Government Response

to the

Senate Standing Committee for the Scrutiny of Bills

Fourth Report -

Entry and Search Provisions in Commonwealth Legislation

August 2003

Executive summary of government response to the Fourth Report of 2000

1. The Government welcomes the Fourth Report of 2000 by the Senate Standing Committee for the Scrutiny of Bills ('the Scrutiny Committee'), entitled 'Entry and Search Provisions in Commonwealth Legislation' ('the Entry Powers Report'). Entry and search powers are a vital tool for ensuring the effective administration of government schemes, and compliance with the law. It is equally important that such provisions be framed to ensure that private rights are protected and that powers are exercised properly.

2. The Government's policy on entry and search powers forms part of the Commonwealth's 'criminal law policy'. Guidelines setting out the policy as at mid-1999 formed part of the Attorney-General's Department's submission to the Scrutiny Committee. The guidelines are currently being revised.

3. The diversity of modern regulatory schemes and law enforcement needs is such that search and entry powers take many different forms, and rely on different procedures for their efficacy. The Scrutiny Committee's views have figured prominently in the development and evaluation of Commonwealth criminal law policy over many years.

4. The Government supports the majority of the principles, and a number of the recommendations articulated in the Scrutiny Committee's Entry Powers Report. However, some of the principles are not considered to be appropriate to implement in specific circumstances. In addition, some of the recommendations are not compatible with the complexity and range of regulatory and enforcement responsibilities of Commonwealth agencies. There is a need to maintain flexibility in this area.

5. The Government agrees with the Committee's view that search and entry powers need to be justified and closely monitored. Commonwealth criminal law policy applies a strict and principled rationale to the framing of coercive powers.

6. The Committee made sixteen *recommendations*. This response addresses each, referring to particular agencies only when the Committee elected to single those agencies out for comment.

Substantive responses to each Recommendation of the Fourth Report

1. 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).

Government response to Recommendation 1: Not accepted

Most agencies' powers have been formulated to operate as a cohesive and integrated whole, which recognises varying enforcement contexts. The advantages of having consistency across Commonwealth legislation should not be achieved at the expense of the effectiveness of existing legal regimes.

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. Nor would it cater for frequently changing enforcement circumstances. Flexibility is necessary to achieve the different objectives of regulatory and enforcement legislation. The following examples illustrate this point.

Example 1: Under some Commonwealth legislation, for example the *Auditor-General Act 1997* and the *Occupational Health and Safety (Commonwealth Employment) Act 1991*, powers of entry and inspection are generally confined to Commonwealth premises. The Government does not consider that the principles identified by the Scrutiny Committee should apply to entry and search provisions exercisable only on the premises of Commonwealth agencies. The Commonwealth should not face undue limitations on the terms on which its own premises may be accessed for the purposes of ensuring occupational health and safety compliance, for instance. Entry to the premises of one Commonwealth agency by another Commonwealth agency should generally be governed by administrative arrangements.

Example 2: Some search powers are exercised in a commercial or regulatory environment which differs markedly from an overtly criminal environment. This is known and understood by the agency involved and those whom it regulates. The routine involvement of police in such circumstances could cause unnecessary alarm, embarrassment and distress, as well as consuming scarce police resources. Police would, of course, be involved where officers judge that their involvement is justified by the particular circumstances of the case. Using police officers where a search is likely to involve examination of large numbers of documents or computer files would consume scarce police resources. Police involvement would assist neither the person whose premises were being searched nor the person conducting the search.

Example 3: In some cases, entry and search powers are based on internationally agreed laws, practice and procedures, for instance, the maritime port state control functions for investigating seaworthiness of vessels. Foreign-flagged vessels are subject to port state control inspections in Australian ports, consistent with international treaties, to ascertain their compliance with internationally agreed standards of safety, environment protection and crew conditions. The procedures for conducting port state control functions are based on conventions, resolutions and guidelines promulgated by the International Maritime Organisation and the International Labour Organisation, which do not envisage a requirement

for warrants or a role for judicial officers. Consistent with this, maritime inspectors appointed by the Australian Maritime Safety Authority are authorised by section 190AA of the *Navigation Act 1912* to go aboard a vessel at any reasonable time to conduct their inspections, without requiring a warrant or the specific consent of the ship's master or owner. Such provisions are consistent with the exception provisions of the Commonwealth's criminal law policy regarding search and entry of conveyances, as obtaining a warrant prior to entry to a vessel is impractical given the inherent mobility of a ship. The Government notes that the requirement for a warrant, particularly one issued by a judicial officer, in such circumstances may in fact frustrate maritime law operations, because of geographic and temporal problems.

