CHAPTER 2

KEY ISSUES

2.1 Most submissions and witnesses expressed in-principle opposition to Schedule 2 of the Bill and considered that it should be withdrawn from the Bill in its entirety. However, in the event that Schedule 2 does proceed, many of those submissions and witnesses offered a range of possible amendments to ameliorate its impact.

2.2 This chapter considers key issues and concerns that emerged during the committee's inquiry in relation to Schedule 2, namely:

- whether there is a demonstrated need for entry, search and seizure powers to be granted to Centrelink officers;
- whether the object to be achieved by granting Centrelink officers entry, search and seizure powers is proportionate to the degree of intrusion resulting from the exercise of the powers;
- the inherent differences between Centrelink and other Commonwealth bodies with similar powers;
- the training that should be given to those officers exercising the powers, and consideration of relevant Centrelink 'cultural' factors;
- whether the powers are more appropriately exercised by the Australian Federal Police (AFP);
- the need for oversight of the powers; and
- other concerns, such as the need for safeguarding third party information, and the need for Schedule 2 to provide for the return of seized material.

Is there a demonstrated need for the powers?

2.3 The committee received conflicting evidence in relation to whether the proposed powers are necessary and appropriate: FaCSIA and Centrelink provided the committee with arguments justifying the powers on the basis that they will enable FaCSIA and Centrelink to more effectively combat social security fraud; the remainder of submissions and witnesses, however, questioned whether the powers are in fact appropriate.

Department/Centrelink view

2.4 Currently, search warrants for Centrelink matters are executed by the AFP under section 3E of the *Crimes Act 1914*.[1] The EM to the Bill notes that over recent years Centrelink has developed its investigative capability to be able to detect,

1 EM, p. 11.

investigate and prosecute more serious fraud committed against the social security law, including focussing on the cash economy and identity fraud. The EM states that while Centrelink's current information-gathering powers are sufficient to address routine non-compliance, in order to effectively investigate and prosecute cases of more serious abuse, enhanced powers are required.[2]

2.5 In response to a question from the committee as to which Department or agency had requested that Centrelink be given the powers contained in Schedule 2, Centrelink advised the committee that, as part of the 2006-07 Budget process, the Department of Human Services put forward a series of measures under the heading 'Better Service Better Compliance' and that one of these measures was 'Enhanced Focus on Serious Social Security Fraud'. Centrelink advised that it put forward this particular measure, which included the search and seizure powers.[3]

2.6 In addition, during the hearing Centrelink referred to the desire of the Department of Employment and Workplace Relations to have more cases referred to the DPP.[4]

2.7 At the public hearing, a representative from FaCSIA told the committee that '(t)he whole-of-government savings from the relevant measures are $150 million over four years'.[5] It is intended that use of the powers under Schedule 2 will commence in January 2008; a representative from Centrelink stated that its CEO 'will not authorise implementation of [the] arrangements to apply or execute warrants until he is satisfied that all requirements – particularly training and operational processes, assurance regimes, regimes to ensure safety – have been settled to his satisfaction after full and open consultation with … stakeholders', including the AFP.[6]

2.8 Centrelink also advised that the proposed powers will be available to a 'limited range of officers', in the order of 20 officers Australia-wide.[7]

2.9 In its submission, FaCSIA stated that the grant of the powers would make Centrelink less dependent on the AFP and other state and territory agencies, which have different operational priorities to Centrelink:

> While we receive cooperation from the AFP, it is now clear that it has an enlarged agenda to work on as a result of terrorism. In order to maintain integrity and public confidence in the welfare system we consider it prudent

2 EM, p. 11.

3 *Submission 16*, p. 8.

4 *Committee Hansard*, 10 November 2006, pp. 41-42 & p. 43.

5 *Committee Hansard*, 10 November 2006, p. 28.

6 *Committee Hansard*, 10 November 2006, pp 30 & 39.

7 *Committee Hansard*, 10 November 2006, p. 32.

> for departments and Centrelink to undertake investigations in their own right.[8]

2.10 Centrelink continued this line of argument:

> Over recent years the resources of the … AFP have been increasingly focused on matters that are rated high under their Case Categorisation and Prioritisation Model (CCPM) eg international terrorism, national security, real threat to life, and economic crime. The types of offences committed against Centrelink are mostly rated 'low' against the CCPM.
>
> Against this environment the Government has resourced Centrelink to train its fraud investigators to handle cases that may have been referred to the AFP in past years. There is an increasing number of more serious cases involving cash economy operations and identity fraud that require the execution of a search warrant.[9]

2.11 Centrelink also stated that the powers contained in Schedule 2 'would enable Centrelink to respond promptly and efficiently to situations which require execution of a search warrant and would enhance overall fraud investigation capability'.[10]

2.12 At the hearing, a representative from Centrelink reiterated that the powers are necessary and would only be used in circumstances where Centrelink has a strong suspicion of fraud. This would only amount to exercise of the powers in a small proportion of the total number of fraud cases:

> The powers will overcome a deficiency in Centrelink's current capability in investigating fraud, which is hamstrung where an individual or employer refuses to provide evidence voluntarily, or where the AFP have not been able to assist within the time lines needed, given other higher level priorities set by the government, such as terrorism. I want to make it clear right at the outset that we receive very good support from the AFP. We are not in any way critical. We understand the priorities they have been set by government. There is no questioning of that.[11]

2.13 The representative continued:

> Of the 20,000 cases of potential fraud that Centrelink investigate every year, around 20 per cent, or 4,000 cases, are referred to the Commonwealth DPP. The quality of the evidence is paramount and we have a protocol with the DPP that covers the sorts of cases which are appropriate for us to refer to them. This element of the serious fraud measure—the element we are discussing now—is targeted to address a known gap. Where we have insufficient documentary evidence of fraud but strong grounds to believe evidence does exist, we need to have the power to gain access to the

8 *Submission 6*, p. 2.

9 *Submission 6A*, p. 2.

10 *Submission 6A*, p. 2.

11 *Committee Hansard*, 10 November 2006, p. 29.

