

The need for general principles

2.3 In its 2000 report the Committee observed that, at common law, every unauthorised entry on to premises is a trespass. The Committee observed that the modern authority to enter and search premises is essentially a creation of statute and should always be regarded as an exceptional power: to be granted by Parliament judiciously, after due deliberation, and to be exercised by executive agencies with restraint and appropriate supervision.

2.4 The Committee considered that while there is a public interest in the effective administration of justice and government, there is also a public interest in preserving people's dignity and protecting them from arbitrary invasions of their property and privacy, and disruption to the functioning of their businesses. Neither of these interests can be insisted on to the exclusion of the other, and proper and fair laws which

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1 Scrutiny of Bills Committee, *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation.*

2 A copy of the Government response is provided at Appendix III to this report.

3 Available at http://www.ag.gov.au/www/agd/agd.nsf/page/Publications

4 Government response, p. 2.

authorise the entry and search of premises can only be made where the right balance is struck between these interests.

2.5 The Committee concluded that while powers of search and entry may be necessary for the effective administration of the law they remain inherently intrusive. One basic form of protection is to ensure that all such powers are drafted according to a set of principles rather than to long-standing practice.[5] These principles should govern the:

- grant of powers of entry and search by Parliament;
- authorisation of entry and search;
- choice of people on whom the power is to be conferred;
- extent of the power granted;
- kinds of matters which might attract the grant of the power;
- manner in which the power to enter and search is exercised;
- provision of information to occupiers;
- protection of people carrying out entry and search;
- issue of warrants by judicial officers; and
- accountability for the exercise of search and entry powers.

Recommendations 1, 2, and 3

2.6 The Committee recommended that a set of fundamental principles should: apply to existing entry and search provisions and to new provisions; have statutory force and that this legislation should take as its starting point the search warrant provisions set out in the *Crimes Act 1914 (Cth)* (Recommendation 1). The Committee further recommended that the search and entry powers available to the AFP under the Crimes Act should constitute the 'high-water mark' for such powers generally and that powers of entry and search available to any other agency, person or organisation should only exceed this 'high water mark' in exceptional and critical circumstances (Recommendation 2). Finally, the Committee recommended that each agency should maintain a centralised record of all occasions on which powers of entry and search are exercised and report annually to the Parliament (Recommendation 3).

Government response

2.7 The Government does not accept Recommendation 1. The Government expressed concern that non-derogable, model standards in legislation might unduly

5 Scrutiny of Bills Committee, *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation*, pp. 49–54. Appendix II to this report contains a list of those principles.

limit the flexibility necessary to address the variety of situations in which entry and search powers are exercised.

2.8 The Government accepts Recommendation 2 in principle. The response states that the Government agrees that the entry and search powers available to the AFP should constitute the 'high-water mark' for such powers generally but that the powers in the *Crimes Act 1914* are considered inappropriate as a model for agencies where there is a need to monitor/audit compliance with legislation where no offence will be suspected.[6]

2.9 The Committee notes that the Government's position on this matter is further set out in the Guide at Part 9.9:

> Principle: The search warrant provisions of Part 1AA of the Crimes Act, which are applicable to police, define the outer limits of the powers and the minimum limitations and obligations that should apply to search warrant powers.
>
> Discussion: Part 1AA reflects the benchmark that parliament has accepted for powers necessary for the investigation of Commonwealth offences by police, including the most serious Commonwealth offences.

2.10 The subsequent paragraphs of the Guide outline relevant safeguards and limitations built into Part 1AA.[7] The Guide also refers to the Committee's view that broader powers should be enacted 'only in exceptional, specific and defined circumstances where Parliament is notified of the exercise of those powers and where those exercising those powers are subject to proper scrutiny'.

2.11 The Guide goes on to note additional considerations the Committee considers appropriate in relation to issuing a search warrant and in legislation conferring a power of seizure. The Guide notes that 'a number of these views are more restrictive than the Commonwealth Government's long-standing approaches' and that 'a Department will need to be prepared to assist its Minister to respond to any concerns raised by the Committee'.

2.12 The Government does not accept Recommendation 3. While the Government agrees that appropriate records should be kept by relevant agencies, the Government does not propose to require centralised records or annual reports to Parliament as it does not accept that this would add to the current regime. The Government response provides details of the accountability mechanisms that apply generally to the execution of warrants under the benchmark provisions of Part1AA of the *Crimes Act 1914* and where warrants are obtained over the telephone or by other electronic means. The Government also considers that in certain contexts, such as under a monitoring warrant regime, it would not be practical to centrally record every monitoring activity.

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6 Government response, pp. 4-5.

7 The Guide, pp. 75-6.

2.13 The Committee recognises the need for flexibility both in legislative provisions and in administrative practises supporting and surrounding entry and search powers. However, the Committee considers that this need for flexibility must be balanced by appropriate safeguards. The Committee did not propose non-derogable legislation, nor did it envisage that every detail of every regulatory or enforcement regime would be catered for in such overarching legislation. The Committee's proposal to give statutory force to the principles was intended to protect rights and ensure accountability in the exercise of intrusive powers by ensuring that certain things follow from a decision to seek to grant or authorise the use of particular search and entry powers. The Committee considers that the choice as to which components are relevant in which circumstances would be a matter to be determined in drafting the detail of such legislation.

2.14 It is perhaps unfortunate that this recommendation suggested that '[T]his legislation should take as its starting point the search warrant provisions set out in the *Crimes Act 1914*' as this may have given the impression that the Committee's preferred model is for the detail of the Crimes Act provisions to apply across the board. In fact, the Committee's recommendation is that the Crimes Act provisions which reflect the principles (perhaps better referred to in this context as safeguards or protections) form the starting point for stand-alone legislation.

2.15 In the absence of a commitment to develop such stand-alone legislation, the Committee welcomes the promulgation of the Guide and with it the consolidation of relevant policy, principles and precedent relevant to the framing of Commonwealth offences, civil penalties and enforcement provisions, including entry and search provisions.

The purpose of search and entry provisions

2.16 The Committee accepted that at a general level search and entry provisions are appropriate for the purpose of gathering intelligence of evidence and also to monitor compliance with some statutes. The Committee concluded that where entry and search powers were conferred on non-government officials, the same principles should apply.

Recommendations 4 and 5

2.17 The Committee recommended that the principles set out in Chapter 1 of the 2000 report should apply to both government and non-government agencies, persons and bodies which seek to enter and search premises by virtue of statutory authorisation (Recommendation 4). The Committee also recommended that the right of entry provisions in the *Workplace Relations Act 1996* should conform with the principles set out in Chapter 1 of the 2000 report (Recommendation 5).

Government response

2.18 The Government accepts this recommendation in principle but reiterated its view that each principle should not be automatically applied to all search and entry

powers. The Government response states that entry powers should generally only be conferred on government employees, as they are subject to a wide range of accountability and disciplinary mechanisms under Commonwealth legislation that do not generally apply to persons outside government.[8] However, the Government notes that in rare instances it may be necessary to empower non-government persons to exercise entry and search powers. The Government response states that in such circumstances there is a range of measures that may be applied to ensure appropriate and adequate accountability:

> Appointment procedures may be set down in legislation to ensure that only appropriate and accountable persons are appointed to head the agency or exercise those powers. The ability to apply for search warrants may then be limited to the head of the agency, who may then be able to delegate those powers to relevant experts or other persons when the need arises. The agency head would then be ultimately accountable for the conduct of delegates. Additional accountability may be achieved by ensuring that the experts who are delegated those powers are also appointed under a specific legislative selection criteria. This selection criteria would vary based on the circumstances, but would, where possible, follow the requirements applied generally to authorised officers who may be empowered to exercise those powers (for example, the need for certain maturity and skills). Furthermore, the exercise of those powers may be further legislatively restricted by limiting the exercise of search and entry powers by such non-government employees to instances where, for example, their expertise would be required (for example, a specialist investigator would only be able to enter and search certain sites in certain instances).[9]

2.19 The Committee welcomes the acceptance of this recommendation and suggests that the accountability measures set out in the Government's response be included in the Guide. The Committee gave further consideration to accountability measures in the current inquiry and discusses these further in Chapter 3 of this report.

2.20 The Government did not accept this recommendation. In its response, the Government stated that the principles are not appropriate for general application to the various entry powers conferred in that Act. For example, the same principle should not apply to entry of premises by both trade union officials and government officials. The Government does not consider that entry of premises only by consent or warrant is appropriate as the Workplace Relations Act does not permit entry by force or provide a power to search.

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8 The *Ombudsman Act 1976*, the *Administrative Decisions (Judicial Review) Act 1977*, the *Privacy Act 1988* and the *Freedom of Information Act 1982*.

9 Government response, p. 7.

Consistency of search and entry provisions

2.21 The Committee noted that it is important that entry and search provisions should be as consistent as practicable across all agencies which exercise those powers. This is particularly the case for large organisations and those in 'sensitive' industries. The Committee noted that consistency is an issue for occupiers and agencies. Occupiers may find themselves subject to different procedures and obligations depending on the agency involved. Agencies may be required to administer (and train staff in the administration of) quite different provisions.

2.22 The Committee used the term consistency to connote consistency with principle rather than with long-standing precedent. However, the Committee noted that while consistency is a guiding principle, it should not be seen as absolute. The Committee recognised that there will be occasions when different powers may be required because different functions need to be performed.

2.23 The Committee noted that model search warrant provisions had been included in the Crimes Act in 1994 and received evidence which suggested that these provisions have operated reasonably consistently and have been well accepted. The Committee also noted that the A/G's Department also used preferred model provisions where it was proposed to include monitoring warrant provisions in a bill. However, the Committee noted anomalous entry and search provisions in relation to powers and provisions administered by the Australian Tax Office (ATO), the (then) Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), the Australian Transaction Reports and Analysis Centre (AUSTRAC), the Australian Security and Intelligence Organisation (ASIO) and the Australian Securities and Investments Commission (ASIC).

Recommendations 6 - 8

2.24 The Committee recommended that all existing entry and search provisions in legislation, including those contained in regulations, be reviewed and amended by 1 July 2001 to ensure that they conform to the principles (Recommendation 6). The Committee also recommended that, as a priority, all entry and search powers that go beyond the entry powers in the *Crimes Act 1914* should be reviewed and amended so that they are consistent with the principles (Recommendation 7). Finally, the Committee recommended that the Commonwealth Ombudsman undertake a regular, random 'sample audit' of the exercise by the ATO of its entry and search powers to ensure that those powers have been exercised properly (Recommendation 8).

Government response

2.25 The Government does not accept Recommendation 6 and the Committee notes that the delay in the production of the Government response makes the date proposed by the Committee for review of relevant legislation appear uncharacteristically optimistic.

2.26 The Government accepts Recommendation 7 in part. The Government response states that the Government does not accept that all existing entry and search provisions that go beyond the entry powers in the *Crimes Act 1914* should be reviewed and amended to conform to the Committee's principles. However, the response notes that some agencies have recognised the merits of undertaking a review at an agency level, in particular DIMIA and the Department of Defence. The Government response notes that the Department of Defence has conducted a review and will amend regulations to permit a local magistrate to issue a warrant to permit entry on to land or premises. The Committee received evidence from a number of agencies during this current inquiry in relation to the review of existing entry and search provisions. This evidence is discussed in Chapter 3 of this report.

2.27 The Government accepts Recommendation 8 in principle and notes that it is unable to direct the Ombudsman to undertake particular investigations but notes that he or she has the power to conduct audits of the exercise of the ATO of its entry and search powers and has exercised those powers when investigating tax complaints.

2.28 The Committee received a submission from the Commonwealth Ombudsman's Office as part of this current inquiry which included a copy of the Ombudsman's findings in relation to an own motion investigation in relation to the ATO which was prompted by the Committee's concerns. As part of that review the Ombudsman reviewed relevant manuals and training materials and sought details of certain cases dealing with 'significant non-compliance and aggressive tax planning' in which the ATO had sought access without notice between July 2002 and December 2003. Of the 24 cases identified, the Ombudsman examined the five cases in which audit work had been completed, and a similar case in which a complaint had been made directly to the Ombudsman. The Ombudsman observed that 'the audit did not bring to notice any significant difficulty with the ATO approach to the use of these powers.' [10]

2.29 The report also noted that the Ombudsman 'receives very few complaints about the ATO's use of access powers' and indicated that '[d]uring the year ending 30 June 2005 it is proposed to audit the use of access powers in a different sphere of ATO operations. Attention will also be directed to any complaints made to the internal ATO complaint service'.[11]

2.30 Despite its misgivings about the reliance placed on internal procedural limitations, the Committee welcomes the Ombudsman's finding. The Committee considers that the external scrutiny of the operations of the ATO should occur as a matter of course, but considers the Ombudsman's Office well-placed to provide a strong measure of accountability, within its limited resources.

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10 Submission No. 16, p. 3.

11 Submission No. 16, p. 3.

2.31 The Committee notes that the Government does not intend to significantly alter the entry powers of the ATO. However, the Committee hopes that these broad powers will not be used as a precedent for establishing entry and search schemes for other agencies. The Committee considers that such an approach in new legislation would be contrary to the policy set out in the Guide.

The fairness of entry and search provisions

Recommendations 9 – 14

2.32 The Committee noted that fairness combines both the content of search and entry provisions and the manner in which they are exercised. A provision may be 'fair' in its form, but administered in an 'unfair' manner. Or a provision may be 'unfair' in its form, but administered by the relevant agency in a way that renders it 'fair'.

2.33 The Committee noted that the majority of agencies exercise their entry powers fairly and that fairness is imposed on agencies by statute and by the courts. However, the Committee also noted a number of ways in which the exercise of entry provisions may be made fairer.

2.34 The Committee recommended that the procedure applicable in Victoria and in some other jurisdictions be followed where, after execution, a warrant is returned to the court that issued it (Recommendation 9).

2.35 The Committee also recommended that all occupiers of premises which are to be entered and searched should be given a written document setting out in plain words their rights and responsibilities in relation to the search, unless there are exceptional circumstances involving clear physical danger (Recommendation 10).

2.36 Where search and entry powers are used by an investigative authority: those who are being investigated should have an ongoing right to be informed of the current status of those investigations and, where an investigation is concluded and no charges laid, those who have been investigated should have the right to be informed of this fact immediately and to have all seized material returned to them. Such persons should also have the right to compensation for any property damage and damage to reputation (Recommendation 11).

2.37 The Committee recommended that all agencies that exercise powers of entry and search should introduce best practice training procedures and other internal controls to ensure that the exercise of those powers is as fair as possible, and should set out the appropriate procedures and scope for the exercise of these powers in enforcement and compliance manuals (Recommendation 12).

2.38 The Committee further recommended that, where practical, all executions of warrants are video-taped or tape-recorded, and that where the person is a suspect, a verbal caution is given and tape-recorded (Recommendation 13).

2.39 The Committee also recommended that the Attorney-General implement a system enabling courts to hear challenges to warrants in camera, or in a way which does not lead to prejudicial publicity for the person challenging the warrant (Recommendation 14).

Government response

2.40 The Government does not accept that returning a warrant to the issuing authority would add to the current regime. The Government considers that the proposal would place a burden on issuing officers and that it was uncertain whether the return of a warrant would provide any additional protection or safeguards in relation to its execution.

2.41 The Government accepts Recommendation 10 in principle stating that:

> The policy on such matters has been changed to require that an occupier be informed in writing or, if that is impractical, informed orally, of his or her rights and responsibilities in relation to the search. There is no reason to distinguish in the context of this proposal between a search warrant, monitoring and search authorised by consent.

2.42 The Committee concurs with the Government's view that the statement of rights and responsibilities should be communicated to an occupier in plain language and should be drawn from the legislation itself. However, the Committee notes the suggestion that the information should not be drawn from common law principles. The Committee considers that it is equally important that the information provided to occupiers includes relevant common law rights or rights guaranteed under other relevant legislation. For example, the Committee has often cited the example of the privilege against self-incrimination. The Committee notes that the Government has sometimes contended that there is no need to include an explicit statement of this privilege in legislation requiring the production of information, indicating that people will be able to rely on the common law. The Committee considers that people must be made aware of their rights in relevant circumstances and would generally prefer to see this right incorporated with the relevant legislative provisions and included in information given to occupiers in relevant cases.

2.43 The Committee received evidence that there is a need to ensure that 'appropriate information is provided to the occupier, in plain words not reconstituted legal text, as to rights and responsibilities in relation to any monitoring activity … undertaken by a regulatory agency with or without the occupier's consent.'[12] This issue is discussed further in Chapter 3 of this report.

2.44 The Committee notes the Government's contention that, in the case of ensuring compliance with legislation, requirements to provide occupiers with written guidelines on their rights and responsibilities is excessive, particularly where these

12 (CBFCA) Submission No.3, p. 1.

searches are conducted in accordance with internationally agreed standards and procedures.

2.45 The Government does not support the proposal that where a search warrant is executed as part of an ongoing investigation, the person investigated should be kept informed of the progress of the investigation. Neither does the Government support a statutory right to compensation. The Government notes that inappropriate actions by law enforcement officers are dealt with by existing disciplinary or criminal sanctions. The issue of a right to compensation for damage to property and reputation is a civil matter best dealt with under the general principles governing tortuous liability. Evidence received from the Australian Customs Service (ACS) and ASIC during this current inquiry indicates that, at the conclusion of an investigation, those agencies advise the subject of the investigation that the investigation has been concluded and whether charges or enforcement action are to be pursued.

2.46 The Government accepts in principle that Commonwealth agencies should adopt best practice training procedures and internal controls to ensure that the exercise of entry and search powers is as fair as possible. The Committee considered training procedures and internal guidelines and controls further during this current inquiry and a number of agencies provided the Committee with examples of their progress in this area.

2.47 The Government does not accept that it is appropriate to impose the common practice of video taping or audio taping the execution of search warrants on all agencies in all circumstances, but noted that it is fairly common practice. The Government advised that an oral caution must be given under existing law to persons suspected of committing a Commonwealth offence. There is currently no requirement for tape recording the warning and the Government does not consider that this should be required.

