

CHAPTER 2

GOVERNMENT RESPONSES

Introduction

2.1 The Government tabled its response to the Committee's original report¹ on 27 November 2003.² In it the Government noted that 'the Scrutiny Committee's views have figured prominently in the development and evaluation of Commonwealth criminal law policy over many years'. The Government also advised the Committee that it was in the process of revising its guidelines on entry and search powers. The Committee notes that those guidelines are now contained in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide)³ which was issued by the Minister for Justice and Customs in February 2004.

Government response to the original report

2.2 In its response, the Government expressed support for the majority of the principles contained in the original report. Generally, the Government does not consider that some of the principles are appropriate to implement in specific circumstances. In particular, the examples in the response distinguish between warrants issued in relation to criminal proceedings and those issued for monitoring compliance with legislation.⁴

The need for general principles

2.3 In its 2000 report the Committee observed that, at common law, every unauthorised entry on to premises is a trespass. The Committee observed that the modern authority to enter and search premises is essentially a creation of statute and should always be regarded as an exceptional power: to be granted by Parliament judiciously, after due deliberation, and to be exercised by executive agencies with restraint and appropriate supervision.

2.4 The Committee considered that while there is a public interest in the effective administration of justice and government, there is also a public interest in preserving people's dignity and protecting them from arbitrary invasions of their property and privacy, and disruption to the functioning of their businesses. Neither of these interests can be insisted on to the exclusion of the other, and proper and fair laws which

1 Scrutiny of Bills Committee, *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation*.

2 A copy of the Government response is provided at Appendix III to this report.

3 Available at <http://www.ag.gov.au/www/agd/agd.nsf/page/Publications>

4 Government response, p. 2.

authorise the entry and search of premises can only be made where the right balance is struck between these interests.

2.5 The Committee concluded that while powers of search and entry may be necessary for the effective administration of the law they remain inherently intrusive. One basic form of protection is to ensure that all such powers are drafted according to a set of principles rather than to long-standing practice.⁵ These principles should govern the:

- grant of powers of entry and search by Parliament;
- authorisation of entry and search;
- choice of people on whom the power is to be conferred;
- extent of the power granted;
- kinds of matters which might attract the grant of the power;
- manner in which the power to enter and search is exercised;
- provision of information to occupiers;
- protection of people carrying out entry and search;
- issue of warrants by judicial officers; and
- accountability for the exercise of search and entry powers.

Recommendations 1, 2, and 3

2.6 The Committee recommended that a set of fundamental principles should: apply to existing entry and search provisions and to new provisions; have statutory force and that this legislation should take as its starting point the search warrant provisions set out in the *Crimes Act 1914 (Cth)* (Recommendation 1). The Committee further recommended that the search and entry powers available to the AFP under the Crimes Act should constitute the 'high-water mark' for such powers generally and that powers of entry and search available to any other agency, person or organisation should only exceed this 'high water mark' in exceptional and critical circumstances (Recommendation 2). Finally, the Committee recommended that each agency should maintain a centralised record of all occasions on which powers of entry and search are exercised and report annually to the Parliament (Recommendation 3).

Government response

2.7 The Government does not accept Recommendation 1. The Government expressed concern that non-derogable, model standards in legislation might unduly

5 Scrutiny of Bills Committee, *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation*, pp. 49–54. Appendix II to this report contains a list of those principles.

limit the flexibility necessary to address the variety of situations in which entry and search powers are exercised.

2.8 The Government accepts Recommendation 2 in principle. The response states that the Government agrees that the entry and search powers available to the AFP should constitute the 'high-water mark' for such powers generally but that the powers in the *Crimes Act 1914* are considered inappropriate as a model for agencies where there is a need to monitor/audit compliance with legislation where no offence will be suspected.⁶

2.9 The Committee notes that the Government's position on this matter is further set out in the Guide at Part 9.9:

Principle: The search warrant provisions of Part 1AA of the Crimes Act, which are applicable to police, define the outer limits of the powers and the minimum limitations and obligations that should apply to search warrant powers.

