CHAPTER 8

GOVERNMENT RESPONSE TO THE COMMITTEE'S INQUIRY INTO ENTRY AND SEARCH PROVISIONS IN COMMONWEALTH LEGISLATION

Introduction

8.1 During the 39th Parliament, the Committee undertook an inquiry into entry and search provisions in Commonwealth legislation. The Committee tabled its findings in its *Fourth Report of 2000* on 6 April 2000. The conduct of the inquiry and findings of the Committee are detailed in *The Work of the Committee during the 39th Parliament November 1998 – October 2001*.[1] At the time that that report was finalised the Government had not yet tabled its response to the Committee's *Fourth Report of 2000*, thus its inclusion in this report.

8.2 The Government tabled its response to the Committee's *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation* on 27 November 2003.[2] The Government response indicated that entry and search powers were considered to be a vital tool for ensuring the effective administration of government schemes and compliance with the law, but that it was 'equally important that such provisions be framed to ensure that private rights are protected and powers are exercised properly.'[3]

8.3 The response noted that policy on entry and search powers formed part of the Commonwealth's criminal law policy, which had been informed by the views of the Scrutiny of Bills Committee over many years. Guidelines setting out the policy had been developed in mid 1999 and were being reviewed at the time that the Government response was tabled.

8.4 The Committee made 16 recommendations in its report. Each recommendation, along with a summary of the Government's response, is provided below.

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1 Scrutiny of Bills Committee, *The Work of the Committee during the 39th Parliament. November 1998 – October 2001*, Commonwealth of Australia, June 2002, pp. 99-113.

2 *Journals of the Senate*, No. 119, 27 November 2003, p. 2757.

3 Government Response to the Senate Standing Committee for the Scrutiny of Bills *Fourth Report – Entry and Search Provisions in Commonwealth Legislation* (Government Response), August 2003, p. 2.

Recommendations 1 & 6

> The Committee recommends that all entry and search provisions in legislation including bills should have to conform with a set of fundamental principles rather than long-standing practice. These principles should be enshrined in stand-alone legislation based on the principles set out in this Report. This legislation should take as its starting point the search warrant provisions set out in the *Crimes Act 1914 (Cth)*.[4]
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> The Committee recommends that all existing entry and search provisions in legislation, including those contained in regulations, be reviewed and amended by 1 July 2001 to ensure that they conform with the principles set out in Chapter 1 of this Report.[5]

8.5 The Government did not accept these recommendations, arguing that most agencies' powers were formulated to operate as a cohesive and integrated whole, recognising varying enforcement contexts, and that the enactment of 'non-derogable, model standards in legislation would not take into account the diversity of situations that entry and search powers are used to address'.[6] The response provided a number of examples to demonstrate the need for flexibility to achieve the different objectives of regulatory and enforcement legislation.

Recommendation 2

> The Committee recommends that the entry and search powers available to the Australian Federal Police [AFP] under the *Crimes Act 1914 (Cth)* should constitute the 'high-water mark' for such powers generally. By law, the powers of entry and search available to any other agency, person or organisation may be less than these, but should only exceed the powers available to the Australian Federal Police in exceptional and critical circumstances.[7]

8.6 The Government agreed that the entry and search powers available to the AFP under the *Crimes Act 1914 (Cth)* should constitute the 'high water mark' for search powers generally, but noted that 'agencies operate under different conditions, and perform different functions, so there will be occasions when particular entry provisions need not conform with the standard approach in every respect.'[8] For example, the Government response argued that the AFP does not have monitoring warrant/audit powers:

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4 Scrutiny of Bills Committee, *Fourth Report of 2000,* p. 81.

5 ibid. p. 107.

6 Government Response, *op. cit.* p. 3.

7 Scrutiny of Bills Committee, *Fourth Report of 2000,* p. 81.

8 Government Response, *op. cit*. p. 5.

> Commonwealth criminal law policy provides that where search powers are sought, not for the investigation of specific offences but to monitor compliance with legislative requirements, a 'monitoring warrant' regime should be employed. The creation of criminal offences simply to 'draw in' the AFP and its search powers is generally deemed to be an inappropriate alternative to monitoring powers.
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> The *Crimes Act 1914* is inappropriate to operate as model legislation for agencies where there is a need to monitor/audit compliance with statutory obligations in circumstances where no offence will be suspected.
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> Monitoring warrant powers are more limited than search warrant powers in some respects (for example, they do not permit seizure), but broader than search warrant powers in other respects (for example, the issue of a warrant does not depend on evidence that an offence has been committed). These distinctions are consistent with the differing objectives of monitoring/audit powers and search warrants. [9]