> property and to the information in a much higher proportion of cases than we are able to now. Delays in the process of obtaining and executing warrants place at risk our ability to obtain the evidence we are seeking. Not being able to act promptly jeopardises our capacity to get the evidence we need to mount a successful prosecution or to prove the innocence of parties. It is important to emphasise here that even a few days delay can put at risk the ability to obtain that evidence—and this is particularly the case where there is, for example, seasonal work, records are likely to be destroyed or it is likely to be very difficult to get hold of them in the future.[12]

The 'emerging gap' issue

2.14 The committee explored at length the issue of the apparent 'emerging gap'[13] in the investigation of Centrelink fraud cases by the AFP. The main thrust of the representative from Centrelink's argument at the hearing appeared to be that 'what Centrelink regards as serious fraud is actually at the low end of what the AFP would describe as serious fraud'[14] which has resulted in the AFP only accepting referrals of alleged high-end fraud from Centrelink. The representative from Centrelink told the committee that since the AFP revised its CCPM, the number of cases that the AFP has been able to accept has declined.[15] Centrelink also asserted that differing views on priority assessments by the two agencies have led to delays in the execution of warrants.[16]

2.15 As evidence in support of its arguments, Centrelink informed the committee that, in 1995-96, the AFP accepted 319 Centrelink cases but that in 2005-06 the AFP accepted less than 50 Centrelink cases. Centrelink contended that '(t)his reflects the changes in priorities detailed in the CCPM over the period.' In a further clarification, Centrelink advised that it referred 35 cases to the AFP for criminal investigation in 2005-06; three of these cases were rejected. Centrelink also informed the committee that it 'does not collect data on the number of cases not referred'.[17]

2.16 Centrelink also noted that its investigative capacity, skills and resources have been steadily increasing at the same time as the AFP acceptance of cases has declined; and that it investigates cases not accepted by the AFP. Centrelink later clarified earlier comments made at the hearing in relation to the 'gap' as follows:

> There is no gap in the sense that where the Australian Federal Police decline to accept a case, it will continue to be investigated by Centrelink.

---

12 *Committee Hansard*, 10 November 2006, p. 29.

13 *Committee Hansard*, 10 November 2006, p. 38.

14 *Committee Hansard*, 10 November 2006, p. 37.

15 *Committee Hansard*, 10 November 2006, p. 38.

16 For example, see *Submission 15*, p. 4.

17 *Submission 15A*, p. 3.

> However, if a search and seizure warrant is required, Centrelink needs to re-approach the Australian Federal Police for assistance.[18]

2.17 At the hearing, Federal Agent Roman Quaedvlieg from the AFP refuted Centrelink's arguments about tardiness in responses:

> Our relationship with Centrelink is grounded in a memorandum of understanding. That service level agreement outlines the respective agencies' obligations. The AFP applies itself to that memorandum of understanding conscientiously. There are no inordinate delays in terms of responses to the referrals that I have spoken of. Yes, occasionally there is a delay caused by an extraneous event such as a CHOGM or a Commonwealth Games. If our response to a Centrelink request is going to be delayed by such an event, we will liaise with Centrelink officers directly through our client service liaison team. We will ascertain whether there is any urgency around the search warrant application for either the erosion of evidence or any other factor. If there is, we will take that into account and make special arrangements. If we get agreement from Centrelink that there is no urgency in relation to the request, we agree on a mutually convenient time, so I reject the assertion that the AFP is tardy in its response to Centrelink referrals.[19]

2.18 Federal Agent Quaedvlieg also noted that there are no complaints on record from FaCSIA or Centrelink in relation to a pattern or trend of untimely responses to warrant requests.[20] This assertion seems to correlate with Centrelink's advice subsequent to the hearing that its concerns, in relation to Centrelink matters increasingly not falling within the matters with which the AFP are able to assist, have not at any stage been formally communicated to the AFP.[21]

2.19 In answers to questions on notice, the AFP clarified its position on the 'emerging gap' issue:

> At the time of the hearing for this Bill Inquiry, the AFP was unaware of the types of cases that [the representative from Centrelink] was referring to that would form the 'emerging gap'. Since the hearing the AFP and Centrelink have had preliminary discussions about this issue which are ongoing.
>
> The AFP understands that [the representative from Centrelink's] comments refer to the number of criminal investigations the AFP has been able to undertake for Centrelink. The AFP does not believe the total number of referrals it has accepted from Centrelink, including the cases it has been able to investigate and requests for assistance including search warrants,

---

18 *Submission 15*, p. 4.

19 *Committee Hansard*, 10 November 2006, p. 17.

20 *Committee Hansard*, 10 November 2006, pp 17 & 19.

21 *Submission 15*, p. 3.

> arrest warrants, and forensic analysis it has been able to action, has declined.[22]

2.20 The AFP provided the committee with some useful referral statistics in support of this assertion. The committee notes that these statistics demonstrate that, contrary to Centrelink's assertions, there has actually been a decline in the number of cases rejected by the AFP in recent years, and pertinently, since 2001:[23]

FINANCIAL YEAR	REFERRALS RECEIVED	REFERRALS UNDER EVALUATION	REFERRALS ACCEPTED	REFERRALS REJECTED
1999/2000	224		213	11
2000/2001	207		178	29
2001/2002	143		104	39
2002/2003	149		133	16
2003/2004	130		106	24
2004/2005	117		109	8
2005/2006	167		164	3
2006/2007 (to date)	58	4	53	1
Grand Total	**1195**	**4**	**1060**	**131**

2.21 The AFP also disputed Centrelink's claim that Centrelink fraud falls within the lowest category of investigation priority in the CCPM:

> The AFP's experience is that not all Centrelink referrals fall into the lowest category. In fact as part of the last Service Agreement negotiations, the AFP chose to make Centrelink search warrant referrals rate higher than had previously been the case. The categorisation of each referral depends on its merits.[24]

2.22 In relation to Centrelink's assertion in relation to response delays, the AFP advised that, of the 254 active Centrelink cases it currently has on hand, the average evaluation time for each referral was 12 days. These figures include matters referred

22 *Submission 14*, p. 6.

23 *Submission 14*, p. 6.