Example 4: Entry and Search powers are not always exercised to determine criminal or civil liability. For example, the investigation activities of the Australian Transport Safety Bureau (ATSB) are not conducted for the purpose of apportioning blame (see section 19CA of the *Air Navigation Act 1920* which applies to investigations that commenced before 1 July 2003, and section 7 of the *Transport Safety Investigation Act 2003* which applies to investigations that commenced after 1 July 2003). Instead, ATSB investigations seek to obtain information about circumstances which led to an accident or incident and identify appropriate safety action to prevent future occurrences. Many of the principles provided are not appropriate in this context. For example, evidence relevant to the ATSB investigations is often perishable and needs to be preserved immediately. For this reason, it is impossible or impracticable in many situations to obtain consent or a search warrant, or to secure evidence pending an application for a warrant.

Example 5: The Scrutiny Committee has recommended that a warrant be struck down as invalid where it goes beyond the requirements of the occasion in the authority to search (see page 54). The current line of judicial authority is that courts will not automatically strike down a search warrant that is wider than it should have been. The court will usually consider whether the offending part of the warrant can be severed from the rest, and uphold a seizure if the items that were seized could have been seized under the warrant had it been drafted more narrowly. The Government considers that judicial discretion in this regard is reasonable, and more consistent with the public interest, than an approach that would strike down a warrant automatically in any case where the officer who issued it made an error about what could be authorised under the relevant statute.

2. The Committee recommends that the entry and search powers available to the Australian Federal Police 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.

Government response to Recommendation 2: Accepted with qualifications

The Government agrees 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 search powers generally. This is reflected in the policy currently adopted by the Government on such matters, which provides that the search warrant provisions applicable to police "define the outer limits of the powers and the minimum limitations and obligations that should normally apply to search warrant powers conferred in other contexts".

However, as the Committee recognises at paragraph 3.8, 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. The Committee accepts, for example, that non-compliance with Part 1AA of the *Crimes Act 1914* may be reasonable to deal with exceptional conditions such as instances of national security or a serious danger to public health (see paragraph 1.44 of the Entry Powers Report). While the Government will continue to regard Part 1AA of the *Crimes Act 1914* as a model for the strongest coercive powers available for search warrants, that Act does not limit the scope of other, related powers that agencies seek.

For instance, the AFP does not have monitoring warrant/audit powers. 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.

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.

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.

The *Gene Technology Act 2000*, *Imported Food Control Act 1992*, *ACIS Administration Act 1999*, *Aged Care Act 1997*, *Therapeutic Goods Act 1989* and *Civil Aviation Act 1988* contain examples of monitoring warrant powers.

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.

Government response to Recommendation 3: Not accepted

The Government agrees that appropriate records should be kept of the exercise of search and entry powers.

As noted already, Part 1AA of the *Crimes Act 1914* sets the benchmark for the provision of search warrant powers in Commonwealth legislation. Accordingly, warrants granted under Commonwealth search warrant regimes generally require an issuing officer to record certain information about the nature and purpose of a search warrant. The warrant must show on its face information such as the magistrate being satisfied that there are reasonable grounds to suspect, in the premises named in the warrant, that there are the things named in the warrant which would afford evidence of the Commonwealth offence identified in the warrant. The warrant must also list the powers the executing officer may exercise, the duration of the warrant, and the types of things that may be searched for or seized. Similar limitations and

obligations apply to warrants obtained over the telephone or by other electronic means. However, in such instances both the issuing officer and applying officer are to complete similar warrants, with the applying officer to return their copy to the issuing officer within one day of the expiry or execution of the warrant. The issuing officer is to attach that copy of the warrant to the copy he or she had already completed. An additional level of accountability is applied by the requirement that if the issue of the authorisation of the warrant is questioned during court proceedings and the issuing officer's signed copy is not produced in evidence, then the court is to assume that the exercise of the power was not duly authorised.

