Government Response

to the

Senate Standing Committee for the Scrutiny of Bills

Twelfth Report –

Entry, Search and Seizure Provisions in Commonwealth Legislation

January 2008

Executive summary of government response to the Twelfth Report of 2006

The Government welcomes the Twelfth Report of 2006 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').

The current inquiry represents a follow up of the Committee's original inquiry in 1999-2000 in relation to search and entry provisions in Commonwealth legislation.

The Committee expressed its interest in examining what improvements have been made since that time, in the level and quality of information available to the Parliament to assist in its consideration of relevant legislation. The report also specifically considers the recent developments in relation to the provisions authorising the seizure of material that is unrelated to an investigation.

The Committee has emphasised its scrutiny role in ensuring that the provisions in relation to law enforcement are balanced. The Government agrees with the Committee's view that search and entry powers need to be justified and closely monitored.

The Committee made fourteen recommendations. In examining the Committee's report, the Government supports a number of the recommendations (ten have been fully accepted and two are accepted in part). This response addresses each recommendation and the government's response, referring to particular agencies where appropriate.

As a consequence of the recommendations in the report, amendments are also being made to update *'A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers'* ('the Guide'). The amendments address many of the areas specified in the report. It is expected that the amended Guide will provide further explanation and assistance.

The relevant changes are specified in the responses below.

Substantive responses to each Recommendation of the Twelfth Report

1. 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.

Government response to Recommendation 1: Accepted

The Government agrees that justification for entry and search powers, including the power to conduct personal searches, should be clearly set out in the explanatory memorandum to the Bill. In order to justify the introduction or expansion of such powers, a clear need for them should be identified and made clear in the explanatory memorandum to the Bill for the benefit of the Parliament and the public.

Sections 9.1 and 11.3 of the Guide, 'Entry powers generally' and 'Personal search powers', are being amended to accord with this recommendation and inform readers of the Committee's views on the subject.

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.

Government response to Recommendation 2: Accepted

The Government agrees that justification for entry and search powers, including the power to conduct personal searches, should address the need for such powers in the particular circumstances rather than relying on precedent alone. The Parliament should be provided with information that allows for these provisions to be considered on their own merits and in the context of the particular circumstances that gave rise to them.

Sections 9.1 and 11.3 of the Guide, 'Entry powers generally' and 'Personal search powers', are being amended to accord with this recommendation and to inform readers of the Committee's views on the subject.

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 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.

Government response to Recommendation 3: Accepted in part

The Government considers that in some circumstances it is necessary for entry and search powers to be exercised without a warrant.

Legislation may address special circumstances in which entry without warrant is provided. One example is particular powers under the *Customs Act 1901* exercisable within customs places to ensure the security and integrity of people and cargo at the Australian border. These powers are

exercised routinely on a daily basis by Customs officers at their discretion, but are subject to approved guidelines and direction.

Notwithstanding any exceptional circumstances, the Government agrees that where it is considered necessary to provide for such powers, appropriate safeguards should be in place to ensure a sufficient level of accountability is maintained. A new section 9.10 is being added to the Guide concerning entry and search powers without warrant, which sets out a number of additional procedures. Details are provided below.

- In most circumstances where it is not practical to obtain a warrant in person, a warrant should be sought by telephone or other electronic means.

- There are situations in which the delay that may be associated with contacting and consulting a judicial officer in order to obtain a warrant would interfere unduly with law enforcement functions.

- Where it is considered necessary for legislation to provide for powers of entry and search without a warrant, provision should be made requiring senior executive authorisation for the exercise of such powers together with appropriate reporting requirements.

- Strong justification is required for such powers, and should be provided in the explanatory memorandum to the Bill.

4. 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.

Government response to Recommendation 4: Accepted

The Government considers that non-government officials or agencies should only be empowered to exercise entry and search powers in cases of necessity, which are assessed by the Attorney-General's Department on a case-by-case basis.

The statement of principle and practice set out in the Government Response is being integrated into section 9.2 of the Guide, 'Authorised officers'. This section is also being amended to advise that justification for conferring entry and search powers on non-government employees should be included both in the letter to the Minister for Home Affairs seeking approval of such provisions and in the explanatory memorandum to the Bill.

The Committee's views on justification for any deviation from the policy set out in the Guide also being provided in the explanatory memorandum have likewise been included in that section of the Guide.

5. 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.

Government response to Recommendation 5: Accepted

The Government agrees that legislative provision should be made for an authorised officer to identify himself or herself and for the occupier to be provided with written advice prior to the execution of a warrant.