24 *Submission 14*, pp 4-5.

for investigation. Of the 708 Centrelink cases the AFP has finalised since 2000, the average evaluation time for each referral was 16 days. The AFP noted that these evaluations occur within the 28-day timeframe stipulated in the AFP and Centrelink Service Agreement. The AFP also advised that, while there is no specific guidance under the Service Agreement for timeliness of execution of search warrants, the AFP seeks to undertake assistance with search warrants in a timely manner.[25]

2.23 The committee notes that, subsequent to the hearing, Centrelink and the AFP provided a joint clarification of their relationship and the disparities in evidence during this inquiry:

> The AFP has experienced a rapid increase in the level of demands placed upon it in the enhanced security environment over the last five years, which have been addressed by government through increased resources. As a result of these issues, a perception has grown amongst Centrelink staff that the AFP is less able to assist with serious fraud investigations. This perception of the AFP's reduced capacity to service Centrelink's requirements is not shared by the AFP, nor was it raised officially at senior levels with the AFP.[26]

2.24 Further:

> Despite the different perceptions, Centrelink and the AFP agree that there are resource implications in meeting the government's commitment to reduce the incidence of serious social security fraud. The Enhanced Focus on Serious Social Security Fraud 2006-07 Budget measure taken forward by the Minister of Human Services was designed to address this need. As part of this process, Centrelink sought access to search and seizure powers comparable to those exercised by some other Australian government agencies.[27]

2.25 However, the AFP and Centrelink noted that Centrelink 'acknowledges the AFP's pre-eminent expertise, capability and role under the Commonwealth Fraud Control Guidelines, particularly, in investigating matters of serious and complex fraud against the Commonwealth'.[28]

2.26 Significantly, both the AFP and Centrelink advised the committee further that:

> The AFP and Centrelink are in full consultation about maximising the AFP's involvement in the investigation of serious and complex social security fraud and the execution of search warrants relating to serious fraud investigations undertaken by Centrelink with a view to minimising the need for separate search and seizure powers. Any agreement reached between Centrelink and AFP on the execution of search warrants and the referral of

25 *Submission 14*, pp 2-3.

26 *Submissions 14 and 15*.

27 *Submissions 14 and 15*.

28 *Submissions 14 and 15*.

> matters for investigations will be reflected in a new Service Level Agreement that will cover agreed service levels and corresponding resource implications for both agencies.[29]

Lack of demonstrated need for the powers

2.27 FaCSIA submitted that the powers in Schedule 2 are similar to powers held currently by more than a dozen Federal Government departments and agencies, including the Department of Environment and Heritage, Medicare Australia, the Department of Transport and Regional Services, the Australian Securities and Investment Commission, the Department of Health and Ageing, and the Australian Customs Service.[30]

2.28 At the hearing, a representative of FaCSIA also stated that Schedule 2 is based on similar powers in other areas:

> This legislation does not involve anything novel in relation to search and seizure powers. Agencies are very aware of the responsibility to ensure that these powers are used appropriately. They are serious powers and they will be used seriously by the agency. I am conscious that secretaries of departments may only authorise an officer where they are satisfied that they have suitable qualifications or experience. Secretaries may also provide directions on the use of powers. That is something that our secretary will certainly be considering very carefully in terms of the behaviour of Centrelink or departmental officers engaging in a search and seizure activity.[31]

2.29 The Office of the Commonwealth Ombudsman expressed reservations about justifying the grant of search and seizure powers to Centrelink officials by reference to the fact that other agencies already have such powers. The Commonwealth Ombudsman's view was that, of all the agencies which are suggested as having powers comparable to those in Schedule 2, only the Australian Customs Service and Medicare Australia have powers of the same scope.[32]

2.30 However, in an answer to a question on notice, FaCSIA maintained that the powers granted to the Australian Customs Service and Medicare Australia are of most similar scope to the proposed amendments and that, in drafting Schedule 2, the new provisions were closely modelled on those in the *Medicare Australia Act 1973*. FaCSIA also stated that the other pieces of legislation previously referred to in its submission provide other examples of search, entry and seizure powers, each of which has some similarities. Further, according to FaCSIA, the powers granted to Medicare Australia under the *Medicare Australia Act 1973* are not restricted to the entry and

---

29 *Submissions 14 and 15*.

30 *Submission 6*, p. 3.

31 *Committee Hansard*, 10 November 2006, p. 28.

32 *Submission 13*, p. 4.

search of business premises and could operate in respect of individuals and their private premises.[33]

2.31 The committee received considerable evidence arguing that there is no demonstrated need for search and seizure powers to be granted to Centrelink officers.[34]

2.32 At the hearing, Mr Michael Raper from the National Welfare Rights Network (NWRN) expressed the view that Centrelink already has 'enormous powers to obtain information – more than probably any other agency'.[35]

2.33 Others concurred with this view. The Acting Commonwealth Ombudsman stated that:

> The existing social security law and related legislation already contains a considerable range of powers to enable Centrelink officials to gather the information they need. Although some are supported by criminal law type sanctions, the financial consequences of others where an administrative step is taken—for example, if payment is denied—is probably as much a penalty as many of the fines that could be imposed.[36]

Proportionality between objects to be achieved and degree of intrusion

2.34 The committee received evidence suggesting that the likely degree of intrusion resulting from any exercise of the proposed powers in Schedule 2 would be disproportionate to the Federal Government's desired objective of combating cases of Centrelink fraud.

Background

2.35 The Senate Standing Committee for the Scrutiny of Bills, in its 2000 report on entry and search provisions in Commonwealth legislation set out a number of principles which should govern the grant of powers of entry and search by Parliament.

2.36 In its report, the Scrutiny of Bills Committee specifically noted that:

> It is often said that empowering … authorities to enter and search private premises involves striking a balance between two competing public interests. There is a public interest in the effective administration of justice and government. However, there is also a public interest in preserving

33 *Submission 6B*, p. 1.

34 See National Welfare Rights Network, *Submission 2*, p. 2; Legal Services Commission of South Australia (LSCSA), *Submission 3*, p. 2; Welfare Rights & Advocacy Service (WRAS), *Submission 7*, p. 2.