Furthermore, copies of these details are provided to relevant persons, such as the occupier of the premises being searched, who is to be provided with the details of the warrant and a receipt for anything seized during the execution of the warrant.

Monitoring warrant regimes apply to industries which often involve risks to the community (for example, environmental and public safety) and practical enforcement difficulties. In such industries it is reasonable to require operators who accept the commercial benefit of such activities to be monitored under a monitoring warrant regime. It is not practical to centrally record every monitoring activity, though any use of such material in proceedings necessitates the keeping of good records if officers are to avoid court challenges.

There may also be instances where it is not practical to obtain a warrant. For example, where the inherent mobility of a conveyance makes it impractical. In such instances adequate protections are imposed. Only authorised inspectors carrying identity cards are to be empowered to exercise search and entry powers. Also, certain protections are offered to occupiers. Entry is permissible only where the occupier is notified of an intention to enter and search and only where the occupier has consented to the entry and search. The occupier is to be informed of the right to withdraw their consent at any time and cannot be held liable for not complying with the directions of an inspector. If non-compliance is to give rise to liability the legislation should expressly state that existing non-disclosure rights and obligations are overridden. Additionally, seizure of items is only permitted under a warrant, which in itself links into recording procedures that apply to the execution of warrants.

The Government does not propose to require centralised records or annual reports to Parliament. The Government does not accept that this practice adds to the current regime. If there is a question as to the validity of a warrant or its subsequent execution the courts can examine that question when it arises and hold that the warrant was not valid and/or its execution was improper.

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.

Government response to Recommendation 4: Accepted in principle

Although the Government is of the view (expressed in the response to Recommendation 1) that each principle identified in Chapter 1 should not be automatically applied to all search and entry powers, the Government agrees that private persons or bodies should be subject to the same policy strictures on search powers that apply to government bodies.

Entry powers should generally only be conferred on government employees. Public officials are subject to a wide range of accountability mechanisms under the *Ombudsman Act 1976*, the *Administrative Decisions (Judicial Review) Act 1977*, disciplinary procedures, the *Privacy Act 1988* and the *Freedom of Information Act 1982*. In general, such accountability mechanisms do not apply to persons outside government. This is to be contrasted with powers conferred in the industrial relations context (see response to Recommendation 5) and monitoring powers, such as are exercised, for example, by contractors to the Commonwealth (appointed as statutory office holders) under the *Airports Act 1996*.

However, there may be rare instances where it is necessary to empower non-government persons to exercise entry and search powers. For example, some specialist investigations may require the input of experts from time to time, such as crash experts or computer experts, to identify certain materials as relevant to an investigation. In such cases it may not be viable for a Government agency to retain such experts on a full time basis. Another example is where there is a need for a person to enter and search inherently mobile conveyances where it would not be possible due to time constraints to have in attendance an authorised government employee (for example, inspection of a ship). However, the Government considers that the empowerment of non-government officials to exercise search and entry powers should be strictly limited to cases of necessity. Necessity would be assessed by the Attorney-General's Department on a case by case basis when it is consulted about requests for a grant of search and entry powers in accordance with Government policy (ie see the Department of the Prime Minister and Cabinet's Legislation Handbook, paragraph 6.26(d)).

Where a need to empower non-Government employees or agencies to exercise search and entry powers is identified there are a range of measures that may be applied to ensure appropriate and adequate accountability is maintained. Appointment procedures may be set down in legislation to ensure that only appropriate and accountable persons are appointed to head the agency or exercise those powers. The ability to apply for search warrants may then be limited to the head of the agency, who may then be able to delegate those powers to relevant experts or other persons when the need arises. The agency head would then be ultimately accountable for the conduct of delegates. Additional accountability may be achieved by ensuring that the experts who are delegated those powers are also appointed under a specific legislative selection criteria. This selection criteria would vary based on the circumstances, but would, where possible, follow the requirements applied generally to authorised officers who may be empowered to exercise those powers (for example, the need for certain maturity and skills). Furthermore, the exercise of those powers may be further legislatively restricted by limiting the exercise of search and entry powers by such non-government employees to instances where, for example, their expertise would be required (for example, a specialist investigator would only be able to enter and search certain sites in certain instances).