2.48 The Government does not accept that there is a need to hear challenges to warrants in camera, or in a way which does not lead to prejudicial publicity for the person challenging the warrant. The Government notes that the existing law provides the courts with the power to make orders to protect parties from publicity if there is a need to do so.

The effectiveness of entry provisions

2.49 The Committee considers that effectiveness is essentially a matter of administration. It raises issues such as whether search and entry powers are used, and whether their use achieves the purposes for which they were granted. All agencies which made submissions to the 2000 inquiry used their entry powers, and felt that their work would be significantly impeded without them.

2.50 The Committee received evidence from the AFP and the ACS which suggested improvements relating to the search warrant provisions in the Crimes Act

and the Customs Act[13]. While the Committee was not in a position to definitively decide, it appeared that many of the proposals put forward would make the administration of those search and entry provisions more effective without affecting the fair operation of those provisions.

Recommendations 15 and 16

2.51 The Committee recommended that the Attorney-General and the Minister for Justice and Customs examine the amendments to the Crimes Act proposed by the AFP and the amendments to the Customs Act proposed by the ACS and introduce legislation to implement those amendments (Recommendation 15). However, in noting the AFP's suggestion that it be authorised to conduct searches, under warrant, without first notifying the occupier (covert searches) the Committee expressed strong reservations. While the Committee is aware that covert searches might make law enforcement easier, the risks are such that the Committee expressed its opposition to recommending such searches (Recommendation 16).

Government response

2.52 The Government accepted Recommendation 15 and implemented amendments to the *Customs Act 1901* proposed by the ACS to extend the retention period of evidential material from 60 to 120 days and to insert a provision dealing with the disposal of abandoned goods. The Government stated that similar amendments would be considered when the *Crimes Act 1914* provisions are next amended.[14]

2.53 The Government noted that the Committee opposed covert searches and advised that this issue remains under consideration.[15] The Committee received submissions during the current inquiry in relation to this recommendation. The matters raised in the submissions do not directly fall within the terms of reference of this inquiry and do not appear to pertain to covert searches as described in Recommendation 16. Nonetheless, it appears to the Committee that there may be matters to be resolved and it recommends discussions between the relevant parties.

Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers

2.54 In February 2004 the Minister for Justice and Customs issued the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide). The promulgation of the Guide signals a different approach from the

13 Scrutiny of Bills Committee, *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation, pp. 132-140.*

14 Government response, p. 17.

15 Government response, p. 17.

Government and one the Committee very much welcomes. According to the main submission from the A/G's Department:

> The Guide seeks to consolidate policy, principles and precedent relevant to the framing of Commonwealth offences, civil penalties and enforcement provisions, including entry, search and seizure powers. It draws on a broad range of source material, including:
>
> - Commonwealth legislation
> - Model Criminal Code Reports
> - Australian Law Reform Commission Reports
> - Senate Scrutiny of Bills Committee material including 'Alert Digests' and 'Reports', and
> - Senate Regulations and Ordinance Committee material including 'Annual Reports'.[16]

2.55 The A/G's Department also stated that it expected that 'promulgation of the Guide will result in significant improvements in the legislation approval process. In particular, it will help those involved in the development of legislative proposals identify significant criminal law and civil penalty issues early in the process, allowing sufficient time to resolve them'.[17]

2.56 The Guide is administered by the Criminal Justice Division (CJD) of the A/G's Department. The CJD is responsible for assisting the Minister for Justice and Customs to ensure that Commonwealth offence, civil penalty and enforcement provisions are framed in a sound, effective and coherent manner. However, departures from the Guide may occur where they can be supported with sufficient justification. The CJD emphasised that the criminal law and civil penalty policy framework must be flexible enough to address other policy and operational objectives as they emerge.[18]

2.57 In its supplementary submission, the CJD set out the consultative processes which underpin the development of relevant legislation. The Committee notes that sponsoring Ministers are required to obtain the agreement of the Minister for Justice and Customs to the criminal law and civil penalty aspects of a bill, including entry, search and seizure powers, prior to the introduction of the bill into Parliament. In doing so, the Minister is required to explain the criminal law and civil penalty aspects of the bill and the justification for the proposed amendments. The Committee notes that the sponsoring Minister must provide a justification to the Minister for Justice and Customs where a legislative proposal departs from the principles set out in the Guide.[19]

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16 Submission No. 1, p. 1.

17 Submission No. 1, p. 2.

18 Submission No. 12, p. 1.

19 Submission No. 12, p. 1.

2.58 The Committee notes that it is normal practice for sponsoring agencies to consult with the CJD during the drafting of the bill. In addition, it is the practice of the Office of Parliamentary Counsel (OPC) to refer any bills which contain provisions which fall within the scope of the Guide to the Criminal Law Branch for comment.[20]

2.59 Although the Guide falls short of providing the Parliament with an opportunity to finally determine the applicable general principles that should apply for entry, search and seizure provisions, it does provide a means by which Parliament can measure the approach taken in a particular bill against the general criminal law policy applicable in the area. The Committee particularly welcomes the inclusion in the Guide of commentary on the extant policy position from the Scrutiny of Bills Committee and the Senate Regulations and Ordinances Committee, not just in relation to search and entry provisions, but across the spectrum of the criminal law provisions.

2.60 The Committee was interested to gain an understanding of the early experience with the consideration of legislation developed in the light of the Guide (or an earlier draft of the Guide). The Committee sought advice from the CJD on the entry and search provisions contained in two Acts, the *Australian Protective Service Amendment Act 2003* and the *Aviation Transport Security Act 2004* and, specifically, on the application of the Guide in the development of that legislation.

2.61 The CJD advised that the Guide was taken into consideration throughout the development of both Acts, though the process followed in the case of the Aviation Transport Security Act was slightly different as the Minister for Justice and Customs was the responsible Minister. Both Acts proposed a departure from the policy set out in the Guide, and in each case the CJD and the sponsoring Minister appear to have worked together to develop a legislative regime which satisfies the policy and operational objectives while at the same time including appropriate safeguards.

2.62 However, the Committee notes that its own consideration of each bill was hindered by the limited explanation of the deviation from policy in each case. While the Committee subsequently received a full explanation from each sponsoring Minister, the Committee would prefer to see the Guide amended to encourage the incorporation of the justification for such deviations from policy in the explanatory memorandum to each bill.

2.63 While the Committee notes that the Guide is neither binding nor conclusive, promulgation of the Guide, together with the consultative processes established between sponsoring departments and the CJD, represent a significant step in the development of a transparent and coherent criminal law and civil penalty policy framework. Notwithstanding the suggestions made above, the Committee considers the Guide serves three important purposes: it consolidates the Commonwealth's general policy on criminal law, promotes consistency in legislative drafting and is a useful educative tool.

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20 Submission No. 14, p. 1.

CHAPTER 3

LEGISLATIVE DEVELOPMENTS

Introduction

3.1 The second paragraph of the terms of reference requires the Committee to review:

> The fairness, purpose, effectiveness and consistency of entry and search provisions in Commonwealth legislation made since the Committee tabled its Fourth Report of 2000

3.2 In undertaking this review, the Committee has adopted the same definitions of these terms as it used in its original report. The Committee sees a connection between the purpose of entry and search provisions and the need for consistency, or otherwise, of such provisions across comparable agencies. Similarly, the Committee considers that fairness and effectiveness are essentially matters of administration. The Committee has therefore considered the provisions made for the administration and review of entry and search powers.

3.3 The Committee has not set out to duplicate its ongoing consideration of legislation at the time of its introduction into Parliament. For the most part, the Committee has reviewed its commentary on particular bills in its Alert Digests and Reports to identify examples of issues that have emerged since it tabled its original report.

The purpose and consistency of entry and search provisions

3.4 Since its original report, the Committee has considered a number of bills containing entry and search provisions. These have included provisions intended to enable the gathering of evidence of an offence, such as the powers in the Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, and those intended to enable the monitoring of compliance with a statute, such as powers in the *Water Efficiency Labelling and Standards Act 2005*.

3.5 The Committee considers that the scope of any particular entry and search power ought to be influenced by the nature of the objectives pursued. The extent of the power conferred should be determined only after all the outcomes likely to flow from the grant of the power have been considered and balanced against each other. In this context, the Committee welcomes the consultative processes instituted by the A/G's Department for the development of provisions dealing with offences, civil penalties and enforcement. The Committee has therefore been interested to note the extent to which the bills it considers appear to have benefited from this process.

3.6 As noted in the original report, the Committee considers it is important that entry and search provisions should be as consistent as practicable across all

comparable agencies which exercise those powers. The Committee considers that all such provisions should accord with a common set of guidelines, unless compelling reasons are advanced to justify a departure from them. As noted in Chapter 2, the Committee considers that the release of the Guide represents a significant and positive step toward achieving this.

3.7 However, while the Committee considers that consistency is an important guiding principle, the Committee does not view it as absolute. The Committee recognises that in certain circumstances there may be a need to deviate from the accepted principles set out in the Guide. In these circumstances, the Committee expects that the explanatory memorandum to a bill will set out a clear explanation of the extent to which the principles in the Guide were considered in the formulation of the provisions and the reasons why, in the particular circumstances, a departure from these principles is justified. Unfortunately, the Committee notes that this expectation has not always been met.

Power to stop, detain and search people, vehicles and vessels

3.8 The Committee has considered a number of statutes which give law enforcement officers and others powers to stop, detain and search people, vehicles and vessels without a warrant. In many cases, these amendments represent a significant expansion of the powers previously available under the relevant legislation. Regrettably, the Committee notes that in most cases the proposed amendments were accompanied by limited explanation as to why the powers were necessary in the particular circumstances. In most cases, the justifications offered related to national security.

3.9 Relevant legislation considered by the Committee in this context included: the *Australian Protective Service Amendment Act 2003,* the *Aviation Transport Security Act 2003,* the *Fisheries Legislation Amendment (High Seas Fishing Activities and Other Matters) Act 2003,* the *Customs Legislation Amendment (Airport, Port and Cargo Security) Act 2004* and the *Maritime Transport Security Act 2003.*

3.10 The *Australian Protective Service Amendment Act 2003* conferred additional powers on protective service officers undertaking security functions to request personal identification details and information; to stop and detain certain persons for security purposes and to seize things found during such a search. The bill was amended during its passage to insert a requirement that a person shall not be detained for longer than is reasonably necessary for a search to be conducted.

3.11 Prior to the enactment of those provisions, protective service officers had the power to arrest people without warrant and search them, and things in their control, when the officer was performing protective security duties under a range of statutes. The arrest power could only be exercised if the protective service officer believed on reasonable grounds that the person was committing an offence mentioned in section 13 of the Protective Service Act and that arresting them was necessary, for

instance, to ensure that they appeared in court or to stop them from continuing to commit an offence.

3.12 The Committee expressed concern that the Act provided for people to be searched without a warrant being obtained and without being arrested. While there appear to be limitations on the exercise of the powers, the explanatory memorandum offered limited justification for these expanded powers, stating simply that:

> They will provide protective service officers with greater flexibility in suspicious circumstances where the exercise of the arrest power is not immediately necessary, but where it is necessary to act quickly to ensure the security of a person or place that is being protected is not compromised.

3.13 The *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* also expanded the powers available to the ASIO to question and detain persons under the Australian Security Intelligence Act 1979. Prior to these amendments, ASIO had no power to question and detain persons. ASIO could ask people to speak to it voluntarily and it had extensive intelligence gathering powers to intercept telecommunications, use listening and tracking devices, remotely access computers, enter and search premises and examine postal articles. Such powers could only be used under the authority of a warrant sought by the Director-General of Security and signed by the Attorney-General.

3.14 The amendments sought to provide for the detention and questioning, under warrant sought by the Director-General of Security and signed by the Attorney-General, of adults who may have information relating to terrorism and of minors aged between 16 and 18 years of age. Among other things, the Committee was particularly concerned about the power to detain persons, not suspected of committing any offence, for the purpose of obtaining intelligence.

3.15 The Committee commented that:

> These provisions seem to suggest that there is no need for anyone involved in seeking or issuing such a warrant to form a reasonable belief that the relevant person has committed any office. Indeed that person is to be detained for the purpose of collecting intelligence, not for the purpose of having an offence investigated. A person might be detained, apparently for a number of consecutive periods of 48 hours, simply because he or she may be able to provide information about, for example, the possible future commission of an offence.[1]

3.16 The Committee also expressed concern at the justification offered for this expansion of powers:

> In his Second Reading Speech, the Attorney-General justifies these provisions on the basis that it is "necessary to enhance the powers of ASIO to investigate terrorism offences." While terrorism provides obvious law

1 Scrutiny of Bills Committee, *Twelfth Report of 2002*, p. 411.

> enforcement challenges, these provisions allow what is, in effect, a new basis for detaining people who need not themselves be suspects and, in any event, are being detained for intelligence gathering rather than investigatory purposes.[2]

3.17 The Minister responded in detail, explaining that while there was no known specific threat to Australia, its profile as a terrorist target has risen and these powers were necessary to help ASIO uncover information before a terrorist offence is perpetrated so that it can be prevented.[3] While the bill was amended during its passage, the Committee concluded that the provisions, even after amendment, might have an adverse impact on personal rights and liberties. The Committee left it for the Senate to decide whether such breaches are acceptable when weighed against the policy objectives of the bill.

3.18 The Committee considers that the justification for the expansion of intrusive enforcement and investigatory powers should not be considered to be self-evident, no matter how beneficial such powers might be in a national security context. The Committee expects that the development of such legislation is preceded by careful consideration of all practicable avenues balanced against consideration of the implications for individual rights and liberties. This consideration should be included in the explanatory memorandum to any legislative proposal in appropriate detail, together with the justification for any deviation from accepted principle, to assist the Parliament in its consideration of the merit of the proposed legislation.

Personal searches

3.19 The Committee has considered a number of recent statutes which have given law enforcement officers, and others, powers to conduct personal searches, including strip searches, again without a warrant.

3.20 Paragraph 11.3 of the Guide advises 'any proposal for new powers to search persons, whether in the form of a frisk, ordinary or strip search, should have strong justification.'[4] However, the Committee notes that on a number of occasions no such 'strong justification' has been provided, and it has been necessary for the Committee to seek an explanation from the relevant Minister. Where justification is provided, it is generally either related to national security or to an apparent precedent for similar powers in other legislation.

National security

3.21 The trigger for the exercise of these powers is generally derived from the unauthorised presence of a person or persons in a security-controlled area. An

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2 Scrutiny of Bills Committee, *Twelfth Report of 2002*, p. 411.

3 Scrutiny of Bills Committee, *Twelfth Report of 2002*, p. 413.

4 The Guide, p. 90.

example is the *Customs Legislation Amendment (Airport, Port and Cargo Security) Act 2004*. Section 219ZJD of that Act would permit a Customs officer to conduct either a frisk search or an ordinary search of a person whom the officer has detained on suspicion of having committed a serious offence against a law of the Commonwealth. The Committee noted that no justification was advanced in the Second Reading Speech to the Act and that the explanatory memorandum advised only that the 'search and seizure powers set out in this section are similar to the powers that are conferred on protective service officers'.[5]

3.22 The Minister advised that the purpose of the powers is to protect Customs officers and prevent the destruction of evidence when a person is suspected of having committed a serious Commonwealth offence, is the subject of a Commonwealth arrest warrant, or is on bail where a condition of the bail is that a person not depart Australia. The Minister also advised that Customs officers already have broad personal search powers under the *Customs Act 1901* and receive extensive training in relation to this aspect of their operational activity.[6] The Committee noted that its consideration of the bill would have been assisted by the inclusion of this explanation in the explanatory memorandum. The Committee also stated that it continues to have concerns with personal search provisions as they may be considered to trespass on personal rights and liberties.

Precedent as a justification for extension of powers

3.23 The Committee has noted a trend in which powers of detention and search without a warrant in earlier bills are used as a precedent for modelling subsequent legislation, but often without the same degree of rigour. The Committee considers that these are significant and intrusive powers and should only be conferred in exceptional and specific circumstances. The Committee does not believe that precedent alone is sufficient reason for pursuing a practice, particularly if the practice is tainted or flawed. The Committee expects that proposals for the inclusion of such powers in legislation should be accompanied by detailed explanation and justification in the explanatory memorandum and also by appropriate safeguards.

3.24 For example, the Committee has considered a number of bills which have sought to extend existing enforcement powers to encompass detention and search powers similar to those in the *Migration Act 1958*. The Committee is concerned that while these subsequent provisions mirror the provisions of the earlier Act, they often also mirror weaknesses in the earlier Act (upon which the Committee expressed concern), or fail to include appropriate safeguards to ameliorate the risks identified by the Committee in commenting on that earlier legislation.

3.25 In a number of cases, the Committee has expressed concern at an apparent lack of rigour in the framing of such powers and at the inadequacy of the justification

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5 Scrutiny of Bills Committee, *Ninth Report of 2004*, p. 170.

6 Scrutiny of Bills Committee, *Ninth Report of 2004*, p. 172.

for such powers provided in the explanatory memorandum to each bill. Relevant legislation includes: the Border Protection Legislation Amendment Bill 1999,[7] the Migration Legislation Amendment (Immigration Detainees) Bill 2001, the Migration Legislation Amendment (Immigration Detainees) Bill (No. 2) 2001, the Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005,[8] and the Environment and Heritage Legislation Amendment (No. 1) Bill 2006.[9]

3.26 The Migration Legislation Amendment (Immigration Detainees) Bill 2001 proposed a series of provisions including the ability for an authorised officer, without warrant, to conduct a strip search of a detainee to determine whether that detainee possesses a weapon or other thing capable of being used to inflict bodily injury or facilitate escape. The Committee expressed concern at the use of provisions in the *Crimes Act 1914* which authorise police officers to search people under arrest as a model for conferring such powers on persons other than police officers in relation to persons in immigration detention. The Committee sought a briefing on the provisions of the bill. On 21 June 2001, the bill was amended in the House of Representatives and a number of provisions of concern to the Committee were removed from the bill. These were subsequently included in the Migration Legislation Amendment (Immigration Detainees) Bill (No. 2) 2001.

