

Ground Floor, 1 Farrell Place ■ Canberra  
GPO Box 442 ■ Canberra ACT 2601  
Phone 1300 362 072 ■ Fax 02 6249 7829  
ombudsman@ombudsman.gov.au  
www.ombudsman.gov.au

Our ref:

November 2006

Secretary  
Senate Legal and Constitutional Affairs Legislation Committee  
Parliament House  
CANBERRA ACT 2600

Dear Secretary

I refer to the Committee's inquiry into the provisions of the Families, Community Services and Indigenous Affairs and Veterans' Affairs Legislation Amendment (2006 Budget Measures) Bill 2006.

Thank you for agreeing to a short extension of time for a submission to be lodged by the office of the Commonwealth Ombudsman. A copy of the submission is attached. An electronic copy has earlier been forwarded to you.

We understand that the Committee is proposing to conduct a hearing on 10 November 2006. Please contact Ms Chadwick if the Committee wishes to question staff of this office.

Yours sincerely

Prof John McMillan  
Commonwealth Ombudsman

**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**

**SUBMISSION BY  
COMMONWEALTH OMBUDSMAN  
NOVEMBER 2006**

## THE COMMONWEALTH OMBUDSMAN

The office of Commonwealth Ombudsman is established by the *Ombudsman Act 1976* and the Ombudsman acts under that Act and under the *Complaints (Australian Federal Police) Act 1981*<sup>1</sup>, to investigate administrative actions by almost all Commonwealth agencies and actions of the Australian Federal Police. The Commonwealth Ombudsman is also the Defence Force Ombudsman, the Taxation Ombudsman, the Immigration Ombudsman, the Postal Industry Ombudsman and, under ACT self-government legislation, the ACT Ombudsman<sup>2</sup>.

Under a range of other legislation, the Ombudsman has roles relating to scrutiny of intrusive or contentious actions taken by officials in areas such as law enforcement, national security and immigration detention:

- *Telecommunications (Interception and Access) Act 1979*, Parts 2-7 and 3-5
- *Surveillance Devices Act 2004*, Part 6
- *Crimes Act 1914*, Part 1AB
- *Criminal Code Act 1995*, Divisions 104 and 105
- *Migration Act 1958*, Part 8C.

Although each piece of legislation is different, the Ombudsman's role in these areas is to examine records and conduct inquiries to ensure that there has been proper compliance with the requirements imposed by Parliament. The Ombudsman reports to the Attorney-General or relevant Minister or the Parliamentary Presiding Officers on most matters of this kind.

As well as cases generated by complaints, the Ombudsman conducts investigations on an "own motion" basis into wider issues in public administration. The Ombudsman has extensive investigation powers, but prefers to investigate with less formality wherever possible.

The office comprises the Commonwealth Ombudsman, two Deputy Ombudsmen and about 150 staff, working from offices in Canberra and all capital cities. The Ombudsman publishes an annual report and releases some investigation reports publicly.

Within the Ombudsman's Canberra office is a specialist team that is responsible for matters relating to the operations of Centrelink and its client departments and the Child Support Agency. This team:

- monitors relevant areas of law and practice;
- liaises with relevant agencies;
- provides guidance and support for investigation officers in the Ombudsman's national network who deal with complaints on a day to day basis;
- investigates the more difficult, complex and protracted complaints, including systemic investigations conducted on an own motion basis.

---

<sup>1</sup> Soon to be repealed, see *Law Enforcement (AFP Professional Standards and Related Matters) Act 2006* that places the Ombudsman's Australian Federal Police role into the *Ombudsman Act 1976*.

<sup>2</sup> The amendment referred to in note 1 will also make the Ombudsman the Law Enforcement Ombudsman.

Another specialist team monitors the administration of the principal Commonwealth law enforcement agencies, including the Australian Federal Police and the Australian Crime Commission. This team also carries out inspections to check the compliance of law enforcement agencies with legislation permitting them to engage in otherwise illegal operations, including operations involving telecommunications interception and covert surveillance.