As noted before, Part 1AA of the *Crimes Act 1914* sets the benchmark for Commonwealth search warrant regimes. Non-government employees in this context would also be required to comply with the basic requirements adopted from Part 1AA that are imposed in general on Government employees. For example, authorised non-government employees would be subject to the same general regime for obtaining search warrants as Government employees (for example, the provision of certain information on oath establishing legitimate grounds to enter and search premises), as well as practical accountability measures such as being required to adequately identify themselves to the occupants of premises being searched and the need to provide the occupier of the premises with notice of the intention to enter and search their premises. Furthermore, the relevant legislation implementing such a search

warrant regime for non-government employees would also apply the same rules to judicial officers granting search warrants that apply in other grants of search warrants to Government employees (for example, the need to be satisfied that there are sufficient grounds set out in the information to establish the need for a warrant).

However, as noted in the Government's response to Recommendation 1, certain principles that are formulated for general application may be inappropriate to apply in every context. For this reason, 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.

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.

Government response to Recommendation 5: Not accepted

The principles set out in Chapter 1 of the Report are not appropriate for general application to the various entry powers conferred by the *Workplace Relations Act 1996* ('WR Act').

The WR Act confers powers of entry on four categories of person: (i) officers and employees of registered trade unions to whom a permit has been issued; (ii) inspectors appointed by the Minister; (iii) Authorised Officers appointed by the Employment Advocate; and (iv) the Industrial Registrar (or person acting on his or her behalf) pursuant to an authorisation issued by the Federal Court. The powers are exercisable for the purpose of ascertaining compliance with the provisions of the WR Act. In the case of inspectors and Authorised Officers, the matters investigated are not offences and attract only civil monetary penalties.

The Government considers that the same principles should not apply to entry of premises by both trade union officials and government officials.

The right of entry conferred on officials or employees of trade unions by the WR Act is limited in a number of ways. Before a trade union official or employee can seek to enter into a workplace, he or she must hold a right of entry permit. Such permits are issued by the Registrar, and can be revoked on application by an employer, organisation of employers, or an inspector, if the Registrar is satisfied the permit-holder intentionally hindered or obstructed any employer or employee or otherwise acted in an improper manner. The Australian Industrial Relations Commission can also revoke a permit as part of the settlement of an industrial dispute about right of entry.

Entry to investigate a suspected breach of the WR Act, or an award, order or certified agreement is only available where persons who are members of the permit-holder's organisation are employed. A permit-holder may also enter premises for the purposes of holding discussions with employees who are members, or eligible to become members, of the organisation concerned.

In either case, permit-holders do not have the right to use force to effect an entry, nor do they have the right to search premises or seize documents or other material. The power to enter may only be exercised during working hours and with 24 hours notice. The right of entry permit must be shown on request. (It is appropriate to note that State workplace relations

legislation may also contain right of entry provisions, with the rights and obligations under that legislation varying according to the jurisdiction.)

As regards the other entry powers conferred under the WR Act, the Government does not consider that entry of premises only by consent or warrant is appropriate. The Government notes that the right of entry provisions under the WR Act do not permit entry by force or provide a power to search.

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.

6. 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.

Government response to Recommendation 6: Not accepted

This recommendation is linked to Recommendation 1, with which the Government does not agree. The reasons set out in the response to Recommendation 1 apply with equal force to the Committee's proposal that all existing entry and search powers be reviewed for conformity with the principles set out in Chapter 1 of the Fourth Report.

7. As a priority, the Committee recommends that all entry and search powers that go beyond the entry powers in the *Crimes Act 1914*, 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.

Government response to Recommendation 7: Accepted in part

Implementing this recommendation could impose a significant additional burden on State magistrates. If magistrates were given the responsibility to issue search warrants under each of the Acts identified by the Scrutiny Committee in Chapter 3, this would have direct resource implications for the State court system, and indirect resource implications for the Commonwealth.