3.27 In considering that subsequent bill, the Committee reiterated its earlier concerns, but noted that the changes made to the provisions previously introduced had provided greater safeguards in relation to the authorisation and conduct of strip searches. The Committee also noted that a *Draft Protocol for Strip Search of Immigration Detainees* had been developed and agreed between the then Minister for Immigration and Multicultural Affairs and the Attorney-General. The Draft Protocol set out the principles and essential operating guidelines for those who authorise a strip search, those who conduct it, and those who are subject to it. The Committee also noted that the Draft protocol was expected to be incorporated into written directions issued pursuant to section 499 of the Migration Act.

3.28 In responding to the Committee's concerns the Minister advised that further amendments were to be made to the bill including requiring a search of an immigration detainee who is at least 10 years old but under 18 years to be authorised by a magistrate and to clarify the basis on which an officer might form a suspicion on reasonable grounds that there is a weapon hidden on, or about, a detainee. The Minister also advised that pursuant to section 499, the Draft Protocol would be tabled in Parliament and that the Protocol would contain provisions requiring the tabling of a statement twice per year providing summary information on the number of strip searches. These additional safeguards, together with the Draft Protocol tempered the Committee's concerns in relation to this bill.

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7 Scrutiny of Bills Committee, *Eighteenth Report of 1999*, pp. 434–443.

8 Scrutiny of Bills Committee, *Fourth Report of 2005*, pp. 69–80.

9 Scrutiny of Bills Committee, *Alert Digest No. 12 of 2006*, pp. 7–19.

3.29 Since the passage of that bill, the Committee has considered other bills which have included search powers closely modelled on those in the Migration Act. The Border Protection Legislation Amendment (Deterrence of Illegal Fishing) Bill 2005 inserted similar provisions in the *Fisheries Management Act 1991* and the *Torres Strait Fisheries Act 1984*. However, the Committee was concerned that these bills were not accompanied by a clear justification for the extension of the powers and did not follow the model of providing for operational guidelines or for Parliamentary scrutiny of those guidelines.

3.30 More recently, the Environment and Heritage Legislation Amendment (No. 1) Bill 2006 has sought to include similar provisions in the *Environment Protection and Biodiversity Conservation Act 1999*. In considering this bill, the Committee expressed concern at the lack of justification for applying personal search provisions, including provision for strip searches, without a warrant, within the context of the Environment Protection Act. In tabling the Committee's report, the Chair of the Committee stated that '[t]o borrow exceptional powers from another regulatory context and seek to apply them without due rigour or detailed justification in a different regulatory context is simply not sustainable'.[10] The Committee was concerned to note the Minister for the Environment and Heritage's response in which he stated that:

> it is considered highly unlikely that it would ever be necessary to conduct strip searches of environment detainees. I understand that under the powers in the Migration Act no adult has been strip searched since January 2003 and no minor has ever been strip searched.[11]

3.31 The Committee considers that powers to detain, search or strip search an individual are significant and intrusive and should only be conferred in exceptional and specific circumstances where there is a demonstrated need for such powers. The Committee considers that where such powers are deemed necessary, a detailed explanation and justification for their use should be included in the explanatory memorandum to the bill and appropriate safeguards should be provided for, both within the legislation itself and within guides and/or protocols. Desirably, such guides or protocols should be provided for in the legislation, promulgated by way of Ministerial direction and tabled in both Houses of the Parliament. In addition, the Committee considers that guidelines and protocols for such powers should contain provisions that require the tabling of an annual statement providing summary information on the number of strip searches.

Reduction of judicial oversight

3.32 The Committee has raised concerns in relation to a number of bills containing powers to detain and search people without warrant. One of the Committee's concerns is the reduction in judicial oversight of the use of sensitive and intrusive powers prior

10 Senate *Hansard*, 18 October 2006, p. 69.

11 Scrutiny of Bills Committee, *Eleventh Report of 2006*, p. ??

to their use, often combined with a restriction upon subsequent judicial oversight through a prohibition on instituting legal proceedings.

3.33 Provision for search without warrant is often justified on the basis of the difficulty of obtaining a warrant urgently in circumstances where it is impractical to obtain a warrant in person, such as in a remote locality or at sea. The Committee notes, for example, the statement in the Government response that:

> The Government does not support the principle that the power to issue warrants to enter and search premises should only be conferred on judicial officers. The delay that is often involved in contacting and consulting with a judicial officer in order to obtain a search warrant is unacceptable in situations where DIMIA officers require a warrant as a matter of urgency to assist in apprehending an illegal migrant believed to be at a particular residence.[12]

3.34 The Committee notes that some bills have made provision for high level authorisation in the case of 'strip searches', at Secretary or Deputy Secretary level or equivalent[13]. However, the Committee remains concerned where the use of such intrusive powers is not subject to judicial oversight. In this context, the Committee endorses the advice in the Guide that in such circumstances, provision should be made for the issue of a warrant by telephone and that section 3R of the Crimes Act should be used as a model[14].

Recommendation 1

3.35 The Committee recommends that the Guide be amended to advise that the justification for entry and search powers in general, and for those conferring the power to conduct personal searches in particular, should be clearly set out in the explanatory memorandum to the bill.

Recommendation 2

The Committee also recommends that the Guide be amended to advise that the justification for entry and search powers, particularly the power to conduct personal searches, should address the need for such powers in the particular circumstances and should not rely on precedent alone.

Recommendation 3

The Committee further recommends that entry and search without a warrant should only be authorised in very exceptional circumstances and only after avenues for obtaining a warrant by telephone or electronic means have proved

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12 Government response, p.10.

13 For example, Schedule 1 of the Environment and Heritage Legislation Amendment Bill 2006.

14 *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, 2004, Minister for Justice and Customs, p. 73.

absolutely impractical in the particular circumstances. In such circumstances, senior executive authorisation for the exercise of such powers should be required together with appropriate reporting requirements. The Guide should be amended to reflect this.

The administration and review of entry and search powers

3.36 As mentioned earlier, the Committee considers that the fairness and effectiveness of entry and search powers is largely a question of administration. In its original report the Committee commented that:

> A provision may be fair in its terms, but administered in an unfair manner. Or a provision may be 'unfair' in its terms, but administered by the relevant agency in a way that renders it 'fair'.[15]

3.37 The Committee notes that the Guide provides a clear statement of Commonwealth policy in relation to the implementation of entry and search powers. It provides guidance in relation to the appointment, qualifications and accountability of officers authorised to administer such powers, identification requirements, the notification of rights of occupiers, the use of force and the seizure of materials. The Committee also notes the clarification provided in the Government's response in relation to a number of these matters. Generally speaking, most of the legislation considered by the Committee in the course of this inquiry has accorded with the principles currently expressed in the Guide. However, the Committee remains concerned about what it considers to be three key areas in the administration of entry and search powers, which are inconsistently addressed in legislative proposals:

- accountability measures for non-government employees and agencies;
- advice of rights and obligations to occupiers prior to search; and
- training procedures and other internal controls.

Accountability measures for non-government employees and agencies

3.38 The Committee endorses the Government's view that entry powers should generally only be conferred on government employees on the ground that such officers are subject to a wide range of accountability mechanisms. The Committee accepts that in certain circumstances it may be necessary to confer such powers on non-government employees, for example, where specialist expertise is required. The Committee endorses the Government's view that:

> the empowerment of non-government officials to exercise search and entry powers should be strictly limited to cases of necessity. Necessity would be assessed by the Attorney-General's Department on a case by case basis

15 Scrutiny of Bills Committee, *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation.*

when it is consulted about requests for a grant of search and entry powers in accordance with Government policy.[16]

3.39 The Committee has expressed concern in the past that coercive and intrusive powers should only be conferred on appropriately qualified persons. The Committee welcomes the Government's statement that appointment procedures may be set down in legislation and that in the case of non-government employees or agencies certain limitations should be applied to the authority to apply for search warrants. Similarly, the Committee welcomes the Government's suggestion that the exercise of entry and search powers be 'legislatively restricted by limiting the exercise of search and entry powers by such non-government employees to instances where, for example, their expertise would be required.

Recommendation 4

3.40 **The Committee recommends that the Guide be updated to include the statement of principle and practice set out in the Government's response and to also include advice that the justification for the empowerment of non-government employees in particular circumstances should be set out in the explanatory memorandum to the bill. Similarly, the justification for any deviation from these principles and practice should also be set out in the explanatory memorandum, for the benefit of the Parliament and the public.**

Advice of statutory rights to occupiers

3.41 In its original report, the Committee stated that the occupier of premises which are to be entered and searched should be given a copy of any relevant warrant and informed in writing, or if that is impractical, informed orally, of his or her rights and responsibilities under the relevant legislation. The Committee also stated that this requirement should be waived only where circumstances are critical, or where an official is threatened with violence or where it is absolutely impractical to follow them.[17]

3.42 The Customs Brokers & Forwarders Council of Australia contends that a need still exists 'to ensure appropriate information is provided to the occupier, in plain words not reconstituted legal text, as to rights and responsibilities in relation to any monitoring activity … undertaken by a regulatory agency with or without the occupier's consent.' In its submission, the CBFCA cites particularly a need for a statement of purpose – that is, whether the activity is for 'monitoring compliance, for the purpose of enforcement or for gaining evidence for a possible prosecution'. The CBFCA submits that this should be a 'clear statement of purpose rather than a broad

16 Government Response, p. 7.

17 Scrutiny of Bills Committee, *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation*, p. 128.

notification to enable 'fishing' expeditions.' The CBFCA notes that, in its experience, occupiers are 'in many instances loath to exercise [their] rights for fear of alienating the regulatory agency in terms of future compliance activity.[18]

3.43 The Committee welcomes the Government's response to that report which states that:

> The policy on such matters has been changed to require that an occupier be informed in writing or, if that is impractical, informed orally, of his or her rights and responsibilities in relation to the search. There is no reason to distinguish in the context of this proposal between a search warrant, monitoring warrant and search authorised by consent. The statement of rights and responsibilities that are suitable for communication to an occupier in plain language should be drawn from the legislation itself …[19]

3.44 The Committee notes that these principles are reflected in the Guide and received evidence from agencies in during the inquiry which indicates that steps have been taken to address this issue. For example, the ACS indicated to the Committee that its practice is to maintain a clear distinction between powers used to monitor compliance and those used to investigate an offence. It also indicated that, when entering and searching premises, 'Customs provides written and verbal information to occupiers about its powers and their rights and obligations.[20]

3.45 AQIS noted in its submission that it has instituted a new practice of providing occupiers with an information sheet when officers enter premises under a search warrant.[21] AQIS provided the Committee with a copy of an information sheet that authorised officers hand to occupiers prior to entering under warrant. The Committee notes that in this case the occupier is asked to endorse receipt of the information sheet. The Committee sees this innovation for AQIS as a positive step. Although the information sheet largely contains legislative provisions, these are drafted and presented in plain language.

3.46 The Committee welcomes the change in government policy in this area and the examples of revised policy and practice. In particular, the Committee notes the provisions of the Trade Practices Legislation Amendment Bill (No.1) 2005. This bill proposed a new scheme of search and entry powers for the Australian Competition and Consumer Commission (ACCC). It provides that entry on to premises must be either by consent or warrant, that ACCC staff members exercising search and seizure powers must have suitable qualifications and experience and that they must carry identity cards at all times. By contrast, the previous regime enabled the ACCC to authorise a staff member to enter premises, inspect documents and make copies if

18 Submission No. 3, p. 1.

19 Government response, p. 13.

20 Submission No. 5, p. 3.

21 Submission No. 10.

there was a suspected contravention of the Trade Practices Act. A warrant was not necessary for the exercise of these powers, though the ACCC could only exercise them if it believed that the person possessing or controlling the document may have contravened the Act.

3.47 However, the Committee notes that there appears to be some unevenness of application of the principles in the Government response and the Guide in the drafting of entry provisions. The Committee has commented on a number of bills which have not required the occupier to be informed of their rights in writing or for the occupier to be provided with a copy of the warrant.

3.48 In some cases the Committee has noted that provision has been made for the occupier to be provided with a copy of a warrant on request. For example, in commenting on the Families, Community Services and Indigenous Affairs and Veterans' Affairs Legislation Amendment (2006 Budget Measures) Bill 2006, the Committee noted that no provision appeared to have been made for the occupier to be advised of his or her rights under the legislation and the bill requires an authorised officer to make a copy of the warrant available only if the occupier of the premises, or another person who apparently represents the occupier, is present at the premises[22].

3.49 In responding to the Committee's concerns, the Minister stated that:

> A warrant to enter premises and search for and seize evidence of offences provides a reasonably clear indication to an occupier of their rights and obligations in regard to that entry, search and seizure. From a practical point of view officers would certainly be instructed to provide sufficient advice to an occupier of premises in regard to their rights and obligations under the warrant to facilitate the execution of the warrant. I believe that the provision of a copy of the warrant to an occupier is a suitable way to provide that person with information in regard to their rights and obligations in regard to the execution of the warrant. Obviously, an occupier is always able to seek his or her own legal advice in regard to these issues.

3.50 The Committee noted in the case of this bill that the authorised officer was only required to make a copy of the warrant available if the occupier of the premises, or another person who apparently represents the occupier, is present at the premises.[23] The Committee does not consider that provisions such as these adequately satisfy the Committee's expectations or the Government's stated policy in relation to advising individuals of their rights and obligations in relation to the exercise of entry, search and seizure powers. The Committee's expectation is that legislative provision should be made for an authorised officer to produce his or her identity card prior to entry, and

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22 Scrutiny of Bills Committee, *Tenth Report of 2006*, pp. 171-172.

23 These provisions were set out in Schedule 2 to the Families, Community Services and Indigenous Affairs and Veterans' Affairs Legislation Amendment (2006 Budget Measures) Bill 2006. The Committee notes that the Senate amended this bill on 28 November 2006 to remove Schedule 2 from the bill in its entirety.

for the occupier of the premises to be provided with a clear statement of his or her rights and obligations in relation to the exercising of the warrant, preferably in writing, together with a copy of the warrant.

3.51 Where the text of legislation is clear in setting out rights and responsibilities, the Committee accepts that it may appropriately form the basis of the information provided to occupiers. However, the Committee does not accept that the information should merely reproduce legislative provisions which are particularly complex or lengthy. The Committee notes the recommendation of the Australian Law Reform Commission (ALRC), in its 95th Report, *Principled Regulation* that, 'When regulators develop publicly available guidelines (however named) in the absence of a legislative requirement to do so, these guidelines should … be drafted in plain English'.[24]

3.52 The Committee also accepts that consideration must be given to the range of languages in which this information might be required and that this might vary from case to case. The Committee received evidence from DIMIA that information sheets in relation to search warrants under section 251 of the Migration Act are translated into 15 languages. Given the work of this Department, this appears particularly apt.[25]

Recommendation 5

3.53 The Committee recommends that where legislation provides for entry and search of premises, legislative provision should also be made for an authorised officer to identify him or herself prior to execution of a warrant and for the occupier of the premises to be provided with written advice, in plain language, prior to execution of a search under the warrant. Such requirements should only be waived in exceptional circumstances, such as the exercise of covert search powers authorised under a warrant.

Recommendation 6

3.54 The Committee further recommends that the advice in the Guide be revised to more clearly reflect the requirements referred to in Recommendation 5.

Best practice training procedures and other internal controls

3.55 As noted in paragraph 3.38, the Committee considers legislative provision for the protection of individual rights is an important element in effecting fairness in entry and search powers. However, the Committee recognises that there are limitations on the extent to which legislative provisions can guide the exercise of such powers. Achieving fairness in the execution of such powers depends significantly on the training and guidance provided to the officers executing the powers. In its original report, the Committee recommended that:

24 Principled Regulation, p. 258.

25 Committee *Hansard*, SSSB 10.

> all agencies which exercise powers of entry and search should introduce best practice training procedures and other internal controls to ensure that the exercise of those powers is as fair as possible and should set out the appropriate procedures and scope for the exercise of these powers in enforcement and compliance manuals.[26]

3.56 The Committee notes that the Government accepts that 'appropriate best practice training procedures and internal controls should be in place in Commonwealth agencies that exercise search and entry powers.'[27] The Government response also notes that the Commonwealth Director of Public Prosecution's (DPP) Search Warrants Manual is available free of charge to interested Commonwealth agencies.

3.57 The Committee received evidence from a number of agencies regarding their own internal guidelines and training procedures. ASIC, DIMIA, Australian Customs Service (ACS) and the AFP provided evidence about their training procedures and internal manuals and guidelines. These agencies use a range of manuals and internal instructions to guide their operations, including the DPP Search Warrant Manual. DIMIA stated that it had issued a 'comprehensive instruction' on entry, search and seizure together with operational guidelines and has introduced a training program which includes a focus on 'entry type issues'. DIMIA also stated that it had been working closely with the Ombudsman in a review of its warrant issue and administration processes. [28]

3.58 The ACS also indicated that it has a series of internal manuals that cover the range of its operational business which describe the operation of relevant legislation, policies and procedures. These manuals are updated each time that the legislation is amended. The ACS explained that some of the manuals were confidential while others were publicly available.[29] The ACS has also reviewed its training procedures. In evidence before the Committee the ACS stated that it works closely with the AFP in training Customs Officers. Face to face training is followed up with on-the-job assessment of competencies prior to the issue of a certificate. The ACS indicated that ACS officers must be trained before they are authorised to have monitoring powers issued to them.[30]

3.59 Given the intrusive nature of entry, search and seizure powers, the Committee would prefer to see provision in the primary legislation for the formulation of training procedures and guidelines for the execution of such powers and considers that these guidelines should be published except where there are good reasons to the contrary.

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26 Scrutiny of Bills Committee, *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation,* p. 128.