35 Mr Michael Raper, National Welfare Rights Network, *Committee Hansard*, 10 November 2006, p. 23.

36 *Committee Hansard*, 10 November 2006, p. 2.

> people's dignity and protecting them from arbitrary invasions of their property and privacy, and disruption to the proper functioning of their businesses and work. Neither of these interests can be insisted on to the exclusion of the other, and proper and fair laws which authorise the entering and searching of premises can only be made where the right balance is struck between these two interests.[37]

2.37 Although the Federal Government rejected many of the Scrutiny of Bills Committee's recommendations, there is reference to the 2000 report in the guidelines to framing Commonwealth offences, civil penalties and enforcement powers, issued by the Minister for Justice and Customs in 2004. Those guidelines state that:

> Where an instructing agency is preparing proposals for entry and search provisions, it should take account of the views of the Senate Scrutiny of Bills Committee, most notably reflected in the Committee's Report 4/2000: *Inquiry into Entry and Search Provisions in Commonwealth Legislation*.[38]

Competing arguments

2.38 In evidence before this committee, the Acting Commonwealth Ombudsman agreed that balancing relevant interests is of fundamental importance when considering the grant of intrusive powers:

> The grant of intrusive powers to Commonwealth officials always warrants careful consideration and this is all the more justified where the powers given are unusually extensive. It could perhaps be said that powers of entry, search and seizure such as these are in fact more disruptive and have a greater immediate impact than eavesdropping powers, which are exercised covertly against those suspected of serious crime. The more extensive the powers, the greater the risk that there they may be misused or abused, and the greater the risk of misuse or abuse, the greater the risk of damage to public confidence in Commonwealth administration as well as suffering and possible financial harm to the victims.
>
> In the end, it is for the government and the parliament to judge community values and weigh the risks to individuals and businesses and to public

---

37 Senate Standing Committee for the Scrutiny of Bills, *Entry and Search Provisions in Commonwealth Legislation*, Fourth Report of 2000, 6 April 2000, p. 67. The committee notes that, in its response to the Scrutiny of Bills Committee's report, the Federal Government rejected many of the committee's recommendations: see Government Response to the Senate Scrutiny of Bills Committee Fourth Report 2000, *Entry and Search Provisions in Commonwealth Legislation*, Canberra, August 2003. On 25 March 2004, the Senate again referred the issue to that committee; the committee is yet to report.

38 Minister for Justice and Customs, *A Guide To Framing Commonwealth Offences, Civil Penalties and Enforcement* Powers, Canberra, February 2004, p. 67 at http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/07B8DF7C133D46C8CA256E5F000339FC/$FILE/Consolidated+Guide+-++February+2004.pdf (accessed 15 November 2006).

> confidence in administration against the public interest in pursuing and containing social security and similar fraud.[39]

2.39 FaCSIA's submission stated that the Federal Government's Human Services agencies (including Centrelink) deliver over $90 billion in payments and services each year across a broad range of programs and on behalf of a number of policy departments. FaCSIA noted that the importance of fraud and compliance activities in relation to social, health and welfare service is illustrated by over $1 billion in savings annually. Further, FaCSIA argued that the community expects a strong and effective fraud and compliance regime.[40]

2.40 The Legal Services Commission of South Australia (LSCSA) pointed out that any debt to the Commonwealth arising from Centrelink matters can be recovered via the normal debt recovery process, including deductions from future benefit entitlements. Given this, LSCSA argued that granting search and seizure powers at an agency officer level is not proportionate to the risk involved for the Commonwealth.[41]

2.41 Some submissions and witnesses also argued that there was the potential for repeated searches on the same premises, which could amount to harassment. Although officers seeking warrants are required to provide the magistrate with information about warrants that they themselves have sought for the same premises, they are not required to give information about warrants for the premises that have been sought by others.[42]

2.42 Submissions also provided comment on the absence of a link in Schedule 2 between the seriousness of the alleged offence, and the grant of a warrant. Catholic Social Services Australia (CSSA) noted the statement in the EM that Centrelink's current powers are sufficient to address 'routine non-compliance'. However, as CSSA pointed out, there is no indication as to how current powers are deficient with regards to cases of more serious abuse:

> … there is nothing in Schedule 2 of the Bill to restrict the application of search-and-seizure powers to cases of 'more serious abuse'.
>
> On the contrary, search-and-seizure powers will be triggered by the existence of reasonable grounds to suspect the presence (or even to suspect the possible presence) of 'evidential material', which is extremely broadly defined. Schedule 2 defines the term 'evidential material' to mean 'a thing relevant to an offence against' family assistance law, the social security law, or the Student Assistance Act 1973.
>
> So it appears these draconian search-and-seizure powers can be triggered by the existence of reasonable grounds to suspect the presence of 'a thing

---

39 *Committee Hansard*, 10 November 2006, p. 2.

40 *Submission 6*, p. 1.

41 *Submission 3*, p. 2.

42 NSW CCL, *Submission 9*, p. 4.

> relevant to' any offence against the social security law. This is wildly disproportionate to the stated impetus for the Schedule 2 search-and-seizure powers, i.e. the need for 'enhanced powers' to 'investigate and prosecute cases of more serious abuse'.[43]

2.43 Mr Stephen Jones from the Community & Public Sector Union (CPSU) made a similar argument:

> We note that the purported purpose of the power … is to enable the department to appropriately detect, investigate and prosecute sophisticated and major fraud. However, nowhere in the legislation is that purported power reflected. In fact, it is quite a broad grant of power which does not necessarily attach itself to the investigation of complex and sophisticated fraud. It is in acknowledging that point that we think there needs to be some proportionality between the use of force and the breadth of a search and seizure power granted to each authorised officer. That proportionality should actually be reflected in the legislation.[44]

2.44 The Queensland Council for Civil Liberties (Qld CCL) noted that, in granting a warrant under section 3E of the Crimes Act, a judicial officer needs to be satisfied that there are reasonable grounds for suspecting there is evidence to be found on the premises; and there are reasonable grounds for believing that it will afford evidence as to the commission of the offence. Qld CCL were of the view that these requirements have been watered down in the current bill because there is no need for the applicant to put before the court the basis for their belief that a person has committed an offence.[45]

2.45 The NSW Council for Civil Liberties (NSW CCL) argued that, if Schedule 2 is to remain in the Bill, it should be amended to give more guidance to judicial officers for determining whether the suspected crimes justify the particular search.[46]

Distinction between Centrelink and other Commonwealth bodies

2.46 As noted above, FaCSIA stated that similar powers have been granted to more than a dozen other Commonwealth agencies and departments. FaCSIA argued that that the Bill proposes safeguards that are at least as rigorous as the safeguards in place for similar powers in other legislation exercisable under warrant.[47]

2.47 However, submissions and witnesses argued that there are significant distinctions between Centrelink and other Commonwealth bodies with search and seizure powers. One of the main differences highlighted was that most other

---

43 *Submission 10*, p. 4.