Discussion: Part 1AA reflects the benchmark that parliament has accepted for powers necessary for the investigation of Commonwealth offences by police, including the most serious Commonwealth offences.

2.10 The subsequent paragraphs of the Guide outline relevant safeguards and limitations built into Part 1AA.⁷ The Guide also refers to the Committee's view that broader powers should be enacted 'only in exceptional, specific and defined circumstances where Parliament is notified of the exercise of those powers and where those exercising those powers are subject to proper scrutiny'.

2.11 The Guide goes on to note additional considerations the Committee considers appropriate in relation to issuing a search warrant and in legislation conferring a power of seizure. The Guide notes that 'a number of these views are more restrictive than the Commonwealth Government's long-standing approaches' and that 'a Department will need to be prepared to assist its Minister to respond to any concerns raised by the Committee'.

2.12 The Government does not accept Recommendation 3. While the Government agrees that appropriate records should be kept by relevant agencies, the Government does not propose to require centralised records or annual reports to Parliament as it does not accept that this would add to the current regime. The Government response provides details of the accountability mechanisms that apply generally to the execution of warrants under the benchmark provisions of Part 1AA of the *Crimes Act 1914* and where warrants are obtained over the telephone or by other electronic means. The Government also considers that in certain contexts, such as under a monitoring warrant regime, it would not be practical to centrally record every monitoring activity.

6 Government response, pp. 4-5.

7 The Guide, pp. 75-6.

2.13 The Committee recognises the need for flexibility both in legislative provisions and in administrative practises supporting and surrounding entry and search powers. However, the Committee considers that this need for flexibility must be balanced by appropriate safeguards. The Committee did not propose non-derogable legislation, nor did it envisage that every detail of every regulatory or enforcement regime would be catered for in such overarching legislation. The Committee's proposal to give statutory force to the principles was intended to protect rights and ensure accountability in the exercise of intrusive powers by ensuring that certain things follow from a decision to seek to grant or authorise the use of particular search and entry powers. The Committee considers that the choice as to which components are relevant in which circumstances would be a matter to be determined in drafting the detail of such legislation.

2.14 It is perhaps unfortunate that this recommendation suggested that '[T]his legislation should take as its starting point the search warrant provisions set out in the *Crimes Act 1914*' as this may have given the impression that the Committee's preferred model is for the detail of the Crimes Act provisions to apply across the board. In fact, the Committee's recommendation is that the Crimes Act provisions which reflect the principles (perhaps better referred to in this context as safeguards or protections) form the starting point for stand-alone legislation.

2.15 In the absence of a commitment to develop such stand-alone legislation, the Committee welcomes the promulgation of the Guide and with it the consolidation of relevant policy, principles and precedent relevant to the framing of Commonwealth offences, civil penalties and enforcement provisions, including entry and search provisions.

The purpose of search and entry provisions

2.16 The Committee accepted that at a general level search and entry provisions are appropriate for the purpose of gathering intelligence of evidence and also to monitor compliance with some statutes. The Committee concluded that where entry and search powers were conferred on non-government officials, the same principles should apply.

Recommendations 4 and 5

2.17 The Committee recommended that the principles set out in Chapter 1 of the 2000 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 (Recommendation 4). The Committee also recommended that the right of entry provisions in the *Workplace Relations Act 1996* should conform with the principles set out in Chapter 1 of the 2000 report (Recommendation 5).

Government response

2.18 The Government accepts this recommendation in principle but reiterated its view that each principle should not be automatically applied to all search and entry

powers. The Government response states that entry powers should generally only be conferred on government employees, as they are subject to a wide range of accountability and disciplinary mechanisms under Commonwealth legislation that do not generally apply to persons outside government.⁸ However, the Government notes that in rare instances it may be necessary to empower non-government persons to exercise entry and search powers. The Government response states that in such circumstances there is a range of measures that may be applied to ensure appropriate and adequate accountability:

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).⁹

2.19 The Committee welcomes the acceptance of this recommendation and suggests that the accountability measures set out in the Government's response be included in the Guide. The Committee gave further consideration to accountability measures in the current inquiry and discusses these further in Chapter 3 of this report.