27 Government response, p. 16.

28 Committee *Hansard*, p. SSSB 10.

29 Committee *Hansard*, p. SSSB 28.

30 Committee *Hansard*, p. SSSB 30–31.

The Committee considers that the approach set out in the ALRC's Report No. 95, *Principled Regulation*, could provide a useful basis for the development and dissemination of such guidelines. The ALRC recommended that:

> when regulators develop publicly available guidelines (however named) in the absence of a legislative requirement to do so, these guidelines should:
>
> - be drafted in plain English;
> - include a statement that they are not legally binding or justiciable;
> - be published in electronic format on the regulator's website and in hard copy;
> - if appropriate, be published using a systematic method that is accessible to both the regulator's staff and the regulated community;
> - clearly indicate they are current and operative guidelines; and
> - to the extent practicable, be developed in consultation with the regulated community.[31]

3.60 On occasion, Ministers have drawn the development of guidelines and protocols in relation to entry and search powers to the attention of the Committee. For example, as noted in paragraph 3.28, in responding to the Committee's concerns in relation to the Migration Legislation Amendment (Immigration Detainees) Bill, the Minister advised the Committee of the existence of a Draft Protocol for Strip Search of Immigration Detainees which had been developed in consultation with the Attorney-General and which would be tabled, pursuant to s.499 of the Migration Act, thus allowing for a degree of parliamentary scrutiny[32].

3.61 The Committee considers that external scrutiny by the Parliament, and by agencies such as the Ombudsman and Australian National Audit Office (ANAO) is an important element in establishing the extent to which training practices and operational procedures can be said to be best practice. The Committee received evidence from a number of agencies which indicated that there was a degree of external scrutiny in relation to some internal practices. The submission from the Commonwealth Ombudsman's Office attached a copy of the Ombudsman's finding in relation to an own motion investigation of the exercise of entry and search powers by the ATO. The report of the Ombudsman's findings notes that the investigation was prompted by the Committee's concerns that 'the ATO's powers are anomalous … not withstanding the procedural limitations which the ATO has imposed on itself, it is a matter of concern that there is no independent oversight of the use of a power which is expressed in such broad terms.'[33]

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31 ALRC Report No. 95, Principled Regulation, pp. 26-27.

32 Migration Act 1958, Direction Under Section 499, Journal of the Senate, No. 1-12 February 2002, p. 47.

33 Scrutiny of Bills Committee, *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation*, pp. 91-108.

3.62 However, the Committee noted from evidence received during the inquiry that for the most part scrutiny of operational procedures is internal scrutiny, with agencies reviewing their own procedures and outcomes. While the Committee notes the commitment of a number of agencies to procedural review, it would prefer that as far as possible legislative provision is made for the development of guidelines and for such guidelines to be tabled in Parliament and published on the agency's website. The Committee notes that some agencies also maintain confidential manuals and guidelines in relation to certain procedures. The Committee considers that this practice should be limited to specific and exceptional circumstances.

Recommendation 7

3.63 The Committee recommends that the Guide be revised to require legislative provision for the development of guidelines for the implementation of entry, search and seizure powers. Other than in specific exceptional circumstances, such guidelines should be tabled in both houses of Parliament and published on the agency's website.

Review of need for powers

3.64 The Committee is concerned by statements by Ministers and agencies that certain significant and intrusive powers, even though they will rarely be required, have been introduced as measures of last resort. The Committee has commented earlier on a tendency among agencies to make ambit claims in relation to the range of powers required. The Committee reiterates its expectation that each legislative proposal for the extension of search and entry powers to any given agency will be considered on its merit and that appropriate justification for the extension of the powers in the particular circumstances will be included in the explanatory memorandum to the bill.

3.65 In addition to this, the Committee considers that it is incumbent upon Ministers and agencies to regularly review the powers at their disposal, their use and the ongoing need for them and to report this information to the Parliament annually.

3.66 In this context, the Committee also notes the submission of the LCA that entry and search powers should be routinely monitored and that a register of the exercise of any such powers should be maintained by an appropriate agency.[34] More specifically, the Customs and International Transactions Committee of the LCA's Business Law Section recommended that there be:

> [A] regular review of the exercise of search and seizure powers, whether pursuant to a warrant or otherwise. This should be conducted by the ANAO no later than once in every 12 months. This should be conducted by way of Public Inquiry with representations sought from all interested parties.

34 Submission No. 8, p.3.

3.67 The Committee considers that there is merit in the establishment of a register of entry, search and seizure powers. Desirably, such a register would include such powers in both Commonwealth and State and Territory legislation. The establishment of such a register would facilitate regular review of which agencies are exercising such powers, with what frequency and in what particular circumstances.

3.68 In addition to the establishment and maintenance of a register, the Committee agrees that it is particularly important to monitor the application and administration of such powers. In this context, the Committee notes the submission of the Office of the Commonwealth Ombudsman in relation to the Senate Legal and Constitutional Affairs Committee Inquiry into the Provisions of the Families, Community Services and Indigenous Affairs and Veteran's Affairs Legislation Amendment (2006 Budget Measures) Bill 2006, that a program should be established to allow it to monitor the administration of the entry, search and seizure provisions in that legislation for the first three years the new powers were in operation. The Committee particularly notes the evidence of the Acting Commonwealth Ombudsman that:

> … regular monitoring by the Ombudsman of the use of the powers … would require records of the process to be kept for the issue of warrants and other procedures, which would then be subject to audit and regular intervals.
>
> This compliance monitoring could be done by the Ombudsman undertaking an own-motion investigation that would examine regularly the way in which the powers have been exercised. If there were significant and chronic compliance problems, a move to a closer level of scrutiny through an inspections regime might be justified.

3.69 The Committee considers that, if properly resourced, the Ombudsman may be well placed to undertake monitoring of the practical application of such powers on a wider scale across all Commonwealth legislation, and that with the cooperation of State and Territory counterparts, this monitoring could be extended to include similar powers in State and Territory legislation. Such monitoring could extend to consideration of guidelines for the application of such powers and relevant governance and accountability frameworks. The Office of the Ombudsman could include the findings of such monitoring in its regular report to Parliament.

Recommendation 8

3.70 **The Committee recommends that the Commonwealth Ombudsman evaluate the feasibility of establishing a register of entry, search and seizure powers in Commonwealth legislation and the ongoing monitoring and audit of the application of such powers.**

Recommendation 9

3.71 **As an interim measure, the Committee recommends that all new proposals for entry, search and seizure powers include legislative provision for regular reports to Parliament in relation to the agency's use of the powers and the continued need for them.**

CHAPTER 4

PROVISIONS AUTHORISING SEIZURE

The nature of powers of seizure

4.1 In principle, seizure powers cannot be separated from the entry and search powers with which they are generally exercised. The inclusion in the terms of reference for this inquiry of a paragraph related to seizure provisions enables the Committee to emphasise that the principles it set out in the original report should be considered to apply, as relevant, to provisions authorising the exercise of powers of seizure.

4.2 In particular, where the seizure of documents or other material represents a significant intrusion upon personal rights, the same considerations should be taken into account as apply in granting or exercising intrusive entry and search powers.

4.3 In this respect, the Committee will continue to test new seizure provisions in legislation against the principles set out in its original report. In keeping with the Committee's comments in Chapters 2 and 3 of this report in relation to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide), the Committee would expect that the explanatory memorandum to any such bill would set out any points of departure from the criminal law policy set out in the Guide.

4.4 This Chapter begins with some commentary on seizure provisions as they apply generally across Commonwealth legislation. The Committee then considers situations in which provisions enable seizure on a basis which is removed from the usual context of entry and search provisions, including the special considerations which apply to the seizure of material in respect of which parliamentary privilege might be claimed, seizure of material that is not relevant to an investigation and technological developments affecting entry, search and seizure of material.

4.5 The Committee also considers the merits of developing protocols to govern the seizure of material.

Seizure provisions in Commonwealth legislation

4.6 The Committee has not undertaken a systematic survey of seizure provisions in Commonwealth legislation, noting that such a survey would largely replicate a similar exercise undertaken in respect of search and entry provisions in its original inquiry. The Committee considers that, while such a survey may be warranted, it would only make sense to undertake it with a defined purpose of review in mind. In this respect, the Committee notes the lack of support from the Government for a general review of existing search and entry provisions.

4.7 The Committee notes the discussion of seizure provisions as set out in the Guide at Part 9.6:

> Principle: Seizure should only be allowed under a warrant, even if entry and search without warrant are permitted. Where entry is allowed without warrant, the legislation may provide that items may be secured, pending a warrant application.
>
> Discussion: Seizure is a significant coercive power and the Commonwealth has consistently taken the approach that it should require authorisation under warrant.

4.8 The Committee also notes a relevant comment in the Government response in relation to record-keeping and reporting practices, namely that 'seizure of items is only permitted under a warrant, which in itself links into recording procedures that apply to the execution of warrants'.[1]

4.9 The Committee received a number of submissions from agencies setting out the particular seizure powers they administer. Common elements include notification of rights, itemisation of things seized, issuing a receipt for things seized, and return of documents and other materials seized (with some exceptions, such as perishable goods, live animals, narcotic goods and dangerous goods).

4.10 In general, these provisions accord with the Committee's principles governing the provision of information to occupiers[2] although the Committee notes that the practice in relation to video or tape recording the execution of search warrants, and providing copies or transcripts, is inconsistent.

4.11 The Committee did not generally note any concerns with the exercise of ordinary powers of seizure pursuant to warrant, except in the case of seizure of material not relevant to an investigation. This includes the seizure of 'electronic' documents and equipment such as under the *Cybercrime Act 2001*. The Cybercrime provisions are considered below, together with a number of similar legislative developments associated with new technology.

Seizure and parliamentary privilege

4.12 In its original report the Committee recorded the protections afforded against the seizure of documents that are subject to legal professional privilege. The Committee did not give consideration at that time to the seizure of documents subject to parliamentary privilege.

4.13 The Senate Committee of Privileges has defined the privileges of Parliament as 'immunities from the operation of certain laws conferred in order to ensure that the

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1 Government response, p. 6.

2 Scrutiny of Bills Committee, *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation,* p. 53.

duties of members as representatives of their constituents may be carried out without fear of intimidation or punishment, and without improper impediment.'[3]

4.14 The relationship between parliamentary privilege and the seizure of documents under warrant has been the subject of much consideration in recent years. The Clerk of the Senate has drawn the Committee's attention to developments in law and practice arising largely from two cases involving the execution of offence-related search warrants by the AFP in senator's offices. As the Clerk points out:

> Parliamentarians have no general immunity against the entry of their premises or the inspection or seizure of their documents under a search warrant or pursuant to a statutory authority … The law of parliamentary privilege … makes the seizure of some categories of documents, associated with proceedings in Parliament, … unlawful.[4]

4.15 The practice which has arisen in the Senate from the two cases referred to above is that any claim of immunity from seizure due to parliamentary privilege is determined by the Senate. The Clerk states:

> In both cases, documents claimed by the senators to be immune from seizure were sealed and the claim of immunity was determined by the Senate through the medium of an independent arbitrator. In both cases documents were withheld from the police and returned to the senators as having been unlawfully seized under the search warrants. In one case some documents were identified as immune from seizure by virtue of parliamentary privilege, and in the other case all of the documents were held to be not authorised to be seized under the warrant.[5]

4.16 That practice is now supported by a memorandum of understanding between the Presiding Officers and the AFP, tabled in the Senate on 9 March 2005.[6] The development and status of the law and practices involved is discussed in greater detail in the 75th, 105th, 114th and 125th reports of the Senate Committee of Privileges.

4.17 The Clerk notes that the immunity from seizure of documents under parliamentary privilege also applies in relation to statutory search and entry:

> … a statutory provision which, for example, authorises the inspection and seizure of 'any documents' relating to a particular matter does not authorise the inspection or seizure of documents which are immune from inspection and seizure by virtue of parliamentary privilege. The statutory provision has to be read as subject to parliamentary privilege unless the statute by its terms alters the law of parliamentary privilege.[7]

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3 Senate Committee of Privileges, *125th Report*, p. 3.

4 Submission No. 2, p. 1.

5 Submission No. 2, p. 2.

6 *Journals of the Senate*, p. 451.

7 Submission No. 2, p. 3.

4.18 The Clerk proposes that Commonwealth agencies with entry, search and seizure powers be advised:

> … that there are categories of documents which are immune from examination and seizure because of parliamentary privilege and that, in exercising such powers, they should not gain access to those kinds of documents. They could also be advised that, should a question of parliamentary privilege arise in relation to documents, they should take steps to have the question determined, along the lines of the procedures adopted by the Australian Federal Police[8].

4.19 The Committee supports this proposal, and sees the matter as one for the President and the Senate Committee of Privileges to progress.

4.20 The Clerk notes that, in its 114th report the Privileges Committee

> … pointed out that potential problems with parliamentary privilege and warranted searches are much more likely to arise because of the current practice of police, when executing a search warrant, of sweeping up every piece of information in an office and taking it away to ascertain whether it is relevant to the investigation (this may be called the 'vacuum cleaner approach to searches).[9]

4.21 The Committee also notes the observation of the Senate Committee of Privileges that this problem is compounded by the electronic storage of documents. This matter is discussed further in the context of a number of other legislative developments associated with new technology[10].

Seizure of material that is not relevant to an investigation

4.22 Generally speaking, in exercising powers of seizure under warrant, an officer cannot go beyond what is properly authorised in the warrant. The courts may also add a measure of fairness in these circumstances by exercising their discretion to exclude evidence which has been improperly seized.

4.23 In Chapter 4 of the original report the Committee noted the guidelines laid down by Fox J in *Tillet's* case 'which emphasise the strict statutory compliance usually insisted on by the courts' among them:

- as a corollary of the power of seizure, a particular offence must be specified, both in the information and in the warrant – this is so even where the statute simply uses the words 'any offence' ; and

8 Submission No. 2, p. 4.

9 Submission No.2, p. 2.

10 Senate Committee of Privileges, *125th Report*, p.36.

- the warrant must not authorise the seizure of things in general, or things which are related to offences in general, but should only authorise the seizure of things by reference to the specified offence.[11]

4.24 Subsequent paragraphs set out the manner in which the court applies these principles. The Government response, at page four, states that '[t]he current line of judicial authority is that courts will not automatically strike down a search warrant that is wider than it should have been' but will exercise a judicial discretion in this regard. The Committee agrees that this approach is sound.[12]

4.25 However, the Committee notes that there are circumstances in which material which is not relevant to an investigation might be seized, specifically:

- seizure of material relevant to another matter; and
- the incidental seizure of material.

4.26 The Committee was concerned to understand what protections or safeguards might exist in relation to the handling of such material.

Seizure of material relevant to another matter

4.27 The Committee notes that under a number of pieces of legislation, officers are authorised to seize material relevant to an offence other than that specified in the warrant. For example, section 98(4) of the *Customs Act 1901* makes provision for a warrant to authorise the seizure of things that the executing officer reasonably believes to be evidential material in relation to an offence to which the warrant relates or to another offence.

4.28 In its submission to the inquiry, the ACS noted that the examination of data on a hard drive may lead to the discovery of documents relevant to another Customs offence, which would be investigated and prosecuted by the ACS, or a non-Customs offence, in which case the data would be passed to the relevant agency for investigation and prosecution.[13]

4.29 Similarly, DIMIA gave evidence that the Migration Act provides DIMIA officers, having entered premises or boarded vessels under a warrant, to seize documents not related to the warrant but which the officer reasonably believes to be

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11 Scrutiny of Bills, *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation*, paragraph 4.28.

12 The Committee notes that the Government response to the original report suggests that the Committee 'recommended that a warrant be struck down as invalid where it goes beyond the requirements of the occasion in the authority to search'. The Committee merely identified principles relevant to judicial officers in the issue of warrants (as set out in Tillett's case) including that 'a warrant *may* be struck down for going beyond the requirements of the occasion in the authority to search'.[12][emphasis added].

13 Submission No. 5, pp. 29-30.

evidence of an offence under the Migration Act. At the hearing, Mr McMahon stated that :

> Essentially, if we saw something that led us to believe that a document relating to travel was fraudulent, we do have powers under 189 in respect of that. If we went in there and, even if it were not related to the warrant, we saw a person about whom we formed the view at that time that they were an illegal, it would not be the warrant that was providing the power; it would be the act itself.[14]

4.30 Mr Walker went on to clarify that the evidence that could be seized needed to be specifically related to immigration matters:

> The power of seizure that goes with the warrant is very much conditioned on the basis of 'may seize any such document'. Reading on in the Act, it is about entering, with the warrant, the premises where you have reasonable cause to believe that you will find:
>
> '(d) any passport or document of identity of, or any ticket for the conveyance from a place within Australia to a place outside Australia of, an unlawful non-citizen, a removee or a deportee, within the meaning of the Act; and to seize any such document, book, paper, passport, document of identity or ticket, as the case may be, and to impound and detain it for such time as the officer thinks necessary …'[15]

4.31 The Committee is concerned that it may not always be clear under what authority material has been seized, particularly if that material relates to a matter other than that listed in the warrant. For the benefit of authorised officers and the occupier of the premises, it is important that the proper authority is established at the time of seizure.

Recommendation 10

4.32 **The Committee recommends that consideration be given to expanding the Guide to set out the principles governing the seizure of material relevant to a different offence, particularly an offence under a different statute, to ensure that proper authority is provided and that proper provision is made for the subsequent investigation and prosecution of offences.**

Incidental seizure of material and the impact of technological developments on the law of entry, search and seizure

4.33 The Committee notes that, as well as opening up a range of new opportunities for criminals, technological developments offer new opportunities in the area of entry, search and seizure and as a result pose significant challenges for the protection of

14 Committee *Hansard*, p. SSSB 13.

15 Committee *Hansard*, pp. SSSB 13-14.

rights. In particular, the Committee notes that successive legislative amendments in response to technological developments in relation to the interception of telecommunications have widened the range of uses and disclosures of a range of personal communications and significantly extended the scope for the seizure of information incidental to the primary purpose of investigations.