Recommendation 3

> The Committee recommends that each agency, person or organisation which exercises powers of entry and search under legislation should maintain a centralised record of all occasions on which those powers are exercised, and should report annually to the Parliament on the exercise of those powers.[10]

8.7 While agreeing that appropriate records should be kept of the exercise of entry and search powers, the Government did not accept the need for centralised records or annual reports to the Parliament, asserting that they would not add to the current regime. The Government argued that, if there was a question about the validity of a warrant or its execution, then 'the courts can examine that question when it arises and hold that the warrant was not valid and/or its execution was improper.'[11]

Recommendation 4

> The Committee recommends that the principles set out in Chapter 1 of this Report should apply to both government and non-government agencies, persons and bodies which seek to enter and search premises by virtue of statutory authorisation.[12]

8.8 As outlined in paragraph 8.5, the Government did not agree that each of the principles identified by the Committee should apply to all entry and search powers, however, they did agree that private persons or bodies should be subject to the same policy strictures on search powers that apply to Government bodies. The Government

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9 ibid.

10 Scrutiny of Bills Committee, *Fourth Report of 2000*, p. 82.

11 Government Response, *op. cit.* p. 6.

12 Scrutiny of Bills Committee, *Fourth Report of 2000*, p. 87.

response emphasised that entry powers should generally only be conferred on Government employees, who are subject to a wide range of accountability mechanisms. It recognised, however, that there may be instances where it is necessary to empower non-government employees with entry and search powers and outlined the types of measures that could be put in place to ensure appropriate and adequate accountability where this occurs. The Government response concluded that 'while the Government agrees in principle that non-government agencies should be subject to scrutiny measures that apply to Government bodies, it does not agree to enshrining this principle in legislation'. [13]

Recommendation 5

> The Committee recommends that the right of entry provisions in the *Workplace Relations Act 1996* should conform with the principles set out in Chapter 1 of this Report.[14]

8.9 The Government did not accept this recommendation, noting that the *Workplace Relations Act 1996* confers powers of entry on four categories of persons: officers and employees of trade unions to whom a permit has been issued; inspectors appointed by the Minister; Authorised Officers appointed by the Employment Advocate; and the Industrial Registrar. The Government response advised that the 'Government considers that the same principles should not apply to entry of premises by both trade union officials and government officials'[15] and went on to detail some of the safeguards governing entry to premises by union officials.

8.10 In respect of entry powers conferred on non-union officials under the *Workplace Relations Act 1996*, the Government indicated that it did not consider that entry to premises only by consent or warrant was appropriate:

> The majority of entries by inspectors and Authorised Officers are to follow up on confidential unofficial complaints or formal claims, to make inquiries, provide information and deal with claims and complaints, generally through voluntary compliance. If a warrant requirement were to be introduced, it is anticipated that this would significantly impair the ability of inspectors and Authorised Officers to efficiently investigate and resolve claims. Resources would have to be diverted from investigation and compliance work to the task of obtaining warrants. The requirement to obtain warrants would delay the resolution of investigations, increase costs and reduce the number of entries by Authorised Officers and inspectors.[16]

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13 Government Response, *op. cit.* p. 8.

14 Scrutiny of Bills Committee, *Fourth Report of 2000,* p. 90.

15 Government Response, *op. cit.* pp. 8-9.

16 ibid. p. 9.

Recommendation 7

> As a priority, the Committee recommends that all entry and search powers that go beyond the entry powers in the Crimes Act, including the powers exercisable by the Australian Taxation Office, the Department of Immigration and Multicultural Affairs, the Australian Transaction Reports and Analysis Centre, the Australian Security Intelligence Organisation and the Minister for Defence under the Defence (Areas Control) Regulations, should be reviewed and amended so that they are consistent with the principles set out in Chapter 1 of this Report.[17]

8.11 The Government reiterated its concern about the application of the principles identified by the Committee and the achievement of consistency across Commonwealth legislation 'at the expense of the effectiveness of existing regimes, which have in many instances been formulated based on functional and operational necessities of different agencies.'[18] However, the Government advised the Committee that the merits of undertaking a review at an agency level had been recognised by some agencies. For example, the Department of Immigration and Multicultural and Indigenous Affairs undertook to conduct a review of its existing search and entry provisions and the Government agreed that the power of the Minister administering the *Defence (Areas Control) Regulations 1989*, to authorise a person to enter on to land or premises to ascertain whether the regulations were being complied with, should be reviewed.[19]