44 *Committee Hansard*, 10 November 2006, p. 8.

45 *Submission 7*, p. 3.

46 *Submission 9*, p. 2.

47 *Submission 6*, p. 4.

Commonwealth bodies would be using their powers to search business premises, whereas Centrelink's powers are more likely to be used to search private residences.[48]

2.48 Two specific concerns in the context of searches of private residences emerged. Firstly, there was concern about the impact such searches would have on those who share homes with people who will be the subject of the powers, including children, the elderly and people with mental illnesses.[49]

2.49 Secondly, submitters were concerned at the use of these powers to investigate 'marriage-like relationships', and argued that evidence of these types of relationships is fundamentally different to documents and records normally sought in suspected fraud cases. As the NWRN explained:

> An investigation of whether a person is living as a single person or as a member of a couple is qualitatively different to an investigation concerning possible identity fraud involving multiple Social Security claims, or concealing employment by working under a false name. Unlike a multiple identity investigation, for which the probability of establishing fraud upon obtaining the evidence sought is quite high, whether or not a person is living in a Marriage-like Relationship, whatever the evidence, is in itself a subjective matter and establishing evidence of co-habitation is only part of the consideration. While the type of evidential material relevant to identity fraud involves documentary material of a specific nature (eg, multiple identity pension cards, or employment records under an assumed name), to which a warrant application can make specific reference, 'evidence' that a person has a partner is by its very nature non-specific, complex and all-encompassing.[50]

2.50 NWRN noted an important further distinction between Centrelink and other Commonwealth bodies, that is the necessity for Centrelink clients to keep in contact with the agency:

> ATO, DIMIA and the Child Support Agency all deal with avoidance issues, ie the citizen generally has something to gain by staying out of contact with the relevant agency.
>
> Centrelink clients on the other hand need to remain in touch in order to continue to receive their benefit.[51]

2.51 NWRN argued that this requirement to stay in contact with Centrelink, combined with the fact that the decisions made by Centrelink are administrative,

---

48 See, for example, Catholic Social Services Australia (CSSA), *Submission 10*, p. 4.

49 See, for example, WRAS, *Submission 7*, p. 2; Acting Commonwealth Ombudsman, *Committee Hansard*, 10 November 2006, p. 3.

50 NWRN, *Submission 2*, p. 2.

51 *Submission 2*, p. 2.

means that there is no decision so urgent it cannot be satisfied under Centrelink's existing information collection powers.[52]

2.52 At the hearing, a representative from FaCSIA explained that the powers are not intended to apply to the investigation of marriage-like relationships:

> In relation to the powers, our view is that the measures are intended to assist government to address serious fraud. They are not to apply generally to the investigation of marriage like relationships and they are not intended to apply generally to investigations regarding overpayments or underpayments or other discrepancies of that nature. We are talking about serious fraud and deliberate attempts to defraud the Commonwealth.[53]

Training and cultural issues

2.53 Training and cultural issues emerged in evidence as important considerations to be taken into account in any grant of powers of the kind proposed in Schedule 2.

Training

2.54 A number of submissions and witnesses raised concerns about the training that 'authorised officers' would receive for executing search warrants, particularly given that provisions in the Bill permit the use of necessary and reasonable force in the course of searches.

2.55 In a general sense, the Office of the Privacy Commissioner (OPC) stated that there are significant differences to take into account when evaluating the appropriateness of granting search and seizure powers to administrative officers as opposed to law enforcement officers. Those differences include the fact that law enforcement agencies have detailed procedures that are binding on sworn members to ensure that the exercise of intrusive powers, and any use of force, is applied appropriately.[54]

2.56 Mr Jones from the CPSU made strong arguments about the importance of appropriate training for those exercising the proposed powers:

> … an absolutely essential requirement of the persons performing these functions is that they are suitably qualified and experienced. It is crucial for the protection of the community and the officers performing this function that they have adequate training and experience in the use of force and in responding to potentially conflicting circumstances. They must be qualified and have experience in dealing with material which will potentially become the subject of a litigation procedure so that that material is admissible before a court of law.

---

52 *Submission 2*, p. 2.

53 *Committee Hansard*, 10 November 2006, p. 28.

54 *Submission 5*, pp 2-3.

> In addition, … [we emphasise] the importance of cultural awareness training … More specifically, it is important that officers who are engaging in exercising these powers have an awareness of the cultural and particular circumstances of the persons whom they are investigating and, in particular, that they have both the training and the capacity to deal with the needs and rights of children who may be living in the households which are subject to the search and seizure order. [There is a] need for the granting of such power to be accompanied by an appropriate level of restraint.[55]

2.57 The Acting Commonwealth Ombudsman also highlighted potential problems with the use of such powers by an agency like Centrelink:

> We make the general point that we have a large agency with a large number of people dispersed in geographic locations throughout Australia and that exercising these powers may be just one part of a job that is multifaceted. It would appear that it would be much harder to achieve consistency and high quality control than where you have specialist law enforcement agencies for which this is in fact one of the parts of their core business and you have fewer people exercising it at fewer locations.[56]

2.58 Federal Agent Quaedvlieg from the AFP made some analogous arguments, pointing to the AFP's rigorous training and competency requirements:

> To ensure that AFP officers are able to exercise these and other powers, the AFP ensures that its agents are trained properly, that specific skill sets such as the use of force are regularly recertified, that internal procedures for planning and executing search warrants are current with the law and best practice and that these are clearly communicated to all staff.[57]

2.59 Federal Agent Quaedvlieg expressed concern that Schedule 2 of the Bill, as drafted, does not give any reassurance as to appropriate training. In any case, in Federal Agent Quaedvlieg's opinion, 'it would be naive to assume that the provision of a truncated, one-off training course in the exercise of these types of powers would equip Commonwealth officers to appropriately and judiciously exercise those powers responsibly'.[58]

2.60 In this context, Federal Agent Quaedvlieg provided important background information to the committee to support his argument. In doing so, he highlighted some obvious deficiencies in Schedule 2, along with a possible lack of foresight with respect to training requirements and competencies – both evidential and operational – associated with any grant of entry, search and seizure powers.