Issuing warrants is an administrative function which judges may consent (but cannot be obliged) to perform on an individual basis. Several years ago, judges of the Federal Court who had consented to issue certain listening device and telephone interception warrants advised the Attorney-General of their intention to withdraw their consent, because they had formed the view that this was not a function that judges should perform. The relevant Acts

subsequently had to be amended to allow authorised members of the Administrative Appeals Tribunal to issue those warrants.

As noted already, the Government is concerned about the application of the principles set out in Chapter 1 and achieving 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. However, the merits of undertaking a review at an agency level have been recognised by some agencies.

Australian Taxation Office

The Australian Taxation Office (ATO) is responsible for administering a range of revenue laws, including self-assessment taxation systems. In recognition of the associated costs, self-assessment systems do not require taxpayers to provide full records to the ATO each year. When returns are lodged, a statement is signed attesting that the information contained in the return is accurate and that records are available for the ATO to confirm this.

The Government does not agree that a warrant must be obtained before access can be gained to premises for the purpose of verifying claims made by taxpayers in their returns. It should be accorded full and free access, and reasonable facilities for this purpose.

The access powers of the ATO are a long-established feature of taxation administration and enforcement in Australia. Even prior to the introduction of the goods and services tax (GST), there were approximately 280,000 access visits yearly. This volume of monitoring activity could not be conducted under a warrant based system without a very large increase in resources or a substantial reduction in monitoring. This in turn would lead to losses in revenue. It is not proposed to amend these provisions.

Department of Immigration and Multicultural and Indigenous Affairs

The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) acknowledges that it is appropriate to review its existing search and entry provisions, and has undertaken to do so. However, as indicated in the response to Recommendation 1, the Government is of the view that it is not appropriate to amend entry and search provisions to accord with each principle outlined in Chapter 1 of the Report. The Government does not support the principle that the power to issue warrants to enter and search premises should only be conferred on judicial officers. The delay that is often involved in contacting and consulting with a judicial officer in order to obtain a search warrant is unacceptable in situations where DIMIA officers require a warrant as a matter of urgency to assist in apprehending an illegal migrant believed to be at a particular residence.

Australian Transaction Reports and Analysis Centre

The Government will give further consideration to the Committee's recommendation that the entry powers available to the Australian Transaction Reports and Analysis Centre (AUSTRAC) be amended to require consent or a warrant issued by a judicial officer.

The Government notes the Committee's comment that many compliance audits by AUSTRAC currently take place by consent and, therefore, a requirement to obtain a warrant in the absence of consent would be unlikely to affect AUSTRAC's work. AUSTRAC's search powers are exercised in a commercial and regulatory environment which is different to

that of a criminal investigation environment. AUSTRAC is not a law enforcement agency, nor does it perform investigative functions. AUSTRAC generally employs a cooperative, non-adversarial approach to monitoring and auditing compliance and assisting cash dealers with their reporting requirements. AUSTRAC conducts inspections, not to investigate specific offences, but to monitor compliance with legislative requirements. AUSTRAC audits are limited to those who have an obligation under the *Financial Transaction Reports Act 1988* to report certain financial transactions or who must undertake specified account signatory identification processes and retain information relating to those processes.

AUSTRAC audits can also form part of a mutually educative process. The cash dealers learn more about compliance and gaps in their own risk management strategies, whilst AUSTRAC learns more about compliance issues for the cash dealers, new systems and processes and existing internal risk management strategies.

However, the Government anticipates that, should a warrant requirement be introduced, a number of cash dealers would require AUSTRAC to always obtain a warrant in order to conduct an inspection. In view of the large number of audits conducted each year, a warrant requirement would cause delays and increase costs for AUSTRAC and may undermine the effectiveness of the audit program.

Australian Security Intelligence Organisation

There are fundamental differences between activities undertaken by the Australian Security Intelligence Organisation (ASIO) in accordance with its security functions and activities undertaken in the performance of law enforcement and revenue functions. ASIO's function is to gather security intelligence, rather than to investigate a crime, or ensure compliance with legislation. ASIO may not be concerned with investigating a specific action, but with gathering information for assessment against a wide range of relevant information from other sources before its significance is apparent. A second important difference is that, unlike most law enforcement activities, ASIO search warrants are frequently exercised covertly, which renders unworkable many of the principles articulated in Chapter 1.