2.20 The Government did not accept this recommendation. In its response, the Government stated that the principles are not appropriate for general application to the various entry powers conferred in that Act. For example, the same principle should not apply to entry of premises by both trade union officials and government officials. The Government does not consider that entry of premises only by consent or warrant is appropriate as the Workplace Relations Act does not permit entry by force or provide a power to search.

8 The *Ombudsman Act 1976*, the *Administrative Decisions (Judicial Review) Act 1977*, the *Privacy Act 1988* and the *Freedom of Information Act 1982*.

9 Government response, p. 7.

Consistency of search and entry provisions

2.21 The Committee noted that it is important that entry and search provisions should be as consistent as practicable across all agencies which exercise those powers. This is particularly the case for large organisations and those in 'sensitive' industries. The Committee noted that consistency is an issue for occupiers and agencies. Occupiers may find themselves subject to different procedures and obligations depending on the agency involved. Agencies may be required to administer (and train staff in the administration of) quite different provisions.

2.22 The Committee used the term consistency to connote consistency with principle rather than with long-standing precedent. However, the Committee noted that while consistency is a guiding principle, it should not be seen as absolute. The Committee recognised that there will be occasions when different powers may be required because different functions need to be performed.

2.23 The Committee noted that model search warrant provisions had been included in the Crimes Act in 1994 and received evidence which suggested that these provisions have operated reasonably consistently and have been well accepted. The Committee also noted that the A/G's Department also used preferred model provisions where it was proposed to include monitoring warrant provisions in a bill. However, the Committee noted anomalous entry and search provisions in relation to powers and provisions administered by the Australian Tax Office (ATO), the (then) Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), the Australian Transaction Reports and Analysis Centre (AUSTRAC), the Australian Security and Intelligence Organisation (ASIO) and the Australian Securities and Investments Commission (ASIC).

Recommendations 6 - 8

2.24 The Committee recommended 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 to the principles (Recommendation 6). The Committee also recommended that, as a priority, all entry and search powers that go beyond the entry powers in the *Crimes Act 1914* should be reviewed and amended so that they are consistent with the principles (Recommendation 7). Finally, the Committee recommended 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 properly (Recommendation 8).

Government response

2.25 The Government does not accept Recommendation 6 and the Committee notes that the delay in the production of the Government response makes the date proposed by the Committee for review of relevant legislation appear uncharacteristically optimistic.

2.26 The Government accepts Recommendation 7 in part. The Government response states that the Government does not accept that all existing entry and search provisions that go beyond the entry powers in the *Crimes Act 1914* should be reviewed and amended to conform to the Committee's principles. However, the response notes that some agencies have recognised the merits of undertaking a review at an agency level, in particular DIMIA and the Department of Defence. The Government response notes that the Department of Defence has conducted a review and will amend regulations to permit a local magistrate to issue a warrant to permit entry on to land or premises. The Committee received evidence from a number of agencies during this current inquiry in relation to the review of existing entry and search provisions. This evidence is discussed in Chapter 3 of this report.

2.27 The Government accepts Recommendation 8 in principle and notes that it is unable to direct the Ombudsman to undertake particular investigations but notes that he or she has the power to conduct audits of the exercise of the ATO of its entry and search powers and has exercised those powers when investigating tax complaints.

2.28 The Committee received a submission from the Commonwealth Ombudsman's Office as part of this current inquiry which included a copy of the Ombudsman's findings in relation to an own motion investigation in relation to the ATO which was prompted by the Committee's concerns. As part of that review the Ombudsman reviewed relevant manuals and training materials and sought details of certain cases dealing with 'significant non-compliance and aggressive tax planning' in which the ATO had sought access without notice between July 2002 and December 2003. Of the 24 cases identified, the Ombudsman examined the five cases in which audit work had been completed, and a similar case in which a complaint had been made directly to the Ombudsman. The Ombudsman observed that 'the audit did not bring to notice any significant difficulty with the ATO approach to the use of these powers.'¹⁰