Recommendation 8

> The Committee recommends that the Commonwealth Ombudsman undertake a regular, random "sample audit" of the exercise by the ATO [Australian Tax Office] of its entry and search powers to ensure that those powers have been exercised appropriately.[20]

8.12 The Government accepted this recommendation in principle, noting that the Ombudsman is an independent statutory office-holder and can initiate an examination of the way in which the Australian Taxation Office, or any other agency within its jurisdiction, exercises their powers of entry and search. The response noted, however, that the Government is not able to direct the Commonwealth Ombudsman to undertake particular investigations.[21]

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17 Scrutiny of Bills Committee, *Fourth Report of 2000*, p. 107.

18 Government Response, *op. cit.* p.10.

19 ibid. pp. 10-12.

20 Scrutiny of Bills Committee, *Fourth Report of 2000*, p. 108.

21 Government Response, *op. cit.* p. 12.

Recommendation 9

> The Committee recommends that the procedure that is applicable in Victoria and in some other jurisdictions be followed where, after execution, a warrant is returned to the court which issued it.[22]

8.13 The Government did not accept this recommendation. While agreeing that warrants should be 'properly and fairly exercised' the Government did not consider that returning the warrant to the court which issued it would add to the current regime whereby an issuing officer is required to retain a copy of the application for a warrant and a copy of the warrant itself. The Government response also argued that:

> …it is uncertain whether the return of a search warrant to the issuing officer or court would provide any additional protection or safeguards in relation to its execution. If an issue arises in relation to the execution of a warrant and the seizure of evidence, it is likely to arise in the context of a prosecution as part of the defence case. In that context the lawfulness of actions taken are reviewed in order to determine the admissibility of evidence. The court would determine whether the warrant had been lawfully executed and the evidence obtained is indeed admissible.[23]

Recommendation 10

> The Committee recommends that, unless there are exceptional circumstances involving clear physical danger, all occupiers of premises which are to be entered and searched should be given a written document setting out in plain words their rights and responsibilities in relation to the search. Occupiers should be informed that the proposed entry and search is either for the purpose of monitoring compliance with a statute, or for the purpose of enforcement or gaining evidence and possible prosecution, but not for both purposes.[24]

8.14 The Government accepted this recommendation in principle, noting that the 'policy on such matters has been changed to require that an occupier be informed in writing or, if that is impractical, informed orally, of his or her rights and responsibilities in relation to the search.'[25] The Government did not, however, see any reason to distinguish between a search warrant, monitoring warrant and search authorised by consent.

8.15 The Government response also indicated that, in cases where entry and search was part of an established ongoing program of inspections to ensure compliance with legislation, such as occupational health and safety or transport safety, the Government considered that requirements to provide occupiers with written advice on their rights

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22 Scrutiny of Bills Committee, *Fourth Report of 2000,* p. 113.

23 Government Response, *op. cit.* p. 13.

24 Scrutiny of Bills Committee, *Fourth Report of 2000,* p. 128.

25 Government Response, *op. cit.* p. 13.

and responsibilities were excessive. The response emphasised that these programs involve thousands of routine inspections annually and that 'persons in the industry understand the purpose of the visits is to conduct regulatory inspection rather than criminal investigations.'[26]

Recommendation 11

> Where search and entry powers are used by an investigative authority, the Committee recommends that:
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> - those who are being investigated should have an ongoing right to be informed of the current status of those investigations; and
> - where an investigation has been concluded with no charges laid, those who have been investigated should have the right to be informed of this fact immediately; the right to have all seized material returned to them; and the right to compensation for any property damage and damage to reputation.[27]

8.16 The Government accepted this recommendation in part, agreeing that:

- individuals should be informed as soon as practicable when proceedings are unlikely to be brought against them on the basis of existing evidence; and
- those who have been investigated should have all seized material returned to them (excluding unlawful items such as narcotics).