The Ombudsman typically receives between 17 to 20,000 complaints per year, and investigates about a third of them. The Ombudsman already receives complaints about the exercise of intrusive investigative powers by Commonwealth officials (just as occurs with police). Where a concern is better able to be addressed by the Court system, it is not investigated.

The agencies responsible administering the legislation being amended in the Bill are all agencies within the Ombudsman's jurisdiction. The Ombudsman already receives many complaints about Centrelink and the relevant departments – some 42% of complaints received in 2005-06 were about Centrelink alone. This is to be explained on the basis of the nature of Centrelink's functions and the size of the population with which it deals..

## THE BILL

This submission focuses on Schedule 2 of the Bill.

The Bill includes, at Schedule 2, provisions permitting Commonwealth officials to enter and search premises and to seize "evidential material" (things relevant to offences against the family assistance law, the social security law, student assistance legislation or Part 7.3 of the Criminal Code, dealing with fraud (insofar as it relates to one of those laws). It amends the *A New Tax System (Family Assistance) (Administration) Act 1999*, the *Social Security (Administration) Act 1999* and the *Student Assistance Act 1973*.

Under the amendments, an officer authorised by the Secretary may:

- enter premises with the consent of the occupier;
- apply to a magistrate personally or by telephone or electronic means for a warrant on the basis that the officer considers there are reasonable grounds to suspect there is evidential material on the premises,
- execute the warrant, with assistance and reasonable force as needed, to enter premises;
- search the premises for evidential material;
- take photographs or video recordings;
- use equipment to process things found in the search and take things away to determine if they can be seized;
- operate electronic equipment at the premises to obtain and copy data that might be evidential material; and
- obtain an order requiring a person to assist in accessing a computer and copying its data.

The Bill also contains administrative processes for notification, receipting for seized items and providing copies of them.

## DISCUSSION

The grant of intrusive powers to Commonwealth officials always warrants careful consideration. For this purpose, the non-technical term “intrusive powers” suggests powers that may permit something that would normally be impossible without consent and that interfere with individual rights to privacy, property and physical safety and the conduct of businesses. When the powers are excessive, or when they are misused, actions taken can damage public confidence in Commonwealth administration.

Where officials are given intrusive powers, they should be answerable for how they exercise them, just as they are answerable for poor decision-making or failures in providing services. The risks to individuals and business, and to public confidence, need to be weighed against the public interest in containing social security and similar fraud and the damage to public confidence caused by that kind of fraud. These risks also need to be considered against the powers and processes already available to support action against the incorrect payment of benefits.

The Ombudsman notes that the Parliament has already given entry and search and seizure powers to officials of other agencies. Indeed, the Explanatory Memorandum to the Bill mentions the Australian Taxation Office (the ATO), the Health Insurance Commission (Medicare Australia), the Child Support Agency and the Department of Immigration and Multicultural Affairs as having access to information gathering and search and seizure powers.

However, the Ombudsman has reservations as to whether any proposal to extend entry, search and seizure powers to Centrelink officials can be justified by reference to the fact that other agencies already have such powers. With one or two exceptions these powers have been given to agencies to serve a public interest beyond simply protecting the financial interests of the Commonwealth as would be the case with the powers proposed to be extended under Schedule 2 of the Bill. For example, these powers have enabled agencies to monitor compliance with statutory requirements in industries such as food production and transport, in monitoring compliance with safety standards, investigate corporate malfeasance, prevent the unlawful disposal of property in insolvencies, and in a number of particular areas such as enforcement of migration laws.

Of the agencies suggested as having comparable powers, only the Australian Customs Service and Medicare Australia have powers of the same scope. The context in which powers are exercised under the Migration Act is quite different, and the powers of the Child Support Agency are in fact significantly narrower in scope. The powers of the ATO are also narrower in some aspects. Thus

- section 263 of the *Income Tax Assessment Act 1936* gives ATO staff access to “buildings, places, documents and other papers” for the purpose of taxation legislation, provides that it is sufficient for the officer to show authorisation and requires the occupier to assist the officer. Although this is otherwise a very broad power there is no provision for ATO staff to seize documents. If a search warrant is needed, eg if documents need to be removed, the ATO relies on the AFP to obtain an appropriate warrant.