2.29 The report also noted that the Ombudsman 'receives very few complaints about the ATO's use of access powers' and indicated that '[d]uring the year ending 30 June 2005 it is proposed to audit the use of access powers in a different sphere of ATO operations. Attention will also be directed to any complaints made to the internal ATO complaint service'.¹¹

2.30 Despite its misgivings about the reliance placed on internal procedural limitations, the Committee welcomes the Ombudsman's finding. The Committee considers that the external scrutiny of the operations of the ATO should occur as a matter of course, but considers the Ombudsman's Office well-placed to provide a strong measure of accountability, within its limited resources.

10 Submission No. 16, p. 3.

11 Submission No. 16, p. 3.

2.31 The Committee notes that the Government does not intend to significantly alter the entry powers of the ATO. However, the Committee hopes that these broad powers will not be used as a precedent for establishing entry and search schemes for other agencies. The Committee considers that such an approach in new legislation would be contrary to the policy set out in the Guide.

The fairness of entry and search provisions

Recommendations 9 – 14

2.32 The Committee noted that fairness combines both the content of search and entry provisions and the manner in which they are exercised. A provision may be 'fair' in its form, but administered in an 'unfair' manner. Or a provision may be 'unfair' in its form, but administered by the relevant agency in a way that renders it 'fair'.

2.33 The Committee noted that the majority of agencies exercise their entry powers fairly and that fairness is imposed on agencies by statute and by the courts. However, the Committee also noted a number of ways in which the exercise of entry provisions may be made fairer.

2.34 The Committee recommended that the procedure applicable in Victoria and in some other jurisdictions be followed where, after execution, a warrant is returned to the court that issued it (Recommendation 9).

2.35 The Committee also recommended that 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, unless there are exceptional circumstances involving clear physical danger (Recommendation 10).

2.36 Where search and entry powers are used by an investigative authority: those who are being investigated should have an ongoing right to be informed of the current status of those investigations and, where an investigation is concluded and no charges laid, those who have been investigated should have the right to be informed of this fact immediately and to have all seized material returned to them. Such persons should also have the right to compensation for any property damage and damage to reputation (Recommendation 11).

2.37 The Committee recommended that all agencies that 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 (Recommendation 12).

2.38 The Committee further recommended 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 (Recommendation 13).

2.39 The Committee also recommended 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 (Recommendation 14).

Government response

2.40 The Government does not accept that returning a warrant to the issuing authority would add to the current regime. The Government considers that the proposal would place a burden on issuing officers and that it was uncertain whether the return of a warrant would provide any additional protection or safeguards in relation to its execution.

2.41 The Government accepts Recommendation 10 in principle stating 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. There is no reason to distinguish in the context of this proposal between a search warrant, monitoring and search authorised by consent.

2.42 The Committee concurs with the Government's view that the statement of rights and responsibilities should be communicated to an occupier in plain language and should be drawn from the legislation itself. However, the Committee notes the suggestion that the information should not be drawn from common law principles. The Committee considers that it is equally important that the information provided to occupiers includes relevant common law rights or rights guaranteed under other relevant legislation. For example, the Committee has often cited the example of the privilege against self-incrimination. The Committee notes that the Government has sometimes contended that there is no need to include an explicit statement of this privilege in legislation requiring the production of information, indicating that people will be able to rely on the common law. The Committee considers that people must be made aware of their rights in relevant circumstances and would generally prefer to see this right incorporated with the relevant legislative provisions and included in information given to occupiers in relevant cases.

2.43 The Committee received evidence that there is a need to ensure that 'appropriate information is provided to the occupier, in plain words not reconstituted legal text, as to rights and responsibilities in relation to any monitoring activity ... undertaken by a regulatory agency with or without the occupier's consent.'¹² This issue is discussed further in Chapter 3 of this report.

2.44 The Committee notes the Government's contention that, in the case of ensuring compliance with legislation, requirements to provide occupiers with written guidelines on their rights and responsibilities is excessive, particularly where these

12 (CBFCA) Submission No.3, p. 1.

searches are conducted in accordance with internationally agreed standards and procedures.