The requirement for an authorised officer to identify himself or herself to an occupier prior to executing a warrant is in line with subsection 3H(4) of the Crimes Act and section 9.2 of the Guide. The provision on 'Authorised officers' is now being amended to make specific reference to both that provision and this recommendation.

Section 9.4 of the Guide, 'Notification of entry', will provide that that these requirements should only be waived in limited circumstances. Examples of this may be where there are reasonable grounds to believe that compliance would endanger a person's safety, where evidence could be destroyed, or where notification is impractical because no occupier is present.

The Government's policy is that where legislation provides for entry and search of premises without consent, the occupier should be informed of his or her rights and responsibilities.

Section 9.2 of the Guide will also be amended to specify that written notice should be in plain language and should explain the relevant legislative provisions rather than merely reproducing them. A note will also be placed in the guide instructing officers to ensure that the provisions are framed in such a way as to be legally accurate.

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

Government response to Recommendation 6: Accepted

Sections 9.2 and 9.4 of the Guide, entitled 'Authorised officers' and 'Notification of entry', are being amended accordingly (see response to recommendation 5).

An appendix will also be added to the Guide providing an example of a 'plain language' written notice that agencies may use as example in creating their own notice.

7. 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.

Government response to Recommendation 7: Not Accepted (alternative measure accepted)

The Government accepts in principle that appropriate training procedures and internal controls should be in place in Commonwealth agencies that exercise entry, search and seizure powers.

The Government does not believe however that there should be a general requirement for such guidelines and for their tabling and publishing. A general requirement of this kind would unnecessarily regulate the use of entry and search regimes without a corresponding accountability benefits.

The Guide provides extensive direction on the framing of entry, search and seizure provisions and the safeguards that should be built into legislation to protect the rights of individuals. It recommends that such powers should generally only be conferred on members of the Australian Public Service and that legislation conferring such powers should require that they only be exercised by appropriately qualified persons. The Guide also outlines various safeguards that should be provided for in legislation, including those relating to entry under force of law, the issuing of warrants, seizure under warrant, and monitoring warrants. Further amendments are being made to the Guide as discussed throughout this response in order to update and provide additional clarification as required.

Legislation and the safeguards it includes provide the framework within which operational guidelines and training procedures are developed. Guidelines and training procedures support the operational implementation of entry, search and seizure powers within the bounds of the relevant provisions. As the legislation itself is publicly available and open to Parliamentary scrutiny, the Government does not agree that it is necessary for the relevant guidelines and training procedures to be tabled in Parliament or published on the agencies website.

The Government considers that the decision of whether or not to make such material public should be at the discretion of individual agencies. In some cases the publication of operational guidelines and training procedures may compromise the integrity of law enforcement operations by revealing operationally sensitive information.

As noted in paragraphs 3.57 to 3.62 of the Committee's Report, a number of agencies have put guidelines and training procedures into place in relation to the exercise of entry, search and seizure powers, some of which are publicly available. While the Government does not agree that legislative provision for such measures should be required, it does agree that appropriate training procedures and guidelines should be developed in cases where legislation provides for powers of entry, search and seizure. A new part is being included in section 9.1 of the Guide, under 'Entry powers generally', recommending that where legislation provides for such powers, training procedures and operational guidelines should be put in place to ensure that authorised officers exercise powers fairly and responsibly.

8. 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.

Government response to Recommendation 8: Accepted in principle

The Office of the Commonwealth Ombudsman is an independent body for which priorities are determined by the Ombudsman. The Ombudsman already conducts oversight activities under a range of legislation. Except in cases where legislative provision is made requiring ongoing monitoring of the powers contained in a particular piece of legislation, the final decision as to whether or not to implement such a scheme rests with the Ombudsman, as does the decision of whether to implement the proposed register.

In the case of intelligence and security agencies, there are separate oversight arrangements that do not involve the Ombudsman. A note will be inserted into the Guide to clarify the position in relation to these organisations.

9. 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.

Government response to Recommendation 9: Not Accepted

The Government agrees that Ministers and agencies should regularly review the powers at their disposal, the extent of their use and the ongoing need to retain them. However, the Government does not believe that it is necessary or practical for this information to be provided in regular reports to Parliament.

Information relating to the exercise of entry, search and seizure powers is likely to be of a sensitive nature and as such not appropriate for public release. On the other hand, if such information was to be de-identified for reporting purposes, it would be of little practical use. Any significant matters can be covered in the annual reports of agencies exercising such powers.

The Government will include provision for reporting to Parliament on the exercise of particular powers where this is appropriate in the specific context, as is the case for example, for telecommunications interception powers.

10. 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.