---

55 *Committee Hansard*, 10 November 2006, p. 8.

56 *Committee Hansard*, 10 November 2006, p. 5.

57 *Committee Hansard*, 10 November 2006, p. 14.

58 *Committee Hansard*, 10 November 2006, p. 15.

2.61 Federal Agent Quaedvlieg also noted the importance of appropriate occupational health and safety frameworks, and other training implications such as the need for negotiation training, training in post-incident trauma and complaints handling. He also placed an emphasis on contingency planning in the event of a search not going according to plan, noting that, with respect to the powers proposed in Schedule 2, '(t)here is no contingency in place for back-up support of either state or Commonwealth police agencies, and we are not confident that the departments or the agencies under FaCSIA actually have that back-up capability at this point'.[59]

2.62 Importantly, Federal Agent Quaedvlieg pointed out that there would be considerable resource implications for the AFP which would, in any case, be required to provide assistance with training.[60]

2.63 FaCSIA indicated that it is proposed that an ongoing training program will be developed for officers exercising the powers under Schedule 2.[61]

2.64 In particular, FaCSIA advised that, since the search warrant powers will not be implemented until 1 January 2008, this provides Centrelink 'with over 12 months to develop and deliver, in consultation with the Australian Federal Police and other agencies, comprehensive search warrant training for fraud investigators'. Further, an appropriate training curriculum and competency assessment will be developed in consultation with the AFP and specific selection criteria for these positions will also be developed in consultation with the AFP.[62]

Centrelink 'culture'

2.65 Some submissions and witnesses raised concerns about the 'culture' within Centrelink, and how this would impact on the selection of staff for authorised officer positions:

> The [Centrelink] culture that has developed as regards to the investigation and assessment of fraud has, in my view, been characterised as extremely adversarial. Many staff involved in such matters have taken the initial view that the customer involved is untrustworthy and guilty and have taken a subjective view of any evidence.
>
> … In my experience, many staff who have these attitudes are the ones who tend to apply for and be selected to perform work involving these duties. In my view, if search and seizure powers were to be used by staff with these characteristics the risk of negative consequences for innocent customers and the investigation itself would be high.[63]

---

59 *Committee Hansard*, 10 November 2006, p. 15.

60 *Committee Hansard*, 10 November 2006, p. 19.

61 *Submission 6*, p. 3.

62 *Submission 6B*, pp 2-3.

63 Mr Stephen Fuller, *Submission 1*, pp 1-2; see also Qld CCL, *Submission 8*, p. 3.

2.66 The NWRN referred to Centrelink's track record in exercising the powers it currently has, pointing to a number of systemic and operational shortcomings in the way it does business:

> [An] ANAO report found a disturbingly high level of inaccuracy in Centrelink's record keeping systems, which revealed a range of systemic and operational shortcomings. Up to 20 per cent of proof of identity information was insufficient or unreliable, up to 500,000 (3 per cent) clients had multiple Customer Reference Numbers, up to 7,000 people shared a tax file number, and in 42 cases, a person's date of birth and date of death were the same.
>
> Centrelink itself reported recently that 585 Centrelink staff had been sanctioned for privacy violations, 19 had been dismissed and a further 92 had resigned.[64]

2.67 The NWRN suggested that, until Centrelink could properly exercise its current powers, it should not be granted the powers set out in Schedule 2.[65] Mr Raper from the NWRN was critical of certain cultural elements within Centrelink:

> Despite the best intentions of Centrelink as an organisation, which is very committed to high standards of service delivery—I know that the management and a lot of people within Centrelink work very hard to ensure high standards—the people involved in the area of debt recovery, fraud and investigations generally … tend to hold negative attitudes. They tend to be incredibly prejudiced, judgemental and heavy-handed. These are not just my assumptions about their personality; it is based on the way they undertake interviews and the way they gain evidence. They set out with an assumption that the person is guilty and then try to find evidence to prove that is the case.

2.68 The Acting Commonwealth Ombudsman advised the committee that the Commonwealth Ombudsman receives a considerable number of complaints about Centrelink, although it noted that this is understandable given the broad nature of their business, the large numbers of transactions they conduct each year, and the types of clients. The Acting Commonwealth Ombudsman stated that '42 per cent of [its] some 17½ thousand complaints last year were about Centrelink'.[66]

2.69 In a response to a question on notice, the Commonwealth Ombudsman also advised that:

> A manual examination of data relating to Centrelink complaints indicates that the Commonwealth Ombudsman receives at least four to five complaints each week about the conduct of Centrelink officials. It is likely that this figure is an underestimate in that complaints made about other issues such as payment cancellation and suspension or debt raising and

64 *Submission 2*, p. 3.

65 *Submission 2*, p. 3.

66 *Committee Hansard*, 7 November 2006, p. 4.