4.34 Careful development of legislative and administrative responses can also be at odds with the sheer speed of technological change. Despite this, in the Parliamentary Joint Committee on the National Crime Authority Report *The Law Enforcement Implications of New Technology*, tabled in August 2001, noted that there is a need to weigh the demands of law enforcement agencies to capitalise on technological developments in their investigations against human rights and privacy considerations. That Committee also noted the desirability of including public discussion as part of that process. [16]

4.35 The report also noted the need for significant developments in the criminal law to keep pace with emerging technologies. It recorded the passage of the *Telecommunications (Interception) Legislation Amendment Act 2000*, which provided for 'named person warrants', enabling authorised agencies to monitor all telecommunications services used by the named person.[17] The previous regime had required the nomination of a particular service (for instance, a particular landline). The National Crime Authority (NCA) made several recommendations about the extension of the telecommunications interception regime and recommended that 'the Government ensure that the integrity of the Telecommunications Interception Act is not undermined by emerging technology (para 1.79)'. The Parliamentary Joint Committee also made recommendations calling for 'an appropriate level of regulation of Internet Service Providers (ISP) to ensure their cooperation with law enforcement (para 1.73)' and the introduction of 'comprehensive national electronic surveillance legislation, with particular emphasis on the inclusion of appropriate privacy provisions (para 1.116)'.[18]

4.36 Subsequent legislation has taken the law relating to entry, search and seizure into novel territory. The *Cybercrime Act 2001* introduced amendments to the Crimes Act which significantly increased the opportunity for the seizure of material unrelated to an investigation. As a result police executing a warrant under the Act are able to search for data in different physical locations, that is not confined to the search premises and may copy all material on a computer if it is suspected that the computer contains evidential material. Previously police could only copy evidential material.

4.37 The Act also enables a law enforcement officer to obtain an assistance order from a magistrate. An assistance order requires a person with knowledge of a

16 National Crime Authority Report: *The Law Enforcement Implications of New Technology. Preface*, pp. xvii – xviii.

17 *The Law Enforcement Implications of New Technology*, p. 9

18 *The Law Enforcement Implications of New Technology*, a summary of recommendations, p. xi.

computer, where it is reasonably expected that there is evidential material, to provide information or assistance to police so that they can access or copy data on that computer. It is an offence not to co-operate with an assistance order.

4.38 Simon Bronitt and Miriam Gani have noted that:

> Compared with ordinary search warrants, these powers are significantly wider in several respects. Ordinary search warrants of private premises do not allow the seizure of material unrelated to the investigation – for reasons of convenience and practicality, warrants targeting data allow the police to copy and analyse large quantities of data without any further obligation placed on the law enforcement officers to mitigate the negative impact on privacy interests of suspects or innocent third parties. While privacy is not absolute, under international human rights law it is well-established that intrusion into the lives and affairs of citizens for the purpose of crime detection must be necessary, reasonable and proportionate. This power may not meet these standards.[19]

4.39 The authors also draw attention to the assistance orders provision and state that it does not address the potential for self-incrimination or the question of whether a court would find that there is an implied defence of 'lawful excuse' if a person refuses to assist on the grounds that it might incriminate them.

4.40 Similarly, the *Telecommunications (Interception) Amendment (Stored Communications) Act 2004* and the *Surveillance Devices Act 2004* also have the potential to invade privacy to an unusual extent. Firstly, because they each authorise covert actions (in some circumstances) and secondly, in the case of the Stored Communications Act, because the person whose consent is required prior to entry is remote from the person whose rights are affected. The *Telecommunications (Interception) Amendment Act 2006*, which implements many of the recommendations of the *Report of the Review of the Regulation of Access to Communications* (the Blunn Report) widens the range of agencies and purposes for which covert access to stored communications may be authorised.

4.41 Each of these bills was examined closely by the Senate Legal and Constitutional Legislation Committee and the Committee does not intend to duplicate that consideration in this report. However, the Committee notes that this trend raises a number of significant issues, particularly the extent to which material unrelated to the investigation and material in relation to innocent third parties can be seized and the safeguards applied to the handling of such material.

Surveillance Devices Act 2004

4.42 The *Surveillance Devices Act 2004* established an interim regulatory regime governing the use of surveillance devices pending the outcome of the Blunn Report.

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19 Simon Bronitt and Miriam Gani, 'Shifting boundaries of cybercrime: from computer hacking to cyber-terrorism', (2003) 27 *Criminal Law Journal*, pp. 303-34 at p.315.

The Act included procedures for federal, state and territory law enforcement agencies to obtain warrants and emergency authorisations for the entry on to premises (using force if necessary) or specified adjoining premises in order to install or remove a surveillance device. The warrant could also authorise action reasonably necessary to conceal the installation of the warrant and interference with the property of a person who is not the subject of the warrant in some circumstances.

Telecommunications (Interception) Amendment (Stored Communications) Act 2004

4.43 The *Telecommunications (Interception) Amendment (Stored Communications) Act 2004* (the Stored Communications Act) amended the *Telecommunications (Interception) Act 1979* to introduce the concept of a stored communication and exclude such communications from the existing prohibition against interception. A 'stored communication' is an electronic message located on a computer, internet server or other equipment, whether read or unread, such as text messages, voice mail and e-mails stored on the servers of an ISP. In effect, the prohibition against interception under this Act is limited to 'live' or 'real time' interception of communications transiting a telecommunications system.

4.44 As a result, the provisions of the Stored Communications Act operate as an exception to the usual telecommunications interception regime so that it is not necessary to obtain a telecommunications interception warrant to access stored communications. However, the legislation still requires lawful access to the communication or the equipment on which it is stored, for instance by execution of a search warrant on the premises of the ISP or by seeking the consent of the ISP to enter its property and access its equipment.

4.45 The Committee notes that measures which are designed to protect individuals and the security of their property, such as seeking the consent of or providing notice to the occupier, are not well-adapted to these circumstances. As Bronitt and Stellios observe, this raises the question of whether such new forms of covert search warrant justify the development of a different regulatory approach.[20] The incidental access to stored communications and material related to other parties not subject to an investigation is also a matter of concern.

4.46 The Committee notes the submission by Electronic Frontiers Australia that:

> covert, remote access to and seizure of the content of communications stored on service providers' equipment should not be permitted under general search warrants because the information obtained invades the privacy of law-abiding third parties who are not suspects, that is any person who has been in contact with a suspect. Remote search and seizure is especially inappropriate because it constitutes secret surveillance that is vastly more open to misuse of search powers that are search warrants

20 Simon Bronitt and James Stellios, 'Regulating Telecommunications Interception and Access in the Twenty-first Century: Technological Evolution or Legal Revolution?' (2006), Promethius, Vol. 24, no. 4, December 2006, p. 415, forthcoming.

executed on a suspect's premises or on a telecommunications service provider's premises.[21]

4.47 Arguably there is little difference between the powers exercised under the stored communications legislation and a telecommunications interception warrant. Both are executed covertly and officers intercepting the communications are expected, in practice, to filter out irrelevant material and retain only material which is relevant to their investigations. One major difference, of course, is the more strenuous level of judicial supervision surrounding the issuing and execution of a telecommunications interception warrant, as opposed to an ordinary search warrant, and, as noted above, even a search warrant may not be necessary where access to property can be obtained by consent.

Telecommunications (Interception) Amendment Act 2006

4.48 The *Telecommunications (Interception) Amendment Act 2006* introduced a warrant regime for enforcement agencies to retrieve stored communications held by a carrier. The amendments regulate the use, communications and recording of information obtained by access to stored communications. Under the amendments, enforcement agencies are required to report to the Minister regarding the use of the stored communications powers.

4.49 The Act also provides for interception warrants for communications of an associate of a person of interest, referred to as 'B Party' interception warrants, and provides for the interception of telecommunications services on the basis of a telecommunications device, rather than attaching to the person who is the owner of the service. This permits access to mobile phone text messages, as well as voice messages.

4.50 The Committee notes that the Act does include some safeguards. Privacy considerations apply to all interception warrants and the use of interception powers by security and law enforcement agencies continues to be subject to reporting, disclosure and destruction provisions within the *Telecommunications (Interception) Act 1979*.

4.51 However, the enactment of these pieces of legislation has made it easier for a wider range of enforcement agencies to seek approval from a wider range of issuing authorities to gain covert access to stored communication for investigation of a wider range of offences. The Committee notes concerns that this apparent easier access appears to be based on a presumption that a stored communication is in some way more considered and therefore able to be subject to a lesser degree of privacy protection than a phone call.

4.52 Developments in telecommunications have moved considerations regarding the impact of entry search and seizure powers further into the realm of privacy than of strictly protection of property. The Committee notes that the Attorney-General

21 Submission No. 13, p. 12

referred a review of the *Privacy Act 1988* to the ALRC on 31 January 2006 and that the ALRC is to have regard to:

- the rapid advance in information, communication, storage, surveillance and other relevant technologies;
- possible changing community perceptions of privacy and the extent to which it should be protected by legislation;
- the expansion of state and territory legislative activity in relevant areas; and
- emerging areas that may require privacy protection.

4.53 The Committee looks forward to the report of that inquiry. In the meantime, the Committee endorses the views of the Senate Legal and Constitutional Committee that stored communications should not be afforded any less privacy than is afforded to real time communications. In commenting on the provisions of the Telecommunications (Interception) Bill, that Committee stated that the primary test should be whether the seriousness of the offence warrants the invasion of privacy, particularly in the case of covert interception. [22]

4.54 Given the covert nature of such investigations, stored communications warrants cannot be considered the equivalent of search warrants. The Committee agrees that covert access to communications should be subject to much tighter controls than overt access because covert access denies individuals the opportunity to protect privileged information or to challenge the grounds on which access has been granted. The Committee also agrees that there should be legislative provision for reporting of use and effectiveness of such warrants equivalent to obligations for telecommunications interception warrants.

Recommendation 11

4.55 Covert access to stored communication should only be permitted with a warrant and should only be accessible to core law enforcement agencies. The subject of the warrant and the telecommunications services for which access is being sought should be clearly identified in the application for the warrant and on the warrant itself.

Protection and disposal of material

4.56 As noted above, access to stored communication results in an increased likelihood of the collection of large amounts of information that may not be relevant to the investigation for which the warrant was issued.

22 Legal and Constitutional Legislation Committee, Provisions of the Telecommunications (Interception) Bill 2006, p. 17.

4.57 The Committee has noted the practices of a number of agencies in relation to the seizure of material. This includes secure storage, limitations on who can access such material in the course of an investigation and maintenance of registers to track access to the material. For example, ASIC advised the Committee that while it endeavours to avoid the seizure of irrelevant material, for both privacy and storage reasons, it is sometimes unavoidable. ASIC explained that it can be difficult to determine the relevance of some material at an early stage in the inquiry and may not be practical to view computer records on the premises. ASIC's policy is to provide the occupier of premises an opportunity to review material prior to its removal, and issue a receipt. Seized material is stored in a secure area and access is controlled.[23]

4.58 The Committee also notes the submission by the Office of the Federal Privacy Commissioner (OFPC) that the Information Privacy Principles (IPPs) in section 14 of the Privacy Act, which apply to information about individuals handled by most Commonwealth agencies, do not include a requirement to destroy data that is not relevant to an agency's functions or activities. The OFPC goes on to state that this is in contrast to the National Privacy Principles, which apply to the private sector, which require that an organisation must take reasonable steps to destroy or permanently de-identify personal information that is no longer needed. The OFPC submitted that legislation granting agencies the power to seize materials should contain a requirement that incidentally collected third party information should be destroyed by the agency as soon as practicable or when operational necessities permit.[24]

4.59 The Committee notes that most agencies do tend to periodically review their holdings of seized material in terms of its relevance to a particular investigation, for storage reasons if for nothing else. The Committee also notes that the Guide suggests that generally an upper limit of 60 days should attach to the retention of seized items, with the possibility of an extension of that period in particular circumstances where this is clearly justified.

4.60 The Committee would like to see the Guide revised to include specific reference to the incidental seizure of material unrelated to a particular investigation. In this regard, the Committee considers that it is particularly important that adequate legislative provision is made to require agencies to regularly review their holdings of seized material in light of its relevance to the particular inquiry, particularly information accessed via stored communications warrants, and return or destroy information no longer required. The Committee also considers it desirable that limitations are placed on the use and derivative use that can be made of certain material obtained in this manner.

23 Committee *Hansard*, SSSB 32.

24 Submission No. 15, p. 3.

Recommendation 12

4.61 **The Committee recommends that the Guide be amended to require that legislative provision be made for the regular review of seized material and for the timely return or destruction of material not relevant to a particular investigation.**

Recommendation 13

4.62 **The Committee recommends that the Guide be amended to encourage the inclusion of limitations on the use and derivative use of seized material which is not relevant to a particular investigation.**

The merits of developing protocols

4.63 The Inquiry's third term of reference required it to consider whether the rights and liberties of individuals would be better protected by the development of protocols governing the seizure of material. The Committee received little substantive evidence on this point, though a small number of submitters were generally supportive of the concept. Both the Law Council[25] and Electronic Frontiers Australia[26] submitted that the rights and liberties of individuals would be better protected by the development of protocols governing the seizure of material. ASIC was not opposed in principle, and the ACS stated that protocols 'would serve an important educative function and may result in an improvement in the development of policy, legislative proposals and administrative decision making of government agencies.'[27]

4.64 The main arguments raised against the development of protocols were the inadvertent limitation of rights and liberties, administrative concerns and the need for agencies to respond flexibly. The ACS expressed concern that the definition of individual rights and liberties within a protocol might serve to limit those rights and both the ACS and ASIC expressed concern at the administrative burden that might be associated with the implementation and review of such protocols.[28] DIMIA advised the Committee that it has its own protocols and guidelines governing the seizure of material, which 'have been designed with the flexibility to cater for the unique demands of enforcing the Migration Act.' [29]

4.65 The Committee notes that this last point raises one of the difficulties in assessing the need for a protocol to cover the seizure of material. As noted in Chapter 3, the manner in which search and entry warrants are executed under relevant

25 Submission No. 8, pp. 10-11.

26 Submission No. 13, p. 2-3.

27 Submission No. 5, p. 32.

28 Submission No. 5, p. 32 and Submission No. 11, p. 8.

29 Submission No. 9, p. 6.

legislative provisions is often determined by guidelines which are not necessarily publicly available. As a result, unless such guidelines are tabled in Parliament, they are not generally available for parliamentary scrutiny.

4.66 The Committee considers that, rather than seek to establish a separate Protocol, there is merit in expanding the Guide to include a set of core principles which could provide a framework for agencies to use to develop their own operational guidelines.

Recommendation 14

4.67 The Committee recommends that the Attorney-General give consideration to the formulation of core principles governing the seizure of material.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

5.1 In framing conclusions, it is often valuable to start at the beginning. That is especially true in the case of entry, search and seizure powers, as they are of a character which inspired the Senate in 1978 to move towards establishing this Committee. The origins of the Senate Standing Committee for the Scrutiny of Bills lie in the germ of an idea that the parliament, in determining the content of statutory law, should consider the impact those legislative provisions might have on individual rights and liberties.[1]

5.2 Entry, search and seizure powers are particularly of a character to attract the jurisdiction of legislative scrutiny committees because such powers are almost exclusively the province of legislation, and the rights on which they intrude are solidly based in the common law. The key questions, however, are questions for the Parliament itself to answer, and again that ethos is one which underlies the operations of the Committee.

5.3 The key questions are questions of balance and accountability. In the case of legislative intrusions upon personal rights they may generally be framed in simple terms: if there is justification for a power of this nature to be granted or exercised, what protection must follow. The protections in this case are all accountability mechanisms, for instance:

- judicial scrutiny through a warrants process, through review of administrative actions and through the courts;
- administrative scrutiny through internal audits, implementation of appropriate training and standards of performance for relevant personnel, implementation of procedural and policy requirements in guidelines and manuals; and
- parliamentary scrutiny of agencies' operations via reports to Parliament.

5.4 The greatest protections lie in the final content of the law, and that remains the responsibility of the Parliament itself. Accordingly, it is for the Parliament to satisfy itself of the need for a particular power and to determine what protection must attach to it. The principles espoused in the original report, the policy outlined in the Guide and framework documents like that proposed by the Privacy Commissioner serve the purpose of ensuring the Parliament is properly informed and better able to make those decisions.

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1 Scrutiny of Bills Committee, *Ten Years of Scrutiny*, pp. 4-7.

5.5 The original report espoused principles designed to enhance the purpose, consistency and fairness of entry and search provisions. The Government has indicated acceptance of a range of those principles, but has not embraced the Committee's preferred approach to consistency – that of a legislated bench-mark. Nevertheless, the Guide, together with the model provisions in the Crimes Act, offer the potential for increased consistency, and provide a tool the Committee and the Parliament can readily use to assess legislative proposals.

5.6 The status of the Guide as being representative of current criminal law policy enhances its usefulness and the Committee welcomes the more transparent approach that this offers. The Committee has suggested that the Government consider the merits of extending the Guide, to include principles governing the seizure of material relevant to a different offence and the incidental seizure of material unrelated to a particular investigation.

5.7 One of the core principles in the original report is that proposers of legislation must justify it, and it has been noted that explanatory memoranda play a key role in setting out such justifications for new legislation. The Committee considers that, where legislation departs significantly from the principles espoused in the Guide or contains exceptional provisions or is enacted in response to exceptional circumstances, the reasons for this should be fully explained in the explanatory memoranda accompanying the bill. The Committee considers this will be further enhanced if the proposers are required to undertake periodic reviews and report to Parliament.

