



Submission to Senate Legal and Constitutional Affairs Committee:

**INQUIRY INTO THE PROVISIONS OF THE FAMILIES,
COMMUNITY SERVICES AND INDIGENOUS AFFAIRS AND
VETERANS' AFFAIRS LEGISLATION AMENDMENT (2006
BUDGET MEASURES) BILL 2006**

1 November 2006

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RECOMMENDATION

In relation to the Provisions of the Families, Community Services and Indigenous Affairs and Veterans' Affairs Legislation Amendment (2006 Budget Measures) Bill 2006 ("the Bill"), Catholic Social Services Australia recommends that the Senate Legal and Constitutional Affairs Committee:

Recommendation 1

Removes Schedule 2 from the Bill.

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I Introduction

A About Catholic Social Services Australia

1. Representing 62 member organisations, Catholic Social Services Australia is the Catholic Church’s peak national body for social services. It advises the Australian Catholic Bishops Conference on social policy issues as well as supporting the delivery of a wide range of social service programs.

2. For 50 years, Catholic Social Services Australia has assisted and promoted better social policy for the most disadvantaged people in Australian society. This continues a much longer tradition of such engagement by the Catholic Church in Australia.

3. Catholic Social Services Australia has the mission of promoting a fairer, more inclusive society that gives preference to helping people most in need. It is committed to an Australian society that reflects and supports the dignity, equality and participation of all people. To this end, Catholic Social Services Australia works with Catholic organisations, governments, other churches and all people of goodwill to develop social welfare policies and other strategic responses that work towards the economic, social and spiritual well-being of the Australian community.

4. Our 62 members employ over 6,500 people and provide 500 different services to over a million people each year from sites in metropolitan, regional and rural Australia. In addition to family relationship services, the services provided by our members encompass aged care, community care, disability services, drug and alcohol addiction, employment and vocational programs (including Job Network, Disability Open Employment and Personal Support Program), housing, mental health, residential care and youth programs.

B Purpose and scope of this submission

5. The *purpose* of this submission is to comment on the inquiry by the Senate Legal and Constitutional Affairs Committee into the Provisions of the Families, Community Services and Indigenous Affairs and Veterans Affairs Legislation Amendment (2006 Budget Measures) Bill 2006 (“the Bill”). Our concerns relate to Schedule 2 of the Bill.

6. The *scope* of this submission is restricted to the Provisions of Schedule 2 of the Bill.

II Provisions of the Families, Community Services and Indigenous Affairs and Veterans Affairs Legislation Amendment (2006 Budget Measures) Bill 2006 – Key areas of concern

A Addressing social security fraud

7. Catholic Social Services Australia has always recognised the need to take appropriate measures to maintain the integrity of the social security system and protect it from fraud.

8. However, we have serious concerns about the provisions of Schedule 2 of the Bill. These measures would appear to be a disproportionate response to the current level of fraud in the social security system. This is a concern shared by several other organizations in the community sector.

9. According to figures from the Centrelink website, there were less than 3500 convictions for welfare fraud in 2004-05. During the same year, about 6.48 million people accessed Centrelink products and services according to the Centrelink Annual Report for 2004-05.

10. Additionally, an extensive range of participation requirements is currently imposed on social security recipients who are unemployed. For example, the Government has recently introduced a new Welfare to Work “contact” model, involving a fortnightly interview with a Centrelink officer. About 90% of job seekers are anticipated to attend such a fortnightly interview, where they will be reminded of their participation obligations, including correct reporting of any additional income received while on income support payments.

B Extreme powers deemed warranted by serious abuse should be restricted to serious offences

11. The use of the powers provided for in Schedule 2 of the Bill to investigate social security fraud is likely to lead to unreasonable invasions of privacy. Where comparable powers are used by other Commonwealth agencies, they are used in the majority of cases to search places of business for written documents.

12. However, a foreseeable use of such powers by Centrelink is the investigation of marriage-like relationships. Intrusive scrutiny of such personal matters raises important issues of privacy and dignity. Determining whether a marriage-like relationship exists depends on a number of subjective criteria, and involves more than simply determining whether the alleged partners live at the same premises. We would therefore be gravely disturbed to find the Bill's extreme search-and-seizure powers put to use to determine whether or not two individuals were co-habiting in a marriage-like way. The Bill provides no assurance that this would not happen (especially in cases where entry was obtained by consent).