Subsection 25(2) of the *Australian Security Intelligence Organisation Act 1979* requires the Attorney-General to be satisfied that the issue of the warrant will substantially assist ASIO collect intelligence in respect of a security matter. It has been the view of successive governments, and parliaments, that responsibility for deciding matters relating to security should, as a general rule, rest with the Executive rather than a judicial officer. The accountability regime for ASIO warrants is independent and rigorous. The Director-General is required to report to the Attorney-General on the utility of every warrant. In addition, the Inspector-General of Intelligence and Security has an oversight role which looks at every aspect of ASIO's warrant processes, and on which the Inspector-General reports annually to the Prime Minister, the Attorney-General and to the Parliament.

Department of Defence

The Government agrees that the power of the Minister administering the *Defence (Areas Control) Regulations 1989* to authorise a person to enter onto any land or premises to ascertain whether the regulations are being complied with, or for related purposes, should be reviewed. Such a review, including the ability for the Minister to authorise that person to undertake various specified actions, has been undertaken. Regulations 14 and 15 of the *Defence (Area Control) Regulations 1989* are to be amended to permit a local magistrate to

issue a warrant to permit entry on to land or premises. This amendment is seen as offering an appropriate safeguard to the community that would be fair and consistent with entry powers under the *Crimes Act 1914*.

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

Government response to Recommendation 8: Accepted in principle

The Ombudsman is an independent statutory office-holder and the Government is unable to direct him to undertake particular investigations. The Ombudsman possesses the power to investigate the ways in which the ATO and other agencies within its jurisdiction exercise their search and entry powers, either following a complaint or on his or her own initiative. It is open to the Ombudsman to consider whether to investigate the ATO's use of such powers in the context of the Office's existing workload and resources and any particular issues that come to his attention.

The Committee noted in paragraph 4.23 of the Report that there were only nine tax complaints relating to the Commissioner's access powers made to the Commonwealth Ombudsman during 1988-99. As the Ombudsman noted in their submission to the Committee, an analysis of these complaints "does not disclose any discernable pattern of systemic defective administration."

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.

Government response to Recommendation 9: Not accepted

The Government agrees that warrants should be properly and fairly exercised. The Government does not accept that returning a warrant to the issuing authority would add to the current regime. Currently an issuing officer is required to retain a copy of the application for, and a copy of, the warrant. Furthermore, the crucial matters to which the warrant relates are to be recorded in the warrant. These include details such as the duration of the warrant (ie generally several days from the time of issue), the premises or persons to which the warrant relates, kinds of evidential material that are to be searched for and the powers authorised by the warrant. Any use of a warrant contrary to the terms set out in the warrant is susceptible to judicial challenge and may be held to amount to an unauthorised exercise of power.

Acceptance of this model would also burden issuing officers with original warrants that they do not seek, in circumstances where the warrant has often already been produced to a judicial officer in another state or territory. The magistrate or the trial judge in the state or territory where the charges are being heard is centrally concerned with the probative value and legality of the means used to collect the evidence. The administrative procedures developed over years of practice by Commonwealth agencies, which satisfy both the principles included in their legislation and the rules of court in each jurisdiction, are sufficient to guard against injustice. The procedures are guided by the Commonwealth Director of Public Prosecutions

(Commonwealth DPP) which provides advice and assistance, through its DPP Search Warrants Manual.

Providing the issuing officer with the warrant also provides security risks as there is the risk of compromising an investigation by leaving operationally sensitive material with an issuing officer who may not be able to provide proper protection. The Commonwealth DPP is currently reviewing the practice that applies with respect to search warrants, with a view to bringing them into line with the practice that applies to telecommunications interception and listening device warrants. The practice in this context is that the material is uplifted when the warrant is issued and is held by the AFP for the Commonwealth DPP with an undertaking to return it to the issuing officer if the issuing officer requires it.

Finally, 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.

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.