5.8 Similar considerations apply when circumstances evolve to alter the impact of legislation, as is arguably the case with technological convergence. Much attention has been given to ensuring that law enforcement and security agencies are in a position to respond to and capitalise on new technologies in their investigative and enforcement roles. The Committee has noted much disquiet over the legislative responses to recent technological developments. The Committee notes that many technological developments have the potential to test existing protections, based as they often are on property protection. Such protections may not be adequate to protect privacy rights in certain circumstances, for example, where officers seize the hard drive of the servers of an ISP and potentially affect the privacy of all of its customers. The Parliament may need to turn its mind to such questions to keep pace with the next generation of technologies.

5.9 In this context, the Committee notes that there can be a temptation for the Government and its agencies, in proposing new laws, to reach for an ambit position which may not be justified, simply by appealing to the existence of a similar, but perhaps rarely used power, elsewhere. The Committee considers that all new legislative proposals should be judged on their own merits, based on a careful assessment of the needs of the agency in the particular circumstances, balanced against the impact of the proposed powers on individual rights. This analysis and justification for the proposed powers should be set out in appropriate detail in the explanatory memorandum to the bill, to assist the Parliament in its consideration of

the legislative proposal. The Committee will continue to play a role in providing the Parliament with the information it needs to make properly informed decisions on the content of legislative proposals, by seeking explanations and justifications from proposing Ministers where these are not provided with the bill.

5.10 The Committee has recognised the important role of administrative and procedural guidelines in ensuring fairness and effectiveness. The Committee notes that some administrative improvements proposed in the original report, such as notifying occupiers of rights and enabling the taping of the exercise of entry, search and seizure powers have been accepted by the Government and are reflected in the Guide and the procedures of some agencies.

5.11 The Committee has recognised that the character of many such guidelines as 'internal documents', together with limited reporting mechanisms, results in less than adequate scrutiny of the use of these intrusive powers. The Committee would prefer to see legislative provision for the formulation of training procedures and implementation guidelines. The Committee also considers that such guidelines should be tabled in parliament and published on the agency's website, except in quite exceptional and specific circumstances.

5.12 The Committee has suggested that the Guide be expanded to provide guidance on the development of such guidelines and has raised the possibility of the establishment of a register of entry, search and seizure provisions to facilitate the ongoing monitoring and audit of the exercise of such powers. The Committee considers that this, together with regular reports from agencies, would greatly assist the Parliament in its scrutiny and legislative roles.

5.13 As has been noted, Parliament and Ministers should give careful consideration to the impact of legislative provisions on the rights of individuals. This should be the case whether the legislation is new or old. The Committee has previously recommended that existing legislation be reviewed to meet new standards, and makes that comment again in respect of the policy position set out in the Guide and in relation to the ongoing need for existing entry, search and seizure provisions.

5.14 The Committee considers that the principles set out in its original report together with the Government's formal response and acceptance of some of the recommendations in that original report provide a good basis for this assessment. The Committee welcomes the reflection of many of these principles in the Guide and considers that the promulgation of the Guide is a very positive step towards achieving greater consistency and fairness in framing, and ultimately in the application, of entry, search and seizure powers. The Committee also notes that the Guide is to be regularly reviewed, and has made some recommendations to assist in this. The Committee considers all relevant legislative proposals against the framework established in the Guide and expects that legislative proposals will conform broadly to the principles set out in it. Where significant deviations from these principles are proposed, the Committee expects that the explanatory memorandum will set out the justification for this in appropriate detail.

Recommendations

5.15 The Committee makes the following recommendations:

Recommendation 1 (paragraph 3.35)

The Committee recommends that the Guide be amended to advise that the justification for entry and search powers in general, and for those conferring the power to conduct personal searches, in particular, should be clearly set out in the explanatory memorandum to the bill.

Recommendation 2 (paragraph 3.35)

The Committee also recommends that the Guide be amended to advise that the justification for entry and search powers, particularly the power to conduct personal searches, should address the need for such powers in the particular circumstances and should not rely on precedent alone.

Recommendation 3 (paragraph 3.35)

The Committee further recommends that entry and search without a warrant should only be authorised in very exceptional circumstances and only after avenues for obtaining a warrant by telephone or electronic means have proved absolutely impractical in the particular circumstances. In such circumstances, senior executive authorisation for the exercise of such powers should be required together with appropriate reporting requirements. The Guide should be amended to reflect this.

Recommendation 4 (paragraph 3.40)

The Committee recommends that the Guide be updated to include the statement of principle and practice set out in the Government's response and to also include advice that the justification for the empowerment of non-government employees in particular circumstances should be set out in the explanatory memorandum to the bill. Similarly, the justification for any deviation from these principles and practice should also be set out in the explanatory memorandum, for the benefit of the Parliament and the public.

Recommendation 5 (paragraph 3.53)

The Committee recommends that where legislation provides for entry and search of premises, legislative provision should also be made for an authorised officer to identify himself or herself prior to execution of a warrant and for the occupier of the premises to be provided with written advice, in plain language, prior to execution of a search under the warrant. Such requirements should only be waived in exceptional circumstances, such as the exercise of covert search powers authorised under a warrant.

Recommendation 6 (paragraph 3.54)

The Committee further recommends that the advice in the Guide be revised to more clearly reflect the requirements referred to in Recommendation 5.

Recommendation 7 (paragraph 3.63)

The Committee recommends that the Guide be revised to require legislative provision for the development of guidelines for the implementation of entry, search and seizure powers. Other than in specific exceptional circumstances, such guidelines should be tabled in both houses of Parliament and published on the agency's website.

Recommendation 8 (paragraph 3.70)

5.16 **The Committee recommends that the Commonwealth Ombudsman evaluate the feasibility of establishing a register of entry, search and seizure powers in Commonwealth legislation and the ongoing monitoring and audit of the application of such powers.**

Recommendation 9 (paragraph 3.71)

5.17 **As an interim measure, the Committee recommends that all new proposals for entry, search and seizure powers include legislative provision for regular reports to Parliament in relation to the agency's use of the powers and the continued need for them.**

Recommendation 10 (paragraph 4.32)

The Committee recommends that consideration be given to expanding the Guide to set out the principles governing the seizure of material relevant to a different offence, particularly an offence under a different statute, to ensure that proper authority is provided and that proper provision is made for the subsequent investigation and prosecution of offences.

Recommendation 11 (paragraph 4.55)

Covert access to stored communication should only be permitted with a warrant and should only be accessible to core law enforcement agencies. The subject of the warrant and the telecommunications services for which access is being sought should be clearly identified in the application for the warrant and on the warrant itself.

Recommendation 12 (paragraph 4.61)

The Committee recommends that the Guide be amended to require that legislative provision be made for the regular review of seized material and for the timely return or destruction of material not relevant to a particular investigation.

Recommendation 13 (paragraph 4.62)

The Committee recommends that the Guide be amended to encourage the inclusion of limitations on the use and derivative use of seized material which is not relevant to a particular investigation.

Recommendation 14 (paragraph 4.67)

The Committee recommends that the Attorney-General give consideration to the formulation of core principles governing the seizure of material.

Robert Ray
Chair

APPENDIX I

ORGANISATIONS AND INDIVIDUALS WHO PRESENTED WRITTEN PUBLIC SUBMISSIONS AND ADDITIONAL INFORMATION TO THE INQUIRY

1. Attorney-General's Department
2. Clerk of the Senate
3. Customs Brokers & Forwarders Council of Australia
4. Australian Computer Society Inc
5. Australian Customs Service
6. Australian Fisheries Management Authority
7. Australian Federal Police
8. Law Council of Australia
9. Department of Immigration and Multicultural and Indigenous Affairs
10. Australian Quarantine and Inspection Service
11. Australian Securities and Investments Commission
12. Attorney-General's Department (Supplementary)
13. Electronic Frontiers Australia Inc
14. Office of Parliamentary Counsel
15. Office of Federal Privacy Commissioner
16. Commonwealth Ombudsman

APPENDIX II

PRINCIPLES GOVERNING POWERS OF ENTRY AND SEARCH[1]

Principles governing the grant of powers of entry and search by Parliament

- people have a fundamental right to their dignity, to their privacy, to the integrity of their person, to their reputation, to the security of their residence and any other premises, and to respect as a member of a civil society;

- no person, group or body should intrude on these rights without good cause;

- such intrusion is warranted only in specific circumstances where the public interest is objectively served and, even where warranted, no intrusion should take place without due process;

- powers to enter and search are clearly intrusive, and those who seek such powers should demonstrate the need for them before they are granted, and must remain in a position to justify their retention;

- when granting powers to enter and search, Parliament should do so expressly, and through primary, not subordinate, legislation;

- a power to enter and search should be granted only where the matter in issue is of sufficient seriousness to justify its grant, but no greater power should be conferred than is necessary to achieve the result required;

- in considering whether to grant a power to enter and search, Parliament should take into account the object to be achieved, the degree of intrusion involved, and the proportion 'between the two - in the light of that proportion, Parliament should decide whether or not to grant the power and, if the power is granted, Parliament should determine the conditions to apply to the grant and to the execution of the power in specific cases;

- the criteria which individuals, groups and organisations must satisfy before they are allowed to enter and search premises should be consistent across

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[1] Extract from Scrutiny of Bills Committee, *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation.*

all jurisdictions - rights should not be inviolate in one jurisdiction but capable of being violated in another;

- consistency should be achieved by ensuring that all entry and search provisions conform to a set of guidelines or principles;

- those who seek search and entry powers which do not accord with this set of guidelines must justify why they are seeking, and why they should retain, such broader powers;

- legislation conferring a power of entry and search should specify the powers exercisable by the officials carrying out the action. It should preserve the right of occupiers not to incriminate themselves and, where applicable, their right to the protection of legal professional privilege;

Principles governing the authorisation of entry and search

- legislation should authorise entry onto, and search of, premises only with the occupier's genuine and informed consent, or under warrant or equivalent statutory instrument, or by providing for a penalty determined by a court for failure to comply;

- where legislation provides for entry and search with consent (or alternatively under a warrant), it should make clear that the consent must be a genuine and ongoing consent, and it should impose no penalty or disadvantage if an occupier fails to co-operate in the search, or subsequently withdraws consent - requiring an occupier to co-operate is inconsistent with the idea of consent;

- where legislation provides for entry and search, but does not contemplate the possibility of entry by force under warrant, then a refusal of entry should attract a penalty imposed by a court;

- the power to issue warrants to enter and search premises should only be conferred on judicial officers; justices of the peace should not have this power, nor should a Minister or departmental officer;

- to ensure consistency with warrants issued by judicial officers, where a statute authorises an entry and search by permit or for monitoring purposes without prior judicial approval, it should provide for an appeal to a judicial officer;

- circumstances may arise which may make it impractical to obtain a warrant before an effective entry and search can be made. Impracticality should be assessed in the context of current technology. If an official exercises a power to enter and search in circumstances of impracticality, that official must then, as soon as reasonably possible, justify that action to a judicial officer;

- simply because a person has received financial assistance from the Commonwealth, or is liable to pay a levy under legislation, it does not follow that that person has thereby consented to entry and search by officials seeking to monitor compliance with the legislation, and no such implication should be drawn unless those subject to entry and search in these circumstances were informed in writing in plain English about those powers when receiving the assistance or on becoming liable to pay the levy;

Principles governing the choice of people on whom the power is to be conferred

- a power to enter and search should be conferred only on those officials who are subject to obligations which make them accountable for the use and any misuse of the power;

- a power to enter and search should be conferred only on those officials who are of sufficient maturity to exercise it and who have received appropriate training. Legislation should not confer a power to enter and search on a recipient categorised simply as 'a person' or as a member of a particular Department or organisation;

- a power to enter and search should not be conferred on a particular recipient simply because it is the most economically or administratively advantageous option;

Principles governing the extent of the power granted

- the extent of a power to enter and search will vary with the circumstances applicable, but the powers of entry and search given to the Australian Federal Police (AFP) under the *Crimes Act 1914* should be seen as a 'high water mark'. Officials in other organisations might be given lesser powers, but greater powers should be conferred only in exceptional, specific and defined circumstances where Parliament is notified of the exercise of those powers and where those exercising those powers are subject to proper scrutiny;

- officials should be given no greater power to enter and search premises than is necessary to carry out their duties;

Principles governing the kinds of matters which might attract the grant of the power

- the power to enter and search can properly be conferred in relation to both civil and criminal matters, but not as a matter of course, and only with provision for due process;

- it is appropriate to grant a power of entry and search to assist in the investigation of serious crime where the investigation is genuine and has a reasonable chance of success;

- it is appropriate to grant a power of entry and search to assist in the gathering of evidence to support a prosecution for a serious offence where the evidence sought is of significance and there is a reasonable chance that it will be found on the premises;

- it is appropriate to grant a power of entry and search to determine whether a person has complied with legislation under which that person has accepted a commercial benefit, subject to being monitored by entry and search;

- it is appropriate to grant a power of entry and search to determine whether a person has complied with legislation which imposes a commercial levy in relation to a serious matter, in circumstances where the legislation provides for this in specific terms;

- it is appropriate to grant a power of entry and search to monitor civil matters which are serious, cannot otherwise be checked, and where the powers are used with maturity and are proportionate to the benefit gained;

Principles governing the manner in which the power to enter and search is exercised

- the power of entry and search should be carried out in a manner consistent with human dignity and property rights;

- as a general rule, entry and search powers should be exercised during reasonable hours and on reasonable notice, unless this would defeat the legitimate purpose to be achieved by the exercise;

- where entry and search is likely to involve force or physical interference with people and their property, it is preferable that this power be exercised only by, or with the assistance of, police officers. If such a power is to be granted to people other than police officers in such circumstances, their maturity, training and experience should be comparable to that of the AFP;

- entry and search of premises, especially if carried out with the authority to use force, should be recorded on video or audio tape, unless this is impractical in all the circumstances;

Principles governing the provision of information to occupiers

- the occupier of premises which have been entered and searched should be:

    - given a copy of any relevant warrant;

    - informed in writing or, if that is impractical, informed orally, of his or her rights and responsibilities under the relevant legislation; and

    - given a genuine opportunity to have an independent third party, legal adviser or friend present throughout the search;

These requirements should be waived only where circumstances are critical, or where an official is threatened with violence, or where it is absolutely impractical to follow them;

- legislation conferring a power to seize documents or other articles should provide:

    - that any material seized be itemised;

    - that the occupier and any others affected be entitled to a copy of that itemized list and copies of any other business or personal records seized;

    - that the occupier and any others affected be entitled to receive copies of any video or audio tape recordings made, or transcripts of those recordings, within 7 days;

    - a procedure for dealing with disputed seizures; and

    - a time limit for the return of any material seized;

Principles ensuring that people carrying out entry and search are protected

- where people enter and search premises under a power that accords with the principles set out in this Report, and exercise that power appropriately and in accordance with due process, they are entitled to do so without being subject to violence, harassment or ridicule, and are entitled to the protection of the law and to respect as persons carrying out their duty on behalf of the community;

Principles relevant to judicial officers in the issue of warrants (as set out in Tillett's case)

- when approached to issue a warrant, a judicial officer should act as an independent authority, exercising his or her own judgment and not automatically accepting the informant's claim;

- the judicial officer has a discretion which must be exercised judicially - to enable its proper exercise, the informant must put forward adequate sworn evidence;

- the warrant itself must clearly state the findings of the judicial officer;

- as a corollary of the power of seizure, a particular offence must be specified, both in the information and in the warrant - even where the statute simply uses the words "any offence" and makes no clear reference to a need to specify a particular offence;

- a warrant must not authorise the seizure of things in general, or things which are related to offences in general, but only the seizure of things by reference to the specified offence;

- a warrant may be struck down for going beyond the requirements of the occasion in the authority to search; and

- the time for execution of a warrant must be strictly adhered to;

Other general principles

- each agency which exercises entry and search powers should maintain a centralised record of all occasions on which those powers are exercised, and should report annually to the Parliament on the exercise of those powers.

APPENDIX III

Government Response

to the

Senate Standing Committee for the Scrutiny of Bills

Fourth Report -

Entry and Search Provisions in Commonwealth Legislation

August 2003

Executive summary of government response to the Fourth Report of 2000

1. The Government welcomes the Fourth Report of 2000 by the Senate Standing Committee for the Scrutiny of Bills ('the Scrutiny Committee'), entitled 'Entry and Search Provisions in Commonwealth Legislation' ('the Entry Powers Report'). Entry and search powers are a vital tool for ensuring the effective administration of government schemes, and compliance with the law. It is equally important that such provisions be framed to ensure that private rights are protected and that powers are exercised properly.

2. The Government's policy on entry and search powers forms part of the Commonwealth's 'criminal law policy'. Guidelines setting out the policy as at mid-1999 formed part of the Attorney-General's Department's submission to the Scrutiny Committee. The guidelines are currently being revised.

3. The diversity of modern regulatory schemes and law enforcement needs is such that search and entry powers take many different forms, and rely on different procedures for their efficacy. The Scrutiny Committee's views have figured prominently in the development and evaluation of Commonwealth criminal law policy over many years.

4. The Government supports the majority of the principles, and a number of the recommendations articulated in the Scrutiny Committee's Entry Powers Report. However, some of the principles are not considered to be appropriate to implement in specific circumstances. In addition, some of the recommendations are not compatible with the complexity and range of regulatory and enforcement responsibilities of Commonwealth agencies. There is a need to maintain flexibility in this area.

5. The Government agrees with the Committee's view that search and entry powers need to be justified and closely monitored. Commonwealth criminal law policy applies a strict and principled rationale to the framing of coercive powers.

6. The Committee made sixteen *recommendations*. This response addresses each, referring to particular agencies only when the Committee elected to single those agencies out for comment.

Substantive responses to each Recommendation of the Fourth Report

1. The Committee recommends that all entry and search provisions in legislation including bills should have to conform with a set of fundamental principles rather than long-standing practice. These principles should be enshrined in stand-alone legislation based on the principles set out in this Report. This legislation should take as its starting point the search warrant provisions set out in the *Crimes Act 1914* (Cth).