2.45 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. Neither does the Government support a statutory right to compensation. The Government notes that inappropriate actions by law enforcement officers are dealt with by existing disciplinary or criminal sanctions. The issue of a right to compensation for damage to property and reputation is a civil matter best dealt with under the general principles governing tortious liability. Evidence received from the Australian Customs Service (ACS) and ASIC during this current inquiry indicates that, at the conclusion of an investigation, those agencies advise the subject of the investigation that the investigation has been concluded and whether charges or enforcement action are to be pursued.

2.46 The Government accepts in principle that Commonwealth agencies should adopt best practice training procedures and internal controls to ensure that the exercise of entry and search powers is as fair as possible. The Committee considered training procedures and internal guidelines and controls further during this current inquiry and a number of agencies provided the Committee with examples of their progress in this area.

2.47 The Government does not accept that it is appropriate to impose the common practice of video taping or audio taping the execution of search warrants on all agencies in all circumstances, but noted that it is fairly common practice. The Government advised that an oral caution must be given under existing law to persons suspected of committing a Commonwealth offence. There is currently no requirement for tape recording the warning and the Government does not consider that this should be required.

2.48 The Government does not accept that there is a need to hear challenges to warrants in camera, or in a way which does not lead to prejudicial publicity for the person challenging the warrant. The Government notes that the existing law provides the courts with the power to make orders to protect parties from publicity if there is a need to do so.

The effectiveness of entry provisions

2.49 The Committee considers that effectiveness is essentially a matter of administration. It raises issues such as whether search and entry powers are used, and whether their use achieves the purposes for which they were granted. All agencies which made submissions to the 2000 inquiry used their entry powers, and felt that their work would be significantly impeded without them.

2.50 The Committee received evidence from the AFP and the ACS which suggested improvements relating to the search warrant provisions in the Crimes Act

and the Customs Act¹³. While the Committee was not in a position to definitively decide, it appeared that many of the proposals put forward would make the administration of those search and entry provisions more effective without affecting the fair operation of those provisions.

Recommendations 15 and 16

2.51 The Committee recommended that the Attorney-General and the Minister for Justice and Customs examine the amendments to the Crimes Act proposed by the AFP and the amendments to the Customs Act proposed by the ACS and introduce legislation to implement those amendments (Recommendation 15). However, in noting the AFP's suggestion that it be authorised to conduct searches, under warrant, without first notifying the occupier (covert searches) the Committee expressed strong reservations. While the Committee is aware that covert searches might make law enforcement easier, the risks are such that the Committee expressed its opposition to recommending such searches (Recommendation 16).

Government response

2.52 The Government accepted Recommendation 15 and implemented amendments to the *Customs Act 1901* proposed by the ACS to extend the retention period of evidential material from 60 to 120 days and to insert a provision dealing with the disposal of abandoned goods. The Government stated that similar amendments would be considered when the *Crimes Act 1914* provisions are next amended.¹⁴

2.53 The Government noted that the Committee opposed covert searches and advised that this issue remains under consideration.¹⁵ The Committee received submissions during the current inquiry in relation to this recommendation. The matters raised in the submissions do not directly fall within the terms of reference of this inquiry and do not appear to pertain to covert searches as described in Recommendation 16. Nonetheless, it appears to the Committee that there may be matters to be resolved and it recommends discussions between the relevant parties.

Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers

2.54 In February 2004 the Minister for Justice and Customs issued the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide). The promulgation of the Guide signals a different approach from the

13 Scrutiny of Bills Committee, *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation*, pp. 132-140.

14 Government response, p. 17.

15 Government response, p. 17.

Government and one the Committee very much welcomes. According to the main submission from the A/G's Department:

The Guide seeks to consolidate policy, principles and precedent relevant to the framing of Commonwealth offences, civil penalties and enforcement provisions, including entry, search and seizure powers. It draws on a broad range of source material, including:

- Commonwealth legislation
- Model Criminal Code Reports
- Australian Law Reform Commission Reports
- Senate Scrutiny of Bills Committee material including 'Alert Digests' and 'Reports', and
- Senate Regulations and Ordinance Committee material including 'Annual Reports'.¹⁶

2.55 The A/G's Department also stated that it expected that 'promulgation of the Guide will result in significant improvements in the legislation approval process. In particular, it will help those involved in the development of legislative proposals identify significant criminal law and civil penalty issues early in the process, allowing sufficient time to resolve them'.¹⁷

2.56 The Guide is administered by the Criminal Justice Division (CJD) of the A/G's Department. The CJD is responsible for assisting the Minister for Justice and Customs to ensure that Commonwealth offence, civil penalty and enforcement provisions are framed in a sound, effective and coherent manner. However, departures from the Guide may occur where they can be supported with sufficient justification. The CJD emphasised that the criminal law and civil penalty policy framework must be flexible enough to address other policy and operational objectives as they emerge.¹⁸

2.57 In its supplementary submission, the CJD set out the consultative processes which underpin the development of relevant legislation. The Committee notes that sponsoring Ministers are required to obtain the agreement of the Minister for Justice and Customs to the criminal law and civil penalty aspects of a bill, including entry, search and seizure powers, prior to the introduction of the bill into Parliament. In doing so, the Minister is required to explain the criminal law and civil penalty aspects of the bill and the justification for the proposed amendments. The Committee notes that the sponsoring Minister must provide a justification to the Minister for Justice and Customs where a legislative proposal departs from the principles set out in the Guide.¹⁹

16 Submission No. 1, p. 1.

17 Submission No. 1, p. 2.

18 Submission No. 12, p. 1.

19 Submission No. 12, p. 1.

2.58 The Committee notes that it is normal practice for sponsoring agencies to consult with the CJD during the drafting of the bill. In addition, it is the practice of the Office of Parliamentary Counsel (OPC) to refer any bills which contain provisions which fall within the scope of the Guide to the Criminal Law Branch for comment.²⁰

2.59 Although the Guide falls short of providing the Parliament with an opportunity to finally determine the applicable general principles that should apply for entry, search and seizure provisions, it does provide a means by which Parliament can measure the approach taken in a particular bill against the general criminal law policy applicable in the area. The Committee particularly welcomes the inclusion in the Guide of commentary on the extant policy position from the Scrutiny of Bills Committee and the Senate Regulations and Ordinances Committee, not just in relation to search and entry provisions, but across the spectrum of the criminal law provisions.

2.60 The Committee was interested to gain an understanding of the early experience with the consideration of legislation developed in the light of the Guide (or an earlier draft of the Guide). The Committee sought advice from the CJD on the entry and search provisions contained in two Acts, the *Australian Protective Service Amendment Act 2003* and the *Aviation Transport Security Act 2004* and, specifically, on the application of the Guide in the development of that legislation.

2.61 The CJD advised that the Guide was taken into consideration throughout the development of both Acts, though the process followed in the case of the *Aviation Transport Security Act* was slightly different as the Minister for Justice and Customs was the responsible Minister. Both Acts proposed a departure from the policy set out in the Guide, and in each case the CJD and the sponsoring Minister appear to have worked together to develop a legislative regime which satisfies the policy and operational objectives while at the same time including appropriate safeguards.

2.62 However, the Committee notes that its own consideration of each bill was hindered by the limited explanation of the deviation from policy in each case. While the Committee subsequently received a full explanation from each sponsoring Minister, the Committee would prefer to see the Guide amended to encourage the incorporation of the justification for such deviations from policy in the explanatory memorandum to each bill.

2.63 While the Committee notes that the Guide is neither binding nor conclusive, promulgation of the Guide, together with the consultative processes established between sponsoring departments and the CJD, represent a significant step in the development of a transparent and coherent criminal law and civil penalty policy framework. Notwithstanding the suggestions made above, the Committee considers the Guide serves three important purposes: it consolidates the Commonwealth's general policy on criminal law, promotes consistency in legislative drafting and is a useful educative tool.

20 Submission No. 14, p. 1.