Government response to Recommendation 10: Accepted in principle

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. There is no reason to distinguish in the context of this proposal between a search warrant, monitoring warrant and search authorised by consent. The statement of rights and responsibilities that are suitable for communicating to an occupier in plain language should be drawn from the legislation itself, rather than from common law principles or those set out in Chapter 1 of the Entry Report. In addition, situations of emergency, serious danger to public health or where national security is involved (as stated by the Scrutiny Committee at paragraph 1.44), will justify exceptions to this policy being made.

A further issue arises when the occupier does not speak English. DIMIA is considering the circumstances in which it is possible to establish the translation requirements of a person prior to the execution of a warrant and obtain an interpreter to explain the provisions of the search warrant. Given the delay involved in having an interpreter available to explain the search and the consequent opportunity for the subject to evade detection, DIMIA is considering the merits of a system whereby officers executing a search warrant carry documents detailing the relevant rights and responsibilities in a variety of different languages.

Where a warrant in relation to either a person or premises is being executed, section 3H of the *Crimes Act 1914* requires that the executing officer or a constable assisting must make

available to the person a copy of the warrant. The executing officer must also identify himself or herself to the person at the premises, or the person being searched, as the case may be.

It is a standard feature of Commonwealth search warrants that they authorise entry to premises *either* for the purpose of monitoring statutory compliance *or* for the purpose of collecting evidence of a criminal breach.

Search warrants may also be authorised for other purposes, such as to gather evidence for non-criminal investigative purposes. The ATSB require search warrants when it is necessary for the purpose of collecting information on a transport accident, incident or unsafe situation. As noted already, these investigations are not conducted to apportion blame, but to obtain information about circumstances which led to an accident or incident and identify appropriate safety action to prevent future occurrences. These activities are conducted in a cooperative environment which renders the need for a search warrant unnecessary in many cases. Police assistance in executing a search warrant is neither appropriate or necessary in most ATSB investigations as this may be counterproductive to the flow of information.

In cases where entry and search is part of an established ongoing program of inspections to ensure compliance with legislation such as occupational health and safety or transport safety, requirements to provide occupiers with written guidelines on their rights and responsibilities is excessive, particularly where these are conducted in accordance with internationally agreed standards and procedures. These programs involve many thousands of routine inspections of premises annually, with no further action being taken in the majority of cases. Persons in the industry understand the purpose of the visits is to conduct regulatory inspection rather than criminal investigations.

11. Where search and entry powers are used by an investigative authority, the Committee recommends that:

- 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.

Government response to Recommendation 11: Accepted in part

The Government does not support the proposal that where a search warrant is executed as part of an ongoing investigation, the person investigated should be kept informed of the progress of the investigation.

In *NCSC v News Corporation Ltd* (1984) 156 CLR 296 the then National Companies and Securities Commission (NCSC) declined certain requests of companies suspected of offences relating to acquisition of shares, which would have given them a greater role in a hearing conducted to investigate the suspected offences. The NCSC declined the respondents' requests for greater information and various forms of involvement in the hearing, on the basis that procedural fairness did not require it to afford the respondents the right to be legally

represented throughout; nor to cross-examine, present evidence or make submissions. In upholding the NCSC's argument, the High Court stated:

> 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... (*NCSC v News Corporation Ltd* (1984) 156 CLR 296 at 323)

The comments are similar to those made in the United Kingdom case of *R v Serious Fraud Office: ex parte Nadir* (Company Law Digest Vol. 12 No.4 1991), where the court stated that it would in fact 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."

While any investigation can be reopened on the discovery of new evidence or similar conduct on another occasion, the Government accepts that individuals should be informed, as soon as practicable, when proceedings are not likely to be instituted on the basis of existing evidence. The advice to individuals will need to be appropriately qualified and tailored to the circumstances of the particular case, including dealing with whether civil proceedings remain an option.

In appropriate contexts, status reports are already provided, particularly in the audit context. For example, as a general rule, the ATO currently informs taxpayers of the progress of audits.