Government response to Recommendation 1: Not accepted

Most agencies' powers have been formulated to operate as a cohesive and integrated whole, which recognises varying enforcement contexts. The advantages of having consistency across Commonwealth legislation should not be achieved at the expense of the effectiveness of existing legal regimes.

The enactment of non-derogable, model standards in legislation would not take into account the diversity of situations that entry and search powers are used to address. Nor would it cater for frequently changing enforcement circumstances. Flexibility is necessary to achieve the different objectives of regulatory and enforcement legislation. The following examples illustrate this point.

Example 1: Under some Commonwealth legislation, for example the *Auditor-General Act 1997* and the *Occupational Health and Safety (Commonwealth Employment) Act 1991,* powers of entry and inspection are generally confined to Commonwealth premises. The Government does not consider that the principles identified by the Scrutiny Committee should apply to entry and search provisions exercisable only on the premises of Commonwealth agencies. The Commonwealth should not face undue limitations on the terms on which its own premises may be accessed for the purposes of ensuring occupational health and safety compliance, for instance. Entry to the premises of one Commonwealth agency by another Commonwealth agency should generally be governed by administrative arrangements.

Example 2: Some search powers are exercised in a commercial or regulatory environment which differs markedly from an overtly criminal environment. This is known and understood by the agency involved and those whom it regulates. The routine involvement of police in such circumstances could cause unnecessary alarm, embarrassment and distress, as well as consuming scarce police resources. Police would, of course, be involved where officers judge that their involvement is justified by the particular circumstances of the case. Using police officers where a search is likely to involve examination of large numbers of documents or computer files would consume scarce police resources. Police involvement would assist neither the person whose premises were being searched nor the person conducting the search.

Example 3: In some cases, entry and search powers are based on internationally agreed laws, practice and procedures, for instance, the maritime port state control functions for investigating seaworthiness of vessels. Foreign-flagged vessels are

subject to port state control inspections in Australian ports, consistent with international treaties, to ascertain their compliance with internationally agreed standards of safety, environment protection and crew conditions. The procedures for conducting port state control functions are based on conventions, resolutions and guidelines promulgated by the International Maritime Organisation and the International Labour Organisation, which do not envisage a requirement for warrants or a role for judicial officers. Consistent with this, maritime inspectors appointed by the Australian Maritime Safety Authority are authorised by section 190AA of the *Navigation Act 1912* to go aboard a vessel at any reasonable time to conduct their inspections, without requiring a warrant or the specific consent of the ship's master or owner. Such provisions are consistent with the exception provisions of the Commonwealth's criminal law policy regarding search and entry of conveyances, as obtaining a warrant prior to entry to a vessel is impractical given the inherent mobility of a ship. The Government notes that the requirement for a warrant, particularly one issued by a judicial officer, in such circumstances may in fact frustrate maritime law operations, because of geographic and temporal problems.

Example 4: Entry and Search powers are not always exercised to determine criminal or civil liability. For example, the investigation activities of the Australian Transport Safety Bureau (ATSB) are not conducted for the purpose of apportioning blame (see section 19CA of the *Air Navigation Act 1920* which applies to investigations that commenced before 1 July 2003, and section 7 of the *Transport Safety Investigation Act 2003* which applies to investigations that commenced after 1 July 2003). Instead, ATSB investigations seek to obtain information about circumstances which led to an accident or incident and identify appropriate safety action to prevent future occurrences. Many of the principles provided are not appropriate in this context. For example, evidence relevant to the ATSB investigations is often perishable and needs to be preserved immediately. For this reason, it is impossible or impracticable in many situations to obtain consent or a search warrant, or to secure evidence pending an application for a warrant.

Example 5: The Scrutiny Committee has recommended that a warrant be struck down as invalid where it goes beyond the requirements of the occasion in the authority to search (see page 54). The current line of judicial authority is that courts will not automatically strike down a search warrant that is wider than it should have been. The court will usually consider whether the offending part of the warrant can be severed from the rest, and uphold a seizure if the items that were seized could have been seized under the warrant had it been drafted more narrowly. The Government considers that judicial discretion in this regard is reasonable, and more consistent with the public interest, than an approach that would strike down a warrant automatically in any case where the officer who issued it made an error about what could be authorised under the relevant statute.

2. The Committee recommends that the entry and search powers available to the Australian Federal Police under the *Crimes Act 1914 (Cth)* should constitute the 'high-water mark' for such powers generally. By law, the powers of entry and search available to any other agency, person or organisation may be less than these, but should only exceed the powers available to the Australian Federal Police in exceptional and critical circumstances.

Government response to Recommendation 2: Accepted with qualifications

The Government agrees that the entry and search powers available to the Australian Federal Police (AFP) under the *Crimes Act 1914* (Cth) should constitute the 'high-water mark' for search powers generally. This is reflected in the policy currently adopted by the Government on such matters, which provides that the search warrant provisions applicable to police "define the outer limits of the powers and the minimum limitations and obligations that should normally apply to search warrant powers conferred in other contexts".

However, as the Committee recognises at paragraph 3.8, agencies operate under different conditions, and perform different functions, so there will be occasions when particular entry provisions need not conform with the standard approach in every respect. The Committee accepts, for example, that non-compliance with Part 1AA of the *Crimes Act 1914* may be reasonable to deal with exceptional conditions such as instances of national security or a serious danger to public health (see paragraph 1.44 of the Entry Powers Report). While the Government will continue to regard Part 1AA of the *Crimes Act 1914* as a model for the strongest coercive powers available for search warrants, that Act does not limit the scope of other, related powers that agencies seek.

For instance, the AFP does not have monitoring warrant/audit powers. Commonwealth criminal law policy provides that where search powers are sought, not for the investigation of specific offences but to monitor compliance with legislative requirements, a 'monitoring warrant' regime should be employed. The creation of criminal offences simply to 'draw in' the AFP and its search powers is generally deemed to be an inappropriate alternative to monitoring powers.

The *Crimes Act 1914* is inappropriate to operate as model legislation for agencies where there is a need to monitor/audit compliance with statutory obligations in circumstances where no offence will be suspected.

Monitoring warrant powers are more limited than search warrant powers in some respects (for example, they do not permit seizure), but broader than search warrant powers in other respects (for example, the issue of a warrant does not depend on evidence that an offence has been committed). These distinctions are consistent with the differing objectives of monitoring/audit powers and search warrants.

The *Gene Technology Act 2000*, *Imported Food Control Act 1992*, *ACIS Administration Act 1999*, *Aged Care Act 1997*, *Therapeutic Goods Act 1989* and *Civil Aviation Act 1988* contain examples of monitoring warrant powers.

3. The Committee recommends that each agency, person or organisation which exercises powers of entry and search under legislation should maintain a centralised record of all occasions on which those powers are exercised, and should report annually to the Parliament on the exercise of those powers.

Government response to Recommendation 3: Not accepted

The Government agrees that appropriate records should be kept of the exercise of search and entry powers.

As noted already, Part 1AA of the *Crimes Act 1914* sets the benchmark for the provision of search warrant powers in Commonwealth legislation. Accordingly, warrants granted under Commonwealth search warrant regimes generally require an issuing officer to record certain information about the nature and purpose of a search warrant. The warrant must show on its face information such as the magistrate being satisfied that there are reasonable grounds to suspect, in the premises named in the warrant, that there are the things named in the warrant which would afford evidence of the Commonwealth offence identified in the warrant. The warrant must also list the powers the executing officer may exercise, the duration of the warrant, and the types of things that may be searched for or seized. Similar limitations and obligations apply to warrants obtained over the telephone or by other electronic means. However, in such instances both the issuing officer and applying officer are to complete similar warrants, with the applying officer to return their copy to the issuing officer within one day of the expiry or execution of the warrant. The issuing officer is to attach that copy of the warrant to the copy he or she had already completed. An additional level of accountability is applied by the requirement that if the issue of the authorisation of the warrant is questioned during court proceedings and the issuing officer's signed copy is not produced in evidence, then the court is to assume that the exercise of the power was not duly authorised.

Furthermore, copies of these details are provided to relevant persons, such as the occupier of the premises being searched, who is to be provided with the details of the warrant and a receipt for anything seized during the execution of the warrant.

Monitoring warrant regimes apply to industries which often involve risks to the community (for example, environmental and public safety) and practical enforcement difficulties. In such industries it is reasonable to require operators who accept the commercial benefit of such activities to be monitored under a monitoring warrant regime. It is not practical to centrally record every monitoring activity, though any use of such material in proceedings necessitates the keeping of good records if officers are to avoid court challenges.

There may also be instances where it is not practical to obtain a warrant. For example, where the inherent mobility of a conveyance makes it impractical. In such instances adequate protections are imposed. Only authorised inspectors carrying identity cards are to be empowered to exercise search and entry powers. Also, certain protections are offered to occupiers. Entry is permissible only where the occupier is notified of an intention to enter and search and only where the occupier has consented to the entry and search. The occupier is to be informed of the right to withdraw their consent at any time and cannot be held liable for not complying with the directions of an inspector. If non-compliance is to give rise to liability the legislation should expressly state that existing non-disclosure rights and obligations are overridden. Additionally, seizure of items is only permitted under a warrant, which in itself links into recording procedures that apply to the execution of warrants.

The Government does not propose to require centralised records or annual reports to Parliament. The Government does not accept that this practice adds to the current regime. If there is a question as to the validity of a warrant or its subsequent execution the courts can examine that question when it arises and hold that the warrant was not valid and/or its execution was improper.

4. The Committee recommends that the principles set out in Chapter 1 of this Report should apply to both government and non-government agencies, persons and bodies which seek to enter and search premises by virtue of statutory authorisation.

Government response to Recommendation 4: Accepted in principle

Although the Government is of the view (expressed in the response to Recommendation 1) that each principle identified in Chapter 1 should not be automatically applied to all search and entry powers, the Government agrees that private persons or bodies should be subject to the same policy strictures on search powers that apply to government bodies.

Entry powers should generally only be conferred on government employees. Public officials are subject to a wide range of accountability mechanisms under the *Ombudsman Act 1976*, the *Administrative Decisions (Judicial Review) Act 1977*, disciplinary procedures, the *Privacy Act 1988* and the *Freedom of Information Act 1982*. In general, such accountability mechanisms do not apply to persons outside government. This is to be contrasted with powers conferred in the industrial relations context (see response to Recommendation 5) and monitoring powers, such as are exercised, for example, by contractors to the Commonwealth (appointed as statutory office holders) under the *Airports Act 1996*.

However, there may be rare instances where it is necessary to empower non-government persons to exercise entry and search powers. For example, some specialist investigations may require the input of experts from time to time, such as crash experts or computer experts, to identify certain materials as relevant to an investigation. In such cases it may not be viable for a Government agency to retain such experts on a full time basis. Another example is where there is a need for a person to enter and search inherently mobile conveyances where it would not be possible due to time constraints to have in attendance an authorised government employee (for example, inspection of a ship). However, the Government considers that the empowerment of non-government officials to exercise search and entry powers should be strictly limited to cases of necessity. Necessity would be assessed by the Attorney-General's Department on a case by case basis when it is consulted about requests for a grant of search and entry powers in accordance with Government policy (ie see the Department of the Prime Minister and Cabinet's Legislation Handbook, paragraph 6.26(d)).

Where a need to empower non-Government employees or agencies to exercise search and entry powers is identified there are a range of measures that may be applied to ensure appropriate and adequate accountability is maintained. Appointment procedures may be set down in legislation to ensure that only appropriate and accountable persons are appointed to head the agency or exercise those powers. The ability to apply for search warrants may then be limited to the head of the agency,

who may then be able to delegate those powers to relevant experts or other persons when the need arises. The agency head would then be ultimately accountable for the conduct of delegates. Additional accountability may be achieved by ensuring that the experts who are delegated those powers are also appointed under a specific legislative selection criteria. This selection criteria would vary based on the circumstances, but would, where possible, follow the requirements applied generally to authorised officers who may be empowered to exercise those powers (for example, the need for certain maturity and skills). Furthermore, the exercise of those powers may be further legislatively restricted by limiting the exercise of search and entry powers by such non-government employees to instances where, for example, their expertise would be required (for example, a specialist investigator would only be able to enter and search certain sites in certain instances).

As noted before, Part 1AA of the *Crimes Act 1914* sets the benchmark for Commonwealth search warrant regimes. Non-government employees in this context would also be required to comply with the basic requirements adopted from Part 1AA that are imposed in general on Government employees. For example, authorised non-government employees would be subject to the same general regime for obtaining search warrants as Government employees (for example, the provision of certain information on oath establishing legitimate grounds to enter and search premises), as well as practical accountability measures such as being required to adequately identify themselves to the occupants of premises being searched and the need to provide the occupier of the premises with notice of the intention to enter and search their premises. Furthermore, the relevant legislation implementing such a search warrant regime for non-government employees would also apply the same rules to judicial officers granting search warrants that apply in other grants of search warrants to Government employees (for example, the need to be satisfied that there are sufficient grounds set out in the information to establish the need for a warrant).

However, as noted in the Government's response to Recommendation 1, certain principles that are formulated for general application may be inappropriate to apply in every context. For this reason, while the Government agrees in principle that non-government agencies should be subject to scrutiny measures that apply to government bodies, it does not agree to enshrining this principle in legislation.

5. The Committee recommends that the right of entry provisions in the *Workplace Relations Act 1996* should conform with the principles set out in Chapter 1 of this Report.

Government response to Recommendation 5: Not accepted

The principles set out in Chapter 1 of the Report are not appropriate for general application to the various entry powers conferred by the *Workplace Relations Act 1996* ('WR Act').

The WR Act confers powers of entry on four categories of person: (i) officers and employees of registered trade unions to whom a permit has been issued; (ii) inspectors appointed by the Minister; (iii) Authorised Officers appointed by the Employment Advocate; and (iv) the Industrial Registrar (or person acting on his or her behalf) pursuant to an authorisation issued by the Federal Court. The powers are exercisable

for the purpose of ascertaining compliance with the provisions of the WR Act. In the case of inspectors and Authorised Officers, the matters investigated are not offences and attract only civil monetary penalties.

The Government considers that the same principles should not apply to entry of premises by both trade union officials and government officials.

The right of entry conferred on officials or employees of trade unions by the WR Act is limited in a number of ways. Before a trade union official or employee can seek to enter into a workplace, he or she must hold a right of entry permit. Such permits are issued by the Registrar, and can be revoked on application by an employer, organisation of employers, or an inspector, if the Registrar is satisfied the permit-holder intentionally hindered or obstructed any employer or employee or otherwise acted in an improper manner. The Australian Industrial Relations Commission can also revoke a permit as part of the settlement of an industrial dispute about right of entry.

Entry to investigate a suspected breach of the WR Act, or an award, order or certified agreement is only available where persons who are members of the permit-holder's organisation are employed. A permit-holder may also enter premises for the purposes of holding discussions with employees who are members, or eligible to become members, of the organisation concerned.

In either case, permit-holders do not have the right to use force to effect an entry, nor do they have the right to search premises or seize documents or other material. The power to enter may only be exercised during working hours and with 24 hours notice. The right of entry permit must be shown on request. (It is appropriate to note that State workplace relations legislation may also contain right of entry provisions, with the rights and obligations under that legislation varying according to the jurisdiction.)

As regards the other entry powers conferred under the WR Act, the Government does not consider that entry of premises only by consent or warrant is appropriate. The Government notes that the right of entry provisions under the WR Act do not permit entry by force or provide a power to search.

The majority of entries by inspectors and Authorised Officers are to follow up on confidential unofficial complaints or formal claims, to make inquiries, provide information and deal with claims and complaints, generally through voluntary compliance. If a warrant requirement were to be introduced, it is anticipated that this would significantly impair the ability of inspectors and Authorised Officers to efficiently investigate and resolve claims. Resources would have to be diverted from investigation and compliance work to the task of obtaining warrants. The requirement to obtain warrants would delay the resolution of investigations, increase costs and reduce the number of entries by Authorised Officers and inspectors.

6. The Committee recommends that all existing entry and search provisions in legislation, including those contained in regulations, be reviewed and amended by 1 July 2001 to ensure that they conform with the principles set out in Chapter 1 of this Report.

Government response to Recommendation 6: Not accepted

This recommendation is linked to Recommendation 1, with which the Government does not agree. The reasons set out in the response to Recommendation 1 apply with equal force to the Committee's proposal that all existing entry and search powers be reviewed for conformity with the principles set out in Chapter 1 of the Fourth Report.

7. As a priority, the Committee recommends that all entry and search powers that go beyond the entry powers in the *Crimes Act 1914*, including the powers exercisable by the Australian Taxation Office, the Department of Immigration and Multicultural Affairs, the Australian Transaction Reports and Analysis Centre, the Australian Security Intelligence Organisation and the Minister for Defence under the Defence (Areas Control) Regulations, should be reviewed and amended so that they are consistent with the principles set out in Chapter 1 of this Report.

Government response to Recommendation 7: Accepted in part

Implementing this recommendation could impose a significant additional burden on State magistrates. If magistrates were given the responsibility to issue search warrants under each of the Acts identified by the Scrutiny Committee in Chapter 3, this would have direct resource implications for the State court system, and indirect resource implications for the Commonwealth.

Issuing warrants is an administrative function which judges may consent (but cannot be obliged) to perform on an individual basis. Several years ago, judges of the Federal Court who had consented to issue certain listening device and telephone interception warrants advised the Attorney-General of their intention to withdraw their consent, because they had formed the view that this was not a function that judges should perform. The relevant Acts subsequently had to be amended to allow authorised members of the Administrative Appeals Tribunal to issue those warrants.

As noted already, the Government is concerned about the application of the principles set out in Chapter 1 and achieving consistency across Commonwealth legislation at the expense of the effectiveness of existing regimes, which have in many instances been formulated based on functional and operational necessities of different agencies. However, the merits of undertaking a review at an agency level have been recognised by some agencies.

Australian Taxation Office

The Australian Taxation Office (ATO) is responsible for administering a range of revenue laws, including self-assessment taxation systems. In recognition of the associated costs, self-assessment systems do not require taxpayers to provide full records to the ATO each year. When returns are lodged, a statement is signed attesting that the information contained in the return is accurate and that records are available for the ATO to confirm this.