- Part XII, Division 12, Sub-Division C of the *Customs Act 1901* provides that search warrants may be obtained by the Australian Customs Service, along the lines of search warrants that may be obtained by law enforcement agencies. As well, sub-Division B relates to the pursuit, boarding and search of vessels, sub-Divisions E and F contain more detail about the processes to be followed and sub-Divisions J and JA contain provisions relating to monitoring powers exercisable with consent or under a warrant.
- The *Medicare Australia Act 1973* provides in Division 2 that if an authorised officer of Medicare has reasonable grounds for suspecting that there may be on any premises evidential material the authorised officer may obtain a warrant to enter the premises and search for and seize evidential material. Force may be used against a person but only by an officer assisting the authorised officer who is a constable. Evidential material not specified in the warrant but relevant to the offence specified in the warrant or evidential material relating to another relevant offence may be seized at the same time. A relevant offence includes the making of a false statement relating to a medical benefit by a person eligible to receive a medical benefit.
- The Child Support Agency (the CSA) has power under s 61 of the *Child Support (Registration and Collection) Act 1988* to enter an employer's premises and to access and copy documents relevant to the payer of child support. The premises may be domestic or commercial premises, depending on where the documents are located. There is no provision for a warrant to be obtained by CSA officers or for documents to be seized and removed. Otherwise the CSA may only require under s 61(1) of the *Child Support (Assessment) Act 1989* that information be provided, and that persons attend and answer questions and produce documents.
- Part 2, Division 13 of the *Migration Act 1958* (notably s 251) includes powers to enter, search and seize specific documents. Section 245FA (in Division 12A) permits searches of individuals on vessels and s 245K requires information about passengers and crew.

These powers exercisable by officials are additional to those that may be exercised by police. Police executing a warrant may sometimes be assisted by other officials, including those with specific expertise (see for example, s 125 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*). Of the examples given the power given to Medicare Australia is the most relevant and the most broadest. However, Medicare Australia's relevance is qualified by the fact that the main focus of the legislation is clearly the providers of medical services. Although subject to the broad powers of entry, search and seizure, the recipients of medical benefits appear to be a secondary target for compliance investigation.

In advancing the case for extending entry, search and seizure powers to Centrelink officials, the Explanatory Memorandum notes that the social security law already contains information gathering powers. The Explanatory Memorandum states:

Information gathering powers are limited to the authority to compel the provision of information from a person where the delegate believes that information will or may impact on the administration of the social security law (section 192 of the Social Security Administration Act) and the authority to compel the provision of information from a person about a class of people to facilitate the detection of cases where social security payments have been incorrectly paid and to verify the qualification of customers (section 195).

The section 192 and 195 provisions are exercised pursuant to section 196, which requires that a written notice give the receiver 14 days to respond. The section 195 power is limited in that only information as specified in the section is able to be collected and the requirements of section 192 remain....

In the normal course of events, search warrants in relation to Centrelink matters are executed by the Australian Federal Police under section 3E of the Crimes Act 1914 (that is, as judicial warrants).

However, the thrust of the Explanatory Memorandum is that these existing powers are only sufficient to enable Centrelink officials to address "routine non-compliance" and that enhanced powers are needed if Centrelink officials are going to be able to effectively investigate more serious abuse. That is to say, if Centrelink officials are going to be able to undertake serious abuse investigations themselves, rather than in conjunction with law enforcement authorities, as is the case now.