The Government supports the proposal that those who have been investigated should have all seized material returned to them, subject to well established limitations on this principle relating to the non-return of unlawful items such as narcotics and the forfeiture of proceeds of crime. The principle that seized material should be returned is already recognised in the case of police investigations by section 3ZV of the *Crimes Act 1914*, which provides that subject to any court order, if a constable seizes a thing by exercising a search and entry power granted under the Crimes Act, he or she must return it if the reason for its seizure has lapsed or it is not to be used in evidence; or otherwise within 60 days, if seized without warrant in an emergency. Commonwealth criminal law policy also provides that there should be an upper limit of 60 days on the retention of seized items, subject to extension in appropriate cases. A longer period may be specified only if there is a clear justification, as was the case in the *Customs Legislation Amendment (Criminal Sanctions and Related Measures) Act 2000*.

The Government does not support a statutory right to compensation, noting that inappropriate actions by law enforcement officers are dealt with by existing disciplinary or criminal sanctions.

The issue of a right to compensation for any property damage and damage to reputation is a civil matter best dealt with under the general principles governing tortious liability. While there is a limited statutory right to compensation for damage to electronic equipment (section 3M of the *Crimes Act 1914*), any other claims for compensation should be addressed in the established civil jurisdiction of tort law.

The Government has a number of reasons for this view.

An entrenched statutory right of compensation is likely to hinder the effective exercise of entry and search powers and the conduct of investigations. Investigators are likely to feel constrained in their activities. This in turn is likely to affect the normal operations of agencies in effectively conducting investigations and administering their affairs.

There may be many reasons for not commencing criminal proceedings (the suggested 'trigger' for a right to compensation) after the execution of an entry and search warrant. Authorities may rely on alternative enforcement measures, such as civil proceedings or administrative sanctions. Consideration of the Commonwealth prosecution policy may lead to a decision not to prosecute (for example, if there is insufficient evidence to justify prosecuting). A failure to prosecute should not imply that the exercise of search and entry powers was inappropriate giving rise to a right to compensation.

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.

Government response to Recommendation 12: Accepted in principle

The Government accepts that appropriate best practice training procedures and internal controls should be in place in Commonwealth agencies that exercise search and entry powers. The Commonwealth DPP Search Warrants Manual is available free of charge to interested Commonwealth agencies.

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.

Government response to Recommendation 13: Accepted in part

It is a fairly common practice for executions of search warrants to be video-taped or audio-taped, and still photographs are routinely taken by some agencies for evidential purposes. However, it is inappropriate to impose this obligation on all agencies in all circumstances.

A verbal caution is required to be given under existing law to persons suspected of committing a Commonwealth offence (section 23F of the *Crimes Act 1914*), which largely covers the Scrutiny Committee's recommendation on warrants executed to investigate offences. There is currently no requirement for tape recording the warning and the Government does not consider that this should be required. An investigating official is obliged under subsection 23F(1) of the *Crimes Act 1914* to caution a person who is merely in their company on suspicion of having committed an offence (before starting to question them):

> that he or she does not have to say or do anything, but that anything the person does say or do may be used in evidence.

Given that a monitoring warrant is typically used in circumstances where the official does not have any grounds to suspect that the person being searched has committed an offence, the existing legal protections appear to largely satisfy the Scrutiny Committee's recommendation regarding verbal cautions.

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.

Government response to Recommendation 14: Not accepted

All Australian courts have the power to make orders to protect parties from publicity if there is a need to do so. Those orders can include directions that evidence be heard in camera or that the names of the parties be suppressed. There is no demonstrated need to change existing law, and it would be anomalous to make specific provision in respect of only one class of matter.

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.

Government response to Recommendation 15: Accepted

Amendments to the *Customs Act 1901* giving effect to the Committee's recommendation commenced on 26 May 2000. The amendments were included in the *Customs Legislation Amendment (Criminal Sanctions & Other Measures) Act 2000* (Act No 23 of 2000).

The amendments:

- extended the retention period for evidential material from 60 to 120 days (section 203S and section 205E); and
- inserted a provision dealing with the disposal of abandoned goods (section 218A).

Similar amendments will be considered when the *Crimes Act 1914* provisions are next amended. There are likely to be amendments to the procedures in relation to investigative powers during 2003 as part of the implementation of the Leaders Summit on Terrorism and Multi-jurisdictional Crime initiatives.

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

Government response to Recommendation 16: Noted

This issue remains under consideration.