> recovery can often also involve issues relating to the conduct of Centrelink officials.[67]

Use of the powers by Centrelink contractors

2.70 The Welfare Rights & Advocacy Service pointed out that it was possible for Centrelink's external contractors to be made 'authorised officers' under Schedule 2.[68] Mr Jones of the CPSU also highlighted this as a potential problem:

> A … point that we think is crucial in ensuring that there is some appropriate level of restraint on and control of the use of these powers is to ensure that the functions are performed directly by an officer of the Commonwealth. The bill in its current form would permit those functions effectively to be delegated to a person who was not an officer of the Commonwealth … We … believe that, for there to be effective control over the use of such a power, that ought to be performed by an officer of the Commonwealth. If it is not an officer of the Federal Police then it most certainly should be an officer performing functions and exercising their duties under the obligations of Public Service Act.[69]

2.71 In response to a question on notice, Centrelink acknowledged that contractors could be appointed as authorised officers under Schedule 2 if the Secretary is satisfied that the contractor has appropriate qualifications or experience. While it is not planned to use contractors, there may be some circumstances where specialist services are required, such as Computer Forensics.[70]

Powers more appropriately exercised by Australian Federal Police

2.72 A number of submissions and witnesses argued strongly that the AFP is the most appropriate agency to exercise powers of the kind proposed in Schedule 2 and that the AFP should continue to execute warrants on behalf of Centrelink.

2.73 For example, Mr Stephen Jones from the CPSU told the committee that, on balance, the CPSU considers that the AFP is the most obvious agency to administer and perform functions associated with these powers:

> … we have come to the conclusion there is a good case to be made for the functions that are typically performed by the policing and law enforcement agencies, such as those contained in this bill, to continue to be performed by those agencies. That case might include the fact, as pointed out by a number of the submissions, that these sorts of functions are actually core functions for the policing agencies, not incidental or ancillary functions as would be the case when they are attached to the agency of Centrelink.

---

67 *Submission 13A*, p. 1.

68 *Submission 7*, p. 3.

69 *Committee Hansard*, 10 November 2006, p. 9.

70 *Submission 6A*, p. 8.

> Being core functions means that within those organisations they have processes and procedures, a well-trained workforce and the capacity to deal with and manage in an appropriate way the powers that are available to them under the legislation.[71]

2.74 Representatives from the NWRM agreed. Ms Linda Forbes told the committee that:

> We believe the way the investigations are conducted now is the proper way. The search of home premises has to be accompanied by the Federal Police … Only the Federal Police have the proper training. If to do more of this the Federal Police need more resourcing, then resource the Federal Police. The only way Centrelink could be properly resourced would be to give them identical training to the Federal Police, which would mean in effect that they become Federal Police. The proper agency for all of this is the Federal Police.[72]

2.75 Representatives of the AFP also provided the committee with compelling evidence which questioned the granting of entry, search and seizure powers to Centrelink, without correspondingly rigorous accountability frameworks. The AFP also disputed claims by FaCSIA and Centrelink that they require the proposed powers because the AFP is currently unable to meet their demands in relation to the execution of warrants.

2.76 The committee understands that the AFP was not consulted in relation to the development of the Bill. As Federal Agent Quaedvlieg told the committee:

> … the AFP has had no formal discussions with the Department of Families, Community Services and Indigenous Affairs, nor with Centrelink, in relation to any implementation measures should this bill be passed by Parliament. The AFP did receive one informal telephone contact from Centrelink in early 2006 seeking the AFP's views on the proposal. At that time the AFP indicated that the responsible exercise of these powers needed to be underpinned by a rigorous and accountable framework which incorporated appropriate training, management oversight and record keeping. The AFP maintains that position today.[73]

---

71 *Committee Hansard*, 10 November 2006, p. 8. However, in making this point, Mr Jones accepted that other agencies could perform similar functions and perform them in a way that Parliament required them to, but if this were to occur 'it would be necessary to put in place significant legislative and administrative processes to ensure that the will of Parliament was adhered to'.

72 *Committee Hansard*, 10 November 2006, p. 24.

73 *Committee Hansard*, 10 November 2006, p. 14. Federal Agent Quaedvlieg also revealed that he had received a telephone call the evening before the public hearing for this inquiry from the Deputy Chief Executive Officer of Centrelink who was seeking the AFP's views on the proposals in Schedule 2: *Committee Hansard*, 10 November 2006, pp 19 & 21.

2.77 Federal Agent Quaedvlieg told the committee that the AFP acknowledges that other Commonwealth agencies have similar powers to those proposed in Schedule 2 for Centrelink, 'albeit of varying scope and extent'.[74] However, he noted that those agencies 'have the option of having those powers conferred either upon themselves or on other agencies that are better equipped and better resourced to undertake these types of activities, such as the AFP'.[75] The AFP currently undertakes the execution of search warrants on behalf of a range of Commonwealth agencies, including Centrelink.[76]

2.78 Federal Agent Quaedvlieg also suggested that there would still be resource implications for the AFP even if the powers contained in Schedule 2 are granted to Centrelink:

> I suspect … that there will be a commensurate increase in requests to the AFP to conduct risk assessments on behalf of these agencies by searching [the AFP's criminal intelligence] databases and providing … information [to assist].[77]

Oversight and accountability mechanisms

2.79 Many submissions and witnesses stressed the need for oversight of the entry, search and seizure powers.

2.80 For example, the Students' Representative Council of the University of Sydney (SRC) suggested that Centrelink should maintain a centralised record of its powers of search and seizure and report annually to Parliament on the effectiveness of the powers.[78] The Qld CCL recommended that individuals who had been granted search warrants should be required to report to the court, with information such as whether or not the warrant was executed, the results of the execution, or reasons the warrant was not executed.[79]

2.81 The Office of the Commonwealth Ombudsman suggested a program should be established to allow it to monitor the administration of the powers for the first three years the new powers were in operation.[80] At the hearing, the Acting Commonwealth Ombudsman expanded on this suggestion:

---

74 *Committee Hansard*, 10 November 2006, p. 14.

75 *Committee Hansard*, 10 November 2006, p. 14.

76 *Committee Hansard*, 10 November 2006, p. 14.

77 *Committee Hansard*, 10 November 2006, p. 19.

78 *Submission 4*, p. 3; see also Office of the Privacy Commissioner, *Submission 5*, p. 4; and NSW CCL, *Submission 9*, p. 3.

79 *Submission 8*, p.2.

80 *Submission 13*, p. 8.