Government response to Recommendation 10: Accepted

The Government's view in relation to entry, search and seizure powers is that the search warrant provisions at Part 1AA of the Crimes Act define the minimum limitations and safeguards that should apply to such powers.

This position is reflected in section 9.9 of the Guide, 'Search warrants (offences)'. This outlines the relevant safeguards and limitations that legislation conferring these powers should provide for and also the views of the Committee. A new part is being added within section 9.6 of the Guide, 'Seizure under warrant', setting out the provisions that should be included in legislation that confers the power to seize material related to an offence other than that for which a warrant was issued.

11.	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.

Government response to Recommendation 11: Accepted in part

Covert access to stored communications should only be permitted with a warrant

This is accepted. Where access to stored communications is sought covertly from a telecommunications carrier, Chapter 3 of the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) requires that a warrant be sought. The limited exceptions to this requirement ensure the workability of the telecommunications industry as well as other access schemes such as the computer access and listening device regimes contained in the *Australian Security Intelligence Organisation Act 1979* and the Australian Communications and Media Authority's enforcement of the *Spam Act 2003*.

Covert access to stored communications should only be accessible to core law enforcement agencies

This is not accepted. There is a separate regime for access to stored communications to reflect technological developments in the storage of documents, and different privacy impacts. The regime clarifies and centralises access arrangements for a range of enforcement (criminal law enforcement, civil penalty enforcement and public revenue) agencies, which have previously accessed stored documents via a range of different warrant and notice to produce provisions.

It is not agreed that access to stored communications should be limited to 'core law enforcement agencies', such agencies are generally interpreted as including State and Federal Police agencies and National Security Agencies'. The wider group of civil penalty enforcement and public revenue protection agencies have a legitimate need to access these types of information to enable effective investigations.

This reflects the reality that the growing dominance of electronic communications in all forms of business and personal transactions displaces and renders obsolete agencies' earlier powers of access to paper documents. However, this access is subject to controls. In particular, stored communications warrants may only be granted in relation to investigations into a contravention of a law of the Commonwealth, a State or a Territory that is:

- a serious offence (the existing threshold for obtaining a telecommunications interception warrant, as defined by section 5 of the Interception Act)
- an offence punishable by imprisonment for a period, or a maximum period, of at least three years, or the equivalent pecuniary penalty (which is at least 180 penalty units for individuals or at least 900 penalty units for corporations), or

- a breach of a civil penalty provision that would render the person committing the contravention liable to a fine of at least 180 penalty units (or at least 900 units if the person is a corporation).

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

This is accepted in part. The form and content of a stored communications warrant are specified by the *Telecommunications (Interception and Access) Regulations 1987*, which require the person to whom the warrant applies to be fully identified. Where the person's name is not known there is scope for a telecommunications service to be identified.

A stored communications warrant authorises the access to all stored communications held by a carrier in respect of a person. That is, all stored communications made by the person in respect of whom the warrant was issued or that another person has made and for which the intended recipient is the person in respect of whom the warrant was issued. Accordingly, there is no need to identify the telecommunications service on the warrant. However, from a practical perspective, there is a requirement that the carrier on whom the warrant is served be provided with sufficient details as to identify the stored communications sought, which will usually be by identification of a telecommunications service.

12. 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.

Government response to Recommendation 12: Accepted

The Government agrees that seized material should be regularly reviewed, and if it is found not to be relevant to any lawful purpose for which it can be used, either returned or destroyed as appropriate. A new part is being added within section 9.6 of the Guide, 'Seizure under warrant', recommending that where legislation authorises the seizure of material, provision is made for the regular review of such material and for the timely return or destruction of material found not to be relevant to any lawful purpose.

As noted in the Committee's report, the Guide recommends that an upper limit of 60 days should generally attach to the retention of seized material. The new part to be inserted into the Guide will note that regular evaluation of seized material is particularly important where legislation does not specify a time limit on the retention of such material.

13. 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.

Government response to Recommendation 13: Accepted

A new part is being added within section 9.6 of the Guide, 'Seizure under warrant', recommending that where legislation authorises the seizure of material, consideration be given to the inclusion of limitations on the use and derivative use of incidentally seized material, particularly information accessed via stored communications warrants.

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

Government response to Recommendation 14: Accepted

The Government accepts that core principles in relation to the seizure of material are required. Additional material on these issues is being inserted into the Guide under section 9.6 entitled - 'Seizure under warrant'. This will deal with subjects including the requirements for warrants, review of seized material, limits on the use and derivative use of seized material, material related to a different offence and limits in relation to its use. In addition, the views of the Committee will be outlined.