8.17 The Government did not, however, support the Committee's recommendation that those under investigation have an ongoing right to be informed about the current status of the investigation, citing the High Court in the case of *NCSC v News Corporation Ltd:*

> It is the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible without the suspect looking over his shoulder all the time to see how the inquiry is going. For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry… [28]

8.18 The response also cited a similar case in the United Kingdom where the court stated that it would be 'contrary to the public interest to supply information which might enable a suspected fraudster to interfere with witnesses or destroy documents before the investigation was completed'.[29]

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26 ibid. p. 14.

27 Scrutiny of Bills Committee, *Fourth Report of 2000*, p. 128.

28 *NCSC v News Corporation Ltd* (1984) 156 CLR 296 at 323, cited in Government response, *op. cit*. p. 15.

29 *R v Serious Fraud Office: ex parte Nadir* (Company Law Digest Vol 12, No. 4, 1991) cited in ibid.

8.19 Similarly, the Government did not support the Committee's recommendation that, where an investigation has been concluded with no charges laid, those who have been investigated should have the right to compensation for any property damage and damage to reputation, arguing that:

- such a right may hinder the effective exercise of entry and search powers and the conduct of investigations, as investigators are likely to feel constrained in their activities; and
- a failure to prosecute should not imply that the exercise of entry and search was inappropriate.

8.20 The Government indicated that it believed that the issue of a right to compensation for any property damage and damage to reputation was a civil matter that would be best dealt with under the principles governing tortious liability.[30]

Recommendation 12

> The Committee recommends that all agencies which exercise powers of entry and search should introduce best practice training procedures and other internal controls to ensure that the exercise of those powers is as fair as possible, and should set out the appropriate procedures and scope for the exercise of these powers in enforcement and compliance manuals.[31]

8.21 The Government accepted that Commonwealth agencies that exercise entry and search powers should have appropriate best practice training procedures and internal controls in place. The Government advised the Committee that the Commonwealth Director of Public Prosecutions' *Search Warrants Manual* is available to interested agencies.[32]

Recommendation 13

> The Committee further recommends that, where practical, all executions of warrants are video-taped or tape-recorded, and that where the person is a suspect, a verbal caution is given and tape recorded.[33]

8.22 The Government accepted this recommendation in part, advising the Committee that, while it is common practice for the execution of search warrants to be video-taped or audio-taped, and for still photographs to be taken for evidential purposes, the Government did not consider it appropriate to impose this obligation on all agencies and in all circumstances. The Government response noted that, under

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30 ibid pp. 15-16.

31 Scrutiny of Bills Committee, *Fourth Report of 2000*, p. 128.

32 Government Response, *op. cit.* p. 16.

33 Scrutiny of Bills Committee, *Fourth Report of 2000*, p. 128.

section 23F of the *Crimes Act 1914*, a verbal caution is required to be given to a person suspected of committing a Commonwealth offence.[34]

Recommendation 14

> The Committee recommends that the Attorney-General implement a system enabling courts to hear challenges to warrants in camera, or in a way which does not lead to prejudicial publicity for the person challenging the warrant.[35]

8.23 The Government did not accept this recommendation, noting that Australian courts have the power to make orders to protect parties from publicity if they consider it appropriate and asserting that there was 'no demonstrated need to change existing law.'[36]

Recommendation 15

> The Committee recommends that the Attorney-General and the Minister for Justice and Customs examine the amendments to the *Crimes Act 1914* proposed by the AFP, and the amendments to the *Customs Act 1901* proposed by the Australian Customs Service, and introduce legislation to implement those amendments. [37]

8.24 The Government accepted this recommendation, advising that amendments to the *Customs Act 1901*, giving effect to the Committee's recommendation, were included in the *Customs Legislation Amendment (Criminal Sanctions & Other Measures) Act 2000* and that similar amendments would be considered when the *Crimes Act 1914* was next amended.[38]

Recommendation 16

> While aware that covert searches might make law enforcement easier, the risks are such that the Committee is opposed to recommending such searches.[39]

8.25 The Government noted the Committee's position in respect to covert searches and advised that this issue remained under consideration.[40]

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Chair

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34 Government Response, *op. cit.* p. 16.

35 Scrutiny of Bills Committee, *Fourth Report of 2000*, p. 128.

36 Government Response, *op. cit.* p. 17.

37 Scrutiny of Bills Committee, *Fourth Report of 2000*, p. 140.

38 Government Response, *op. cit.* p. 17.

39 Scrutiny of Bills Committee, *Fourth Report of 2000*, p. 140.

40 Government Response, *op. cit.* p. 17.