> … 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 at 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. However, a review of how the legislation has worked in practice would be advisable before a full inspections regime is considered. There would of course be moderate funding implications for any approach which entailed a regular monitoring regime, particularly if a full inspections regime were instituted.[81]

2.82 Mr Jones from the CPSU submitted that appropriate accountability mechanisms do not appear to be in place for the proposed powers:

> … it will always be an ancillary function of Centrelink if the Parliament determines that these functions should be performed there, as opposed to being a core function of a policing agency, which has systems, processes and a history of dealing with those sorts of functions. That is not to say that it cannot be performed within Centrelink, but resourcing, administrative and oversight requirements that are not there at the moment would have to be put in place.[82]

2.83 Mr Jones argued further that 'there should be some mechanism for administrative and parliamentary oversight of the issuing and administration of the warrants' under Schedule 2.[83] The AFP also emphasised the importance of governance and accountability frameworks.[84]

2.84 FaCSIA informed the committee that it intends to establish a pre- and post-warrant reporting and quality assurance assessment program.[85] In terms of management oversight, it advised that Centrelink will not begin use of the powers until the CEO is satisfied that all relevant assurance frameworks are in place. To enable appropriate record-keeping, Centrelink proposes to enhance existing fraud management and access control systems within its integrated systems to record and monitor warrants.[86]

---

81 *Committee Hansard*, 10 November 2006, p. 3.

82 *Committee Hansard*, 10 November 2006, p. 11.

83 *Committee Hansard*, 10 November 2006, p. 9.

84 Federal Agent Quaedvlieg, *Committee Hansard*, 10 November 2006, p. 14.

85 *Submission 6*, p. 3.

86 *Submission 6B*, pp. 2-3.

Other matters

2.85 Both the OPC and the LSCSA noted that there was no provision in Schedule 2 for adequate safeguards in respect of third party personal information:

> In general, legislation granting agencies a power to seize materials should contain a requirement that incidentally collected third party personal information be destroyed by the agency as soon as practicable or when operational necessities permit.[87]

2.86 The OPC also noted that the Crimes Act requires that, once a certain period of time has expired and seized items are no longer required for the investigation, then the items must be returned. The OPC has recommended that a similar provision be included in the Bill.[88]

2.87 Federal Agent Quaedvlieg from the AFP observed that there were some significant differences between the powers under Schedule 2 and the powers that AFP officers have available to them.[89]

2.88 Centrelink informed the committee that procedures in relation to the handling of evidence will be developed in accordance with the standards set down by the Australian Government Investigations Standards (AGIS) package. In this regard, Centrelink also noted that:

> The AFP website states that AGIS has been developed for all Australian Government agencies to further enhance their investigative practices, and are the standards used by the AFP when undertaking quality assurance reviews as required by the Commonwealth Fraud Control Guidelines. AGIS includes the requirement that the security and continuity of exhibits must be maintained at all time. It is envisaged the AFP and/or Attorney-General's Department would be consulted during the development of these procedures.[90]

2.89 Centrelink also stated that, in accordance with AGIS, Centrelink procedures in relation to the handling of seized evidence 'would include provision for the return of evidence to the lawful owner if the reason for its seizure no longer existed or the evidence was not going to be used'. In all other circumstances, 'seized material would be returned to the owner at the conclusion of the court proceedings and appeal period'.[91]

---

87 OPC, *Submission 5*, p. 3; see also LSCSA, *Submission 3*, p. 2.

88 *Submission 5*, p. 3.

89 *Committee Hansard*, 10 November 2006, p. 21.

90 *Submission 6A*, p. 5.

91 *Submission 6A*, pp. 7-8.

Committee view

2.90 Overwhelmingly, the view among those who provided evidence to the committee was that Schedule 2 of the Bill raises serious concerns. Indeed, the committee notes that the majority of submissions and witnesses expressed opposition in absolute terms to Schedule 2 and its broader policy objectives. The committee welcomes advice from the Minister for Human Services that the Federal Government will be withdrawing Schedule 2 from the Bill in its entirety.[92]

2.91 The committee agrees that the proposed powers in Schedule 2 are unsupported by clear evidence, and disproportionate to the likely degree of intrusion which is likely to result from the exercise of the powers. Further, it is clear that many fundamental aspects of the supporting framework to the powers have not yet been fully considered. These include the issues of training and recertification of officers exercising the powers; the absence of governance, accountability and oversight mechanisms; procedures for handling evidence; and other operational guidelines.

2.92 The committee considers that powers of entry, search and seizure are most appropriately exercised by the AFP. In this vein, the committee expresses concern that the AFP was not consulted in relation to Schedule 2. The committee is of the view that the development of Schedule 2 would probably not have been necessary if better communication and coordination between FaCSIA/Centrelink and the AFP had taken place. At the very least, the committee is hopeful that its inquiry has encouraged and helped promote an improvement in this relationship.

2.93 The committee is, however, encouraged by advice from both Centrelink and the AFP that they are now in full consultation about maximising the AFP's involvement in the investigation of serious and complex social security fraud, and the execution of search warrants relating to serious fraud investigations undertaken by Centrelink. The committee encourages Centrelink and the AFP to collaborate further and amend its Service Level Agreement accordingly to comprehensively cover search warrants and the referral of matters for investigations, agreed service levels, and corresponding resource implications for both agencies.

2.94 With respect to the evidence provided to the committee by FaCSIA and Centrelink in the course of this inquiry, the committee considers that information relating to a number of key issues, including the presentation of clear and coherent explanations of the need for Schedule 2, and how the proposals will operate in practice, have only been made available by FaCSIA and Centrelink after persistent questioning by the committee.

2.95 Moreover, when such information has been provided, the committee has not been assisted in its understanding of the full history and impact of the proposed

92 Correspondence from the Hon. Joe Hockey MP, Minister for Human Services to the Chair, 20 November 2006.

measures by the brevity and, in many cases, contradictory nature of much of the information provided. The committee also expresses concern at the apparent inability of FaCSIA and Centrelink to provide accurate statistics and background information to support its arguments; along with the obvious discrepancies with respect to vital data received from FaCSIA and Centrelink, on the one hand, and the AFP, on the other.

2.96 The committee acknowledges the attendance of representatives from FaCSIA and Centrelink at the hearing, many of whom were not required to give evidence.

Recommendation 1

2.97 Subject to removal of Schedule 2, the committee recommends that the Senate pass the Bill.

Senator Marise Payne

Chair