The Government does not agree that a warrant must be obtained before access can be gained to premises for the purpose of verifying claims made by taxpayers in their

returns. It should be accorded full and free access, and reasonable facilities for this purpose.

The access powers of the ATO are a long-established feature of taxation administration and enforcement in Australia. Even prior to the introduction of the goods and services tax (GST), there were approximately 280,000 access visits yearly. This volume of monitoring activity could not be conducted under a warrant based system without a very large increase in resources or a substantial reduction in monitoring. This in turn would lead to losses in revenue. It is not proposed to amend these provisions.

Department of Immigration and Multicultural and Indigenous Affairs

The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) acknowledges that it is appropriate to review its existing search and entry provisions, and has undertaken to do so. However, as indicated in the response to Recommendation 1, the Government is of the view that it is not appropriate to amend entry and search provisions to accord with each principle outlined in Chapter 1 of the Report. The Government does not support the principle that the power to issue warrants to enter and search premises should only be conferred on judicial officers. The delay that is often involved in contacting and consulting with a judicial officer in order to obtain a search warrant is unacceptable in situations where DIMIA officers require a warrant as a matter of urgency to assist in apprehending an illegal migrant believed to be at a particular residence.

Australian Transaction Reports and Analysis Centre

The Government will give further consideration to the Committee's recommendation that the entry powers available to the Australian Transaction Reports and Analysis Centre (AUSTRAC) be amended to require consent or a warrant issued by a judicial officer.

The Government notes the Committee's comment that many compliance audits by AUSTRAC currently take place by consent and, therefore, a requirement to obtain a warrant in the absence of consent would be unlikely to affect AUSTRAC's work. AUSTRAC's search powers are exercised in a commercial and regulatory environment which is different to that of a criminal investigation environment. AUSTRAC is not a law enforcement agency, nor does it perform investigative functions. AUSTRAC generally employs a cooperative, non-adversarial approach to monitoring and auditing compliance and assisting cash dealers with their reporting requirements. AUSTRAC conducts inspections, not to investigate specific offences, but to monitor compliance with legislative requirements. AUSTRAC audits are limited to those who have an obligation under the *Financial Transaction Reports Act 1988* to report certain financial transactions or who must undertake specified account signatory identification processes and retain information relating to those processes.

AUSTRAC audits can also form part of a mutually educative process. The cash dealers learn more about compliance and gaps in their own risk management strategies, whilst AUSTRAC learns more about compliance issues for the cash dealers, new systems and processes and existing internal risk management strategies.

However, the Government anticipates that, should a warrant requirement be introduced, a number of cash dealers would require AUSTRAC to always obtain a warrant in order to conduct an inspection. In view of the large number of audits conducted each year, a warrant requirement would cause delays and increase costs for AUSTRAC and may undermine the effectiveness of the audit program.

Australian Security Intelligence Organisation

There are fundamental differences between activities undertaken by the Australian Security Intelligence Organisation (ASIO) in accordance with its security functions and activities undertaken in the performance of law enforcement and revenue functions. ASIO's function is to gather security intelligence, rather than to investigate a crime, or ensure compliance with legislation. ASIO may not be concerned with investigating a specific action, but with gathering information for assessment against a wide range of relevant information from other sources before its significance is apparent. A second important difference is that, unlike most law enforcement activities, ASIO search warrants are frequently exercised covertly, which renders unworkable many of the principles articulated in Chapter 1.

Subsection 25(2) of the *Australian Security Intelligence Organisation Act 1979* requires the Attorney-General to be satisfied that the issue of the warrant will substantially assist ASIO collect intelligence in respect of a security matter. It has been the view of successive governments, and parliaments, that responsibility for deciding matters relating to security should, as a general rule, rest with the Executive rather than a judicial officer. The accountability regime for ASIO warrants is independent and rigorous. The Director-General is required to report to the Attorney-General on the utility of every warrant. In addition, the Inspector-General of Intelligence and Security has an oversight role which looks at every aspect of ASIO's warrant processes, and on which the Inspector-General reports annually to the Prime Minister, the Attorney-General and to the Parliament.

Department of Defence

The Government agrees that the power of the Minister administering the *Defence (Areas Control) Regulations 1989* to authorise a person to enter onto any land or premises to ascertain whether the regulations are being complied with, or for related purposes, should be reviewed. Such a review, including the ability for the Minister to authorise that person to undertake various specified actions, has been undertaken. Regulations 14 and 15 of the *Defence (Area Control) Regulations 1989* are to be amended to permit a local magistrate to issue a warrant to permit entry on to land or premises. This amendment is seen as offering an appropriate safeguard to the community that would be fair and consistent with entry powers under the *Crimes Act 1914*.

8. The Committee recommends that the Commonwealth Ombudsman undertake a regular, random "sample audit" of the exercise by the ATO of its entry and search powers to ensure that those powers have been exercised appropriately.

Government response to Recommendation 8: Accepted in principle

The Ombudsman is an independent statutory office-holder and the Government is unable to direct him to undertake particular investigations. The Ombudsman possesses the power to investigate the ways in which the ATO and other agencies within its jurisdiction exercise their search and entry powers, either following a complaint or on his or her own initiative. It is open to the Ombudsman to consider whether to investigate the ATO's use of such powers in the context of the Office's existing workload and resources and any particular issues that come to his attention.

The Committee noted in paragraph 4.23 of the Report that there were only nine tax complaints relating to the Commissioner's access powers made to the Commonwealth Ombudsman during 1988-99. As the Ombudsman noted in their submission to the Committee, an analysis of these complaints "does not disclose any discernable pattern of systemic defective administration."

9. The Committee recommends that the procedure that is applicable in Victoria and in some other jurisdictions be followed where, after execution, a warrant is returned to the court which issued it.

Government response to Recommendation 9: Not accepted

The Government agrees that warrants should be properly and fairly exercised. The Government does not accept that returning a warrant to the issuing authority would add to the current regime. Currently an issuing officer is required to retain a copy of the application for, and a copy of, the warrant. Furthermore, the crucial matters to which the warrant relates are to be recorded in the warrant. These include details such as the duration of the warrant (ie generally several days from the time of issue), the premises or persons to which the warrant relates, kinds of evidential material that are to be searched for and the powers authorised by the warrant. Any use of a warrant contrary to the terms set out in the warrant is susceptible to judicial challenge and may be held to amount to an unauthorised exercise of power.

Acceptance of this model would also burden issuing officers with original warrants that they do not seek, in circumstances where the warrant has often already been produced to a judicial officer in another state or territory. The magistrate or the trial judge in the state or territory where the charges are being heard is centrally concerned with the probative value and legality of the means used to collect the evidence. The administrative procedures developed over years of practice by Commonwealth agencies, which satisfy both the principles included in their legislation and the rules of court in each jurisdiction, are sufficient to guard against injustice. The procedures are guided by the Commonwealth Director of Public Prosecutions (Commonwealth DPP) which provides advice and assistance, through its DPP Search Warrants Manual.

Providing the issuing officer with the warrant also provides security risks as there is the risk of compromising an investigation by leaving operationally sensitive material with an issuing officer who may not be able to provide proper protection. The Commonwealth DPP is currently reviewing the practice that applies with respect to search warrants, with a view to bringing them into line with the practice that applies to telecommunications interception and listening device warrants. The practice in this

context is that the material is uplifted when the warrant is issued and is held by the AFP for the Commonwealth DPP with an undertaking to return it to the issuing officer if the issuing officer requires it.

Finally, it is uncertain whether the return of a search warrant to the issuing officer or court would provide any additional protection or safeguards in relation to its execution. If an issue arises in relation to the execution of a warrant and the seizure of evidence, it is likely to arise in the context of a prosecution as part of the defence case. In that context the lawfulness of actions taken are reviewed in order to determine the admissibility of evidence. The court would determine whether the warrant had been lawfully executed and the evidence obtained is indeed admissible.

10. The Committee recommends that, unless there are exceptional circumstances involving clear physical danger, all occupiers of premises which are to be entered and searched should be given a written document setting out in plain words their rights and responsibilities in relation to the search. Occupiers should be informed that the proposed entry and search is either for the purpose of monitoring compliance with a statute, or for the purpose of enforcement or gaining evidence and possible prosecution, but not for both purposes.

Government response to Recommendation 10: Accepted in principle

The policy on such matters has been changed to require that an occupier be informed in writing or, if that is impractical, informed orally, of his or her rights and responsibilities in relation to the search. There is no reason to distinguish in the context of this proposal between a search warrant, monitoring warrant and search authorised by consent. The statement of rights and responsibilities that are suitable for communicating to an occupier in plain language should be drawn from the legislation itself, rather than from common law principles or those set out in Chapter 1 of the Entry Report. In addition, situations of emergency, serious danger to public health or where national security is involved (as stated by the Scrutiny Committee at paragraph 1.44), will justify exceptions to this policy being made.

A further issue arises when the occupier does not speak English. DIMIA is considering the circumstances in which it is possible to establish the translation requirements of a person prior to the execution of a warrant and obtain an interpreter to explain the provisions of the search warrant. Given the delay involved in having an interpreter available to explain the search and the consequent opportunity for the subject to evade detection, DIMIA is considering the merits of a system whereby officers executing a search warrant carry documents detailing the relevant rights and responsibilities in a variety of different languages.

Where a warrant in relation to either a person or premises is being executed, section 3H of the *Crimes Act 1914* requires that the executing officer or a constable assisting must make available to the person a copy of the warrant. The executing officer must also identify himself or herself to the person at the premises, or the person being searched, as the case may be.

It is a standard feature of Commonwealth search warrants that they authorise entry to premises *either* for the purpose of monitoring statutory compliance *or* for the purpose of collecting evidence of a criminal breach.

Search warrants may also be authorised for other purposes, such as to gather evidence for non-criminal investigative purposes. The ATSB require search warrants when it is necessary for the purpose of collecting information on a transport accident, incident or unsafe situation. As noted already, these investigations are not conducted to apportion blame, but to obtain information about circumstances which led to an accident or incident and identify appropriate safety action to prevent future occurrences. These activities are conducted in a cooperative environment which renders the need for a search warrant unnecessary in many cases. Police assistance in executing a search warrant is neither appropriate or necessary in most ATSB investigations as this may be counterproductive to the flow of information.

In cases where entry and search is part of an established ongoing program of inspections to ensure compliance with legislation such as occupational health and safety or transport safety, requirements to provide occupiers with written guidelines on their rights and responsibilities is excessive, particularly where these are conducted in accordance with internationally agreed standards and procedures. These programs involve many thousands of routine inspections of premises annually, with no further action being taken in the majority of cases. Persons in the industry understand the purpose of the visits is to conduct regulatory inspection rather than criminal investigations.

11. Where search and entry powers are used by an investigative authority, the Committee recommends that:

- those who are being investigated should have an ongoing right to be informed of the current status of those investigations; and
- where an investigation has been concluded with no charges laid, those who have been investigated should have the right to be informed of this fact immediately; the right to have all seized material returned to them; and the right to compensation for any property damage and damage to reputation.

Government response to Recommendation 11: Accepted in part

The Government does not support the proposal that where a search warrant is executed as part of an ongoing investigation, the person investigated should be kept informed of the progress of the investigation.

In *NCSC v News Corporation Ltd* (1984) 156 CLR 296 the then National Companies and Securities Commission (NCSC) declined certain requests of companies suspected of offences relating to acquisition of shares, which would have given them a greater role in a hearing conducted to investigate the suspected offences. The NCSC declined the respondents' requests for greater information and various forms of involvement in the hearing, on the basis that procedural fairness did not require it to afford the respondents the right to be legally represented throughout; nor to cross-examine,

present evidence or make submissions. In upholding the NCSC's argument, the High Court stated:

> It is the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible without the suspect looking over his shoulder all the time to see how the inquiry is going. For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry... (*NCSC v News Corporation Ltd* (1984) 156 CLR 296 at 323)

The comments are similar to those made in the United Kingdom case of *R v Serious Fraud Office: ex parte Nadir* (Company Law Digest Vol. 12 No.4 1991), where the court stated that it would in fact be "contrary to the public interest to supply information which might enable a suspected fraudster to interfere with witnesses or destroy documents before the investigation was completed."

While any investigation can be reopened on the discovery of new evidence or similar conduct on another occasion, the Government accepts that individuals should be informed, as soon as practicable, when proceedings are not likely to be instituted on the basis of existing evidence. The advice to individuals will need to be appropriately qualified and tailored to the circumstances of the particular case, including dealing with whether civil proceedings remain an option.

In appropriate contexts, status reports are already provided, particularly in the audit context. For example, as a general rule, the ATO currently informs taxpayers of the progress of audits.

The Government supports the proposal that those who have been investigated should have all seized material returned to them, subject to well established limitations on this principle relating to the non-return of unlawful items such as narcotics and the forfeiture of proceeds of crime. The principle that seized material should be returned is already recognised in the case of police investigations by section 3ZV of the *Crimes Act 1914*, which provides that subject to any court order, if a constable seizes a thing by exercising a search and entry power granted under the Crimes Act, he or she must return it if the reason for its seizure has lapsed or it is not to be used in evidence; or otherwise within 60 days, if seized without warrant in an emergency. Commonwealth criminal law policy also provides that there should be an upper limit of 60 days on the retention of seized items, subject to extension in appropriate cases. A longer period may be specified only if there is a clear justification, as was the case in the *Customs Legislation Amendment (Criminal Sanctions and Related Measures) Act 2000*.

The Government does not support a statutory right to compensation, noting that inappropriate actions by law enforcement officers are dealt with by existing disciplinary or criminal sanctions.

The issue of a right to compensation for any property damage and damage to reputation is a civil matter best dealt with under the general principles governing tortious liability. While there is a limited statutory right to compensation for damage to electronic equipment (section 3M of the *Crimes Act 1914*), any other claims for compensation should be addressed in the established civil jurisdiction of tort law.

The Government has a number of reasons for this view.

An entrenched statutory right of compensation is likely to hinder the effective exercise of entry and search powers and the conduct of investigations. Investigators are likely to feel constrained in their activities. This in turn is likely to affect the normal operations of agencies in effectively conducting investigations and administering their affairs.

There may be many reasons for not commencing criminal proceedings (the suggested 'trigger' for a right to compensation) after the execution of an entry and search warrant. Authorities may rely on alternative enforcement measures, such as civil proceedings or administrative sanctions. Consideration of the Commonwealth prosecution policy may lead to a decision not to prosecute (for example, if there is insufficient evidence to justify prosecuting). A failure to prosecute should not imply that the exercise of search and entry powers was inappropriate giving rise to a right to compensation.

12. The Committee recommends that all agencies which exercise powers of entry and search should introduce best practice training procedures and other internal controls to ensure that the exercise of those powers is as fair as possible, and should set out the appropriate procedures and scope for the exercise of these powers in enforcement and compliance manuals.

Government response to Recommendation 12: Accepted in principle

The Government accepts that appropriate best practice training procedures and internal controls should be in place in Commonwealth agencies that exercise search and entry powers. The Commonwealth DPP Search Warrants Manual is available free of charge to interested Commonwealth agencies.

13. The Committee further recommends that, where practical, all executions of warrants are video-taped or tape-recorded, and that where the person is a suspect, a verbal caution is given and tape recorded.

Government response to Recommendation 13: Accepted in part

It is a fairly common practice for executions of search warrants to be video-taped or audio-taped, and still photographs are routinely taken by some agencies for evidential purposes. However, it is inappropriate to impose this obligation on all agencies in all circumstances.

A verbal caution is required to be given under existing law to persons suspected of committing a Commonwealth offence (section 23F of the *Crimes Act 1914*), which largely covers the Scrutiny Committee's recommendation on warrants executed to investigate offences. There is currently no requirement for tape recording the warning and the Government does not consider that this should be required. An investigating official is obliged under subsection 23F(1) of the *Crimes Act 1914* to caution a person who is merely in their company on suspicion of having committed an offence (before starting to question them):

that he or she does not have to say or do anything, but that anything the person does say or do may be used in evidence.

Given that a monitoring warrant is typically used in circumstances where the official does not have any grounds to suspect that the person being searched has committed an offence, the existing legal protections appear to largely satisfy the Scrutiny Committee's recommendation regarding verbal cautions.

14. The Committee recommends that the Attorney-General implement a system enabling courts to hear challenges to warrants in camera, or in a way which does not lead to prejudicial publicity for the person challenging the warrant.

Government response to Recommendation 14: Not accepted

All Australian courts have the power to make orders to protect parties from publicity if there is a need to do so. Those orders can include directions that evidence be heard in camera or that the names of the parties be suppressed. There is no demonstrated need to change existing law, and it would be anomalous to make specific provision in respect of only one class of matter.

15. The Committee recommends that the Attorney-General and the Minister for Justice and Customs examine the amendments to the *Crimes Act 1914* proposed by the AFP, and the amendments to the *Customs Act 1901* proposed by the Australian Customs Service, and introduce legislation to implement those amendments.

Government response to Recommendation 15: Accepted

Amendments to the *Customs Act 1901* giving effect to the Committee's recommendation commenced on 26 May 2000. The amendments were included in the *Customs Legislation Amendment (Criminal Sanctions & Other Measures) Act 2000* (Act No 23 of 2000).

The amendments:

- extended the retention period for evidential material from 60 to 120 days (section 203S and section 205E); and

- inserted a provision dealing with the disposal of abandoned goods (section 218A).

Similar amendments will be considered when the *Crimes Act 1914* provisions are next amended. There are likely to be amendments to the procedures in relation to investigative powers during 2003 as part of the implementation of the Leaders Summit on Terrorism and Multi-jurisdictional Crime initiatives.

16. While aware that covert searches might make law enforcement easier, the risks are such that the Committee is opposed to recommending such searches.

Government response to Recommendation 16: Noted

This issue remains under consideration.