13. The Explanatory Memorandum states that:

“while the information gathering **powers currently available** to Centrelink investigators **are sufficient to address routine non-compliance**, to effectively investigate and prosecute cases of more serious abuse, Centrelink needs access to enhanced powers.” (p. 11; emphasis added)

14. This statement makes it clear that suspected “routine non-compliance” is not expected to trigger search-and-seizure powers.

15. Unfortunately, the Explanatory Memorandum does not specify the respects in which current powers are regarded as deficient “in cases of more serious abuse”; and nor does it identify what is meant by either “routine non-compliance” or “more serious abuse” – much less provide any evidence of the known or estimated incidence of either category of offence.

16. Even more unfortunately, there is nothing in Schedule 2 of the Bill to restrict the application of search-and-seizure powers to cases of “more serious abuse”.

17. 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* presence¹) 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 1973.²

18. 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 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**”.

¹ Subsection 103A(1)(a), and see Attachment A to this submission at second paragraph. In this submission, unless otherwise stated all section references are to the Schedule 2 provisions amending the A New Tax System (Family Assistance)(Administration) Act 1999, but also apply in substance to the corresponding Schedule 2 provisions amending the Social Security (Administration) Act 1999 and the Student Assistance Act 1973.

² Subsection 3(1). That definition also encompasses “an offence against”_Part 7.3 of the Criminal Code insofar as fraudulent conduct addressed by that Part relates to a matter under the family assistance law, a matter under the social security law, or a student assistance benefit.

C Conduct of search and seizure operations by “authorised officers” not police

19. The power to enter and search private premises should remain with the police. Properly safeguarded search and seizure operations require an enormous amount of professional expertise and discretion, with appropriate training, experience and organisational infrastructure. The officers of the Australian Federal Police meet these criteria: they are appropriately trained and experienced, and their role in conducting such organisations is widely understood by the community and highly credible.

20. By contrast, Centrelink officers tasked to conduct search and seizure would be unfairly expected to act as if they had an entire dimension of expertise which they necessarily lack, while at the same time confronting a certain amount of public resentment arising from this novel police-like role. Nor would it assist matters if Centrelink employed ex-police personnel to serve as “authorised officers”: on the questionable assumption that raiding a home is deemed necessary, only police force members currently accountable as such can fairly be tasked with this role. This is especially apparent when it comes to the use of reasonable force: the authorisation of the use of force by inadequately trained/ experienced individuals will jeopardise the personal security and human dignity of the “authorised officer” as well as of the “occupier” of the searched premises.

21. The ability of Centrelink personnel to exercise the Schedule 2 powers fairly and impartially is questionable, and not only because of the expertise and credibility issues raised above. Recently, 585 Centrelink officers were sanctioned for privacy violations; 19 were dismissed and 92 resigned. Australian National Audit Office reports have found a very high level of inaccuracy in Centrelink’s record keeping. This context gives good reason for caution about authorising search and seizure by virtue of (1) a Centrelink officer’s “reasonable grounds for suspecting” the possible presence of “evidential material” combined with the consent given by a householder who may not be fully aware of his/her right to refuse entry; or even (2) a search warrant issued by a magistrate on the basis of “information” provided by a potentially over-zealous or under-scrupulous Centrelink employee.

22. While the overwhelming majority of Centrelink staff are of impeccable character and integrity, any large organisation will contain individuals who are deficient in these respects. This is why safeguards have been developed over the centuries to protect the rights of individuals against those wielding state power – and why we have such serious concerns about the powers provided for by Schedule 2 of the Bill.

D Absence of monitoring, reporting and oversight of use of powers

23. We are also troubled by the absence in the Bill of monitoring, reporting and oversight provisions. Such provisions are a necessary (though insufficient) safeguard against the abuse of powers such as those set out in Schedule 2.

E Other concerns

24. Attachment A contains some additional points on other concerns arising from Schedule 2:

- Seizure and search with consent but without warrant
- Application for warrant
- Occupier’s rights to watch search and receive copies of seized items

III Conclusion and recommendation

25. Catholic Social Services Australia has appreciated the opportunity to contribute to the Committee's Inquiry and thanks Committee members for their consideration of this submission and its recommendation.

