

The Committee Secretary
Senate Legal & Constitutional Committee
Parliament House
Canberra ACT 2600

By Fax (02) 6277 5794

By Email: legcon.sen@aph.gov.au

Dear Sir/Madam,

Re: Inquiry into the Provisions of the Families, Community Services and Indigenous Affairs and Veterans' Affairs Legislation Amendment (2006 Budget Measures) Bill 2006.

This submission is made on behalf of the NSW Council of Civil Liberties in respect of the abovenamed legislation. We give permission for our submission to be published, and seek permission to publish it on our own website.

For the sake of simplicity, our comments are related to the sections of the Bill that would amend the A New Tax System Family Assistance Administration Act. They should be taken, mutatis mutandis, to apply also to the parallel sections applying to the Social Security Administration Act and the Student Assistance Act.

1. Home Invasion—Schedule two.

Offences under the A New Tax system (Family Assistance) (Administration) Act 1999, the Social Security Administration Act and the Student Assistance Act include breaches of confidentiality by departmental officers or police officers, misuse of protected information and failure to notify the Secretary of various specified events affecting a person's status or the status of a child care centre as well as outright fraud. Penalties range from ten penalty units to two years' imprisonment. Part 7.3 of the Criminal code, on the other hand, deals with offences whose penalties range from one year (obtaining financial advantage) up to 12 years' imprisonment (making an unwarranted demand with menaces).

Evidence relevant to these offences is most likely to be held in a place of work, a doctor's surgery, a childcare centre or in a person's home. The current bill envisages officers from Centrelink forcing their way into one of these places (new subsection 103J(1))—though not into a child care centre—and then if necessary standing guard over a piece of equipment for up to 24 hours (subsection 103Q(1)).

For many of the offences, it will be a place of residence that is the target.

Intrusion into a person's home is a very serious matter. A person's sense of safety and control over their lives is bound up, in our society at least, with the integrity and inviolability of the place where they live. The impact of officials forcing their way in and poking around into their bedrooms and bathrooms may in particular be traumatic on an old or frail person in full-time care at home; and of course children may be present. Since, *ex hypothesi*, investigation is carried out where there is no independent proof that the person suspected has in fact committed any fault, there will be cases where the person is innocent. If the entry is observed by others, the reputation of the person being investigated is tarnished.

The power to seek a warrant and then to invade homes, by force if necessary, is already held by the police, the Australian Tax Office, the Health Insurance Commission, the Child Support Agency and the Department of Immigration and Multicultural Affairs. In the CCL's opinion, the Parliament should be loath to give the power to yet more officials to intrude in this fashion. The CCL urges the Senate Committee to consider very carefully for which offences such an invasion might be justified by the kind of crime envisaged.

Entry into a doctor's surgery, in order to examine and copy records involves obvious, different, concerns about privacy, even though there are strict rules about the use of information obtained.

Entry to a place of work is less of a concern, but privacy considerations still apply.

If this Schedule is to stay in the Bill, it should be up to the magistrate to determine whether the crime that is believed to be being committed justifies the particular search. In the CCL's opinion, the bill should be amended to give more guidance to the judicial officer.

Recommendation 1. The magistrate should be required to take into account the nature of the premises that it is proposed should be entered and the possible effects on those inside including the impact upon their privacy, and to weigh that against the seriousness of the crime that is suspected. Proposed section 103C(1) in the Family Assistance Act and the parallel sections in the other Acts should be altered accordingly.¹

¹ Similar requirements on judicial officers have been inserted into the telecommunications (Interception and Access) Act 1979, for example in section 46, in relation to terrorist offences.

Recommendation 2. The magistrate should be required to take into account whether there are alternative, less intrusive means for obtaining the necessary information.

Cascading authorisation.

The CCL is concerned that under paragraph d or proposed subsection 103D(1) an authorised officer who has been granted a warrant may authorise another to conduct the search, and the latter may authorise assistants. The magistrate should properly inquire into the training that authorised officers have received before giving them powers to force entry.

Recommendation 3. That proposed section 103D(1) be amended to remove the power of an authorised officer to delegate responsibility for a search to others.

Harassment.

If the Bill becomes law, it will become possible for a person's house to be searched many times. Proposed new clause 103B(3) requires persons seeking a warrant to give information about any other warrants they themselves have sought for the same premises, but not information about warrants sought by others.

Recommendation 4. Proposed subsection 103B(3) should be amended to require the person seeking a warrant to provide information concerning occasions when other authorised officers have sought warrants for the same premises or in respect of investigations concerning suspected offences by the same person.

Register of warrants.

It is desirable that there be public knowledge of the frequency of searches under the acts. The Secretary should be obliged to keep a register with the relevant information, and to report to Parliament on an annual basis. Such a register would also assist the Ombudsman to investigate, should there be any formal complaints.

Recommendation 5. The Secretary should be required to keep a register of applications for search and seizure warrants, whether they were granted, whether they were executed, and whether evidence was found that proved that a crime had been committed. A report should be made to Parliament each year summarising the statistics of applications for warrants, the number granted, the number of convictions that resulted and the number of instances in which benefits were discontinued. The Ombudsman should have access to the register.

Rights of authorised officers.

The CCL is concerned that proposed subsection 103E(11) would reverse the onus of proof when an officer is charged with use of a fraudulent warrant.

Recommendation 6. Subsection 103E(11) should be amended so that the onus of proof remains with the prosecution. If an occupier resists the entry of an officer and is charged accordingly, the warrant should be required as part of the evidence. But if an officer is charged with obtaining entry with an unsigned warrant, the elements of the charge should have to be proven.

Schedule four.

The major risk with permitting the provision of information collected for one purpose, to be used for another, is that when it is divorced from its original context, the information may be misinterpreted. Such misinterpretations may range from mistaken identity (so that the wrong person loses their entitlements) to misunderstandings on the part of the provider of the information of the significance of the descriptions used. This is a standard concern about privacy.

The CCL therefore supports proposals that have been made that the recipient of a benefit should be given notice and an opportunity to respond before a benefit is cut off.

Recommendation 7. The acts should be amended to ensure that notice is given to the recipient of benefits that the benefit is about to be cut off.

We would be glad to elaborate our comments or to comment further on the Bill should the Committee so desire.

Yours faithfully,

Martin Bibby, Assistant Secretary
David Bernie Vice President
NSW Council for Civil Liberties