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 to make decisions and administer payments. Although some are supported by criminal law type sanctions, the financial consequence in others where an administrative step is taken (a denial of payment) is probably as much of a penalty as many fines that could be imposed. Whilst the section 192 and 195 powers are perhaps more appropriately directed to third parties, other coercive powers exist in the social security law that are specifically directed at those claiming or receiving social security payments. For example, section 63 of the *Social Security (Administration) Act 1999* provides that the Secretary may require a claimant or a recipient to give information to the Secretary within a time specified by the Secretary and provided that the requirement is reasonable then non-compliance will result in the social security payment not being payable to the person. The Secretary is not required to make his request in writing.

Further details about information gathering provisions already contained in the social security and related legislation are set out at Attachment A.

Based on experience in handling of complaints about these sorts of powers the Ombudsman draws attention to aspects of the Bill that warrant careful consideration:

- although those who commit fraud should be subject to investigation, the argument is less clear when it comes to the homes and workplaces that these people share with others, whether with those inside or outside the income support net. In terms of those inside the income support net, it is noteworthy that no amendments are proposed to be made to extend entry, search and seizure powers to the *Veterans' Entitlements Act 1986*;

- the proportion of the Australian population potentially subject to the Bill's processes (either as claimants or recipients or as people or entities who may have information relevant to a payment) is much higher than that in respect of comparable powers that are commonly exercised under other legislation. For example, the powers in the *Migration Act 1958* are available only in relation to unlawful non-citizens and the powers in the *Medicare Australia Act 1973* and the *Income Tax Assessment Act 1936* are commonly used only in relation to large scale inquiries with ordinary Medicare cardholders and taxpayers seldom affected. Many of the Centrelink customers likely to be affected will be people who are more vulnerable than the average member of the community;
- the powers will be exercisable by officials spread over a wide range of locations, each of whom may have limited experience and expertise (notwithstanding any training given). This can be contrasted with the use of police who are comprehensively trained and experienced in search and seizure techniques and, as a consequence, it would not be surprising if the exercise of these powers were affected by errors from time to time. Errors could lead to adverse effects on privacy and reputation and damage to persons and property and could frustrate prosecutions if evidence was considered to have been unfairly obtained;
- although there is opportunity for warrant applications to be scrutinised by the issuing magistrate (although the standard to be satisfied for an application is low), in the course of a criminal prosecution or in civil action arising from the exercise of the powers in the Bill, the fact remains that errors, especially those made after issue of the warrant, may go unremarked for a considerable time or not at all.

One suggestion for promoting accountability is that people whose premises are subject to the search, entry and seizure processes be told expressly at that time of their right to complain to the Ombudsman. Although the Ombudsman's office would not be able to deal with complaints about the magistrate's decision to issue the warrant, the office would be able to assess the basis on which it was sought and the conduct of the entry, search and seizure.

A second suggestion would involve regular monitoring by the Ombudsman. The nature of the entry, search and seizure powers, the population likely to be affected and the fact that it is to be exercised by officials other than police may suggest that it should receive more structured oversight. It may be a power that should be subject to regular monitoring by the Ombudsman in the same way as are the powers of law enforcement agencies to conduct intrusive activities under, for example, the *Telecommunications (Interception and Access) Act 1979* and the *Surveillance Devices Act 2004*. This would require records to be kept of the process for the issue of warrants and other procedures such as authorisations, which would be subject to inspection at regular intervals. It would be usual for a report on the inspections then to be submitted to the responsible Minister for tabling in the Parliament.

A regime of regular compliance monitoring by an independent body such as the Ombudsman has the effect of engendering public confidence and allaying public concern about the use of powers by government agencies. This is important where the powers are by their nature intrusive and particularly where they are used covertly or run the risk of being used oppressively. Such a regime also encourages the agency to focus in a continuing way on acting legally and accountably. Regular compliance monitoring becomes a source of ideas for improved administration, and the Ombudsman is also able to contribute to the training of officials through direct briefings and scrutiny of training manuals and guidelines.

The long term effect is to reduce the risk of illegal or otherwise unacceptable behaviour of officials and enhance transparency and accountability.