26. We agree with Senate Scrutiny of Bills Committee's observation that:

There is a public interest in the effective administration of justice and government. However, there is also a public interest in preserving people's dignity and protecting them from arbitrary invasions of their property and privacy... [P]roper 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.³

27. We conclude that Schedule 2 of the Bill falls very far short of "the right balance".

Recommendation:

28. Catholic Social Services Australia recommends that the Senate Legal and Constitutional Affairs Committee recommend the removal from the Bill of Schedule 2.

³ Senate Standing Committee for the Scrutiny of Bills, Fourth Report of 2000, *Entry and Search Provisions in Commonwealth Legislation*, Canberra, 6 April 2000, p. 67 [cited in Dale Daniels & Jerome Davidson, *Bills Digest*, Families, Community Services and Indigenous Affairs and Veterans' Affairs Legislation Amendment (2006 Budget Measures) Bill 2006, Parliamentary Library, 12 October 2006, no. 35, 2006-07, p.3.

Additional concerns regarding Schedule 2 of the Bill

A Seizure and search with consent but without warrant

i. If made law, the Bill would permit seizure of evidential material found during searches which are undertaken with the occupier's consent and without a warrant (s. 103A(3)(b)). This is inconsistent with the principle that seizure should only be allowed under a warrant. That principle, among others, was set out by the Senate Scrutiny of Bills Committee in a 2000 report which the Attorney-General's Department has recommended should be taken into account by agencies preparing proposals for entry and search provisions.⁴ Schedule 2 of the Bill departs from this principle.

ii. This seizure provision is especially worrisome as this form of search requires only that "the authorised officer has reasonable grounds for suspecting that evidential material **may be** [not 'is'] on or in the premises" combined with the occupier's consent to entry (s.103A(1), emphasis added). So this form of search not only lacks the additional oversight associated with warrant issue, but may be triggered by a lower evidentiary threshold (since magistrates issuing warrants must be satisfied that there are reasonable grounds for suspecting that there **is, or there will be within the next 72 [48] hours**, evidential material on the premises" (s.103C(1)(b) [s.103E(4)(a)], emphasis added).

iii. In practice, in many situations an "occupier" may allow admission even where not wanting to, perhaps through not fully understanding their right to refuse and/or the fact that consent to entry entails consent to seizure.

iv. The provisions enabling warrantless search and seizure are rendered even more problematic by the unsatisfactory definition of "occupier of premises" as "the person apparently in charge of the premises" (s.3(1)). Would this encompass a child, for example, if no-one else was at home? What about the visiting cousin of one resident of a "share house"? How is the "authorised officer" to discern which of several adults present is "apparently in charge", especially if they differ in their response to the request for consent made by the "authorised officer"? A consenting individual may have a tenuous or hostile relationship with the person suspected of committing the offence or with the person whose belongings are at risk of being seized (who may not be the same person). We would query the moral validity of consent by such an individual to authorise the search of a third party's living space and the seizure of any of his or her belongings.

B Application for warrant

- v. A number of significant questions are left unanswered by the Bill:
- (a) How detailed must the evidence/information be which is provided to the magistrates?
 - (b) Just how specific must a warrant application be about the nature and form of "evidential material" suspected to be present?

⁴ See Senate Standing Committee for the Scrutiny of Bills, Fourth Report of 2000, *Entry and Search Provisions in Commonwealth Legislation*, Canberra, 6 April 2000 and Dale Daniels & Jerome Davidson, *Bills Digest*, Families, Community Services and Indigenous Affairs and Veterans' Affairs Legislation Amendment (2006 Budget Measures) Bill 2006, Parliamentary Library, 12 October 2006, no. 35, 2006-07, p.3-4.

- (c) What safeguards are there against action being based on nothing more reliable than a telephone “tip-off”, anonymous or otherwise?
- (d) How can we be sure that the Schedule 2 provisions will not be used (or abused) to authorise “fishing expeditions”?
- (e) An authorised officer applying for a warrant by telephone need not swear or affirm the information giving rise to the warrant application until the day after the execution of the warrant (s.103E(9)) – why is this the case?
- (f) Why must a magistrate from whom a warrant is sought be advised of previous search warrants for the same premises only if the same “authorised officer” is involved, rather than in every case where the same premises have previously been the subject of a warrant application? (s.103B)

C *Occupier’s rights to watch search and receive copies of seized items*

- vi. The occupier’s right to watch the search is negated by the explicit provision allowing more than two areas of the premises to be searched simultaneously (s.103L(4)).
- vii. Why will copies of seized things be provided to the “occupier” only upon request? (s.103U).