This compliance monitoring could be done by the Ombudsman undertaking an “own motion” investigation that would examine regularly the way in which the powers in the Bill have been exercised. A systemic review of this kind may help to provide some assurance to the Parliament and the public that these powers are being exercised properly and lawfully. In making this recommendation, the Ombudsman notes that his Office previously conducted an own motion investigation<sup>3</sup> into the use of entry and search powers by the Australian Taxation Office following concerns having been expressed by the Senate Standing Committee for the Scrutiny of Bills about the lack of oversight of those powers and recommending that the Ombudsman undertake a regular, random “sample audit” of the Australian Taxation Office’s powers to ensure they were exercised appropriately.<sup>4</sup>

The Ombudsman notes that his office would require additional funding in respect of these suggestions.

### **Recommendations**

The Ombudsman recommends:

- that people whose premises are subject to the entry, search, and seizure processes be told expressly at that time of their right to complain to the Ombudsman;
- that the Committee endorse the proposal that the Ombudsman establish a program of regular monitoring of the administration of the new powers during the first three years of their operation; and
- note that these recommendations would involve additional funding requirements for the Ombudsman’s office..

---

<sup>3</sup> Commonwealth Ombudsman, *“Use of access powers by the Australian Taxation Office”*, August 2004

<sup>4</sup> Senate Standing Committee for the Scrutiny of Bills, Fourth report of 2000, *“Entry and Search Provisions in Commonwealth Legislation”* 6 April 2000

# ATTACHMENT A

## *A New Tax System (Family Assistance) (Administration) Act 1999*

This Act includes provisions that (for example):

- require immunisation details to be provided (s 57E);
- require the provision of information to verify data (s 57F, s 59, s 5, s 9A, s59B, s 59C, s 59D, s 59E, s 59F, s 59G, s 60);
- enable the Secretary to require a person to provide information or documents (s 154, s 157-s 160) and to obtain information from (s 155) or about (s 156) a person who owes a debt to the Commonwealth;
- enable an authorised officer to enter child care premises to inspect records (s 219K) with a requirement for the occupier to assist (s219L); and
- require information to be given about child care (s 219M-s 219P).

## *Social Security (Administration) Act 1999*

This Act includes provisions that:

- allow the Secretary to require a person to attend or give information (s 63), with a failure to comply possibly leading to non-payment;
- allow the Secretary to require a person to complete a questionnaire, give information or undergo a medical examination (s 64) with failure to comply possibly leading to non-payment;
- permit the Secretary to issue a notice to any person requiring information or a document relevant to a claim or payment (s 192);
- permit the Secretary to require information from or about Commonwealth debtors (s 193 -s 194); and
- enable the Secretary to require a range of information from any person related to classes of case (s 195).

## *Student Assistance Act 1973*

This Act includes provisions that:

- allow the Secretary to obtain information relevant to a student assistance benefit from any person (s 343);
- allows the Secretary to obtain information from or about a Commonwealth debtor (s 344-s 345);

## Other laws

### *Data-Matching Program (Assistance and Tax) Act 1990*

Another mechanism by which information may be obtained from or about people who have claimed or received payments is through the operation of the *Data-Matching Program (Assistance and Tax) Act 1990*. This Act allows certain Government agencies (the Department of Families, Community Services and Indigenous Affairs, the Department of Employment and Workplace Relations, the Department of Veterans' Affairs, the Australian Taxation Office (the ATO), the Department of Immigration and Multicultural Affairs, the Department of Health and Ageing, and the Department of Education, Science and Training and Centrelink) to share certain types of information. The Act creates a framework within which information is lawfully exchanged between Commonwealth agencies for the purpose of ascertaining tax liability and benefit entitlements.

### Criminal investigation legislation

The Australian Federal Police (the AFP) can lawfully use a number of investigative techniques (including surveillance, searches and telecommunications interception) in investigating serious crime. It is reasonable to expect that the AFP would be involved, subject to its priorities, in any significant case relating to organised fraud.