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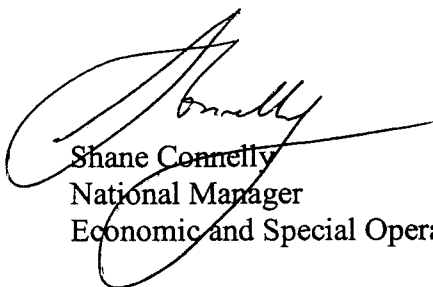
Ms Janice Paull
Acting Secretary
Senate Standing Committee for the Scrutiny of Bills
Suite SG – 49
Parliament House
CANBERRA ACT 2600

Dear Ms Paull

**GOVERNMENT'S RESPONSE TO THE COMMITTEE'S FOURTH REPORT FOR 2000:
ENTRY AND SEARCH PROVISIONS IN COMMONWEALTH LEGISLATION**

Please find attached the Australian Federal Police submission regarding the above inquiry, as requested in your letter of 8 April 2004.

Yours sincerely


Shane Connelly
National Manager
Economic and Special Operations

**Senate Standing Committee for
the Scrutiny of Bills**

**Inquiry: Government's response to the
Committee's Fourth Report for 2000: Entry and
Search Provisions in Commonwealth Legislation**

Submitted by the Australian Federal Police

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1. INTRODUCTION

1.1. Overview

The Australian Federal Police (AFP) welcomes the opportunity to make a submission to this Inquiry.

Given the breadth of its functions, the AFP occupies a unique position in the Australian criminal justice environment as an agency with an international, national and community policing role.

The AFP operates in a dynamic environment, which creates an ongoing need to refine legislation to enable the AFP to adequately investigate emerging complex crimes such as terrorism, trafficking in persons and high-tech crimes.

The AFP has limited its comments in this submission to areas related to the practical aspects of search and entry provisions, with a focus on the amendments made since the Committee's Fourth Report of 2000.

1.2. The AFP's Roles & Responsibilities

The AFP is the Commonwealth's premier law enforcement agency and a chief source of advice to the Commonwealth Government on law enforcement and national security issues affecting Australia as well as Australians and Australian interests overseas. Its role is to enforce Commonwealth criminal law, protect Commonwealth and national interests from crime and threats to national security within Australia and overseas, and provide a secure and safe environment in the Australian Capital Territory (ACT) and external territories. The AFP also represents the Australian Government's international law enforcement and policing interests in a range of other countries and in multilateral fora.

The AFP's functions are set out in section 8 of the *Australian Federal Police Act 1979* (AFP Act). The way in which these functions are pursued may be refined through a Ministerial Direction issued under section 37(2) of the AFP Act.

2. TERMS OF REFERENCE

In relation to the Committee's terms of reference, the AFP provides the following:

2.1 The Government's responses to the Committee's Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation and, in particular whether there has been a resultant impact on the practices and drafting of entry and search provisions.

The AFP obtains its powers of entry and search from a variety of Commonwealth legislation dependant on the particular criminal offence being investigated. Primarily the powers of entry and search are exercised under Part IAA Divisions 1, 2 & 3 of the *Crimes Act 1914*.

In the report titled *Government Response to the Senate Standing Committee for the Scrutiny of Bills, Fourth report – Entry and Search Provisions in Commonwealth Legislation* the Government clearly articulates the importance it places on the exercising of entry and search powers and the strict requirements placed on the AFP when utilising these powers.

Since the Fourth report was tabled in 2000 the criminal environment has changed significantly and this reinforced the necessity to expand current legislation to meet new challenges. Entry and search provisions have been included and considered in the range of acts. Further detail regarding the impact of these legislative changes is provided under the Committee's second term of reference, below.

2.2 A review of the fairness, purpose, effectiveness and consistency of entry and search provisions in Commonwealth legislation made since the Committee tabled its Fourth Report of 2000 on 6 April 2000.

Major amendments to search and entry provisions since the Committee's Fourth Report which have impacted on the AFP include the following:

Cybercrime Act 2001

This Act enhanced police search and seizure powers in the Crimes Act and Customs Act that relate to electronically stored data. The purpose of these enhancements was to assist law enforcement officers overcome problems previously experienced with the enhancement of technology and its increased use in facilitating the commission of crimes. Experience to date is that these powers are working well and are assisting law enforcement efforts to counter the exploitation of technology by criminals.

Australian Protective Service Amendment Act 2003

With the integration of the AFP and Australian Protective Service (APS) new suspicion based powers of search and seizure have been included in the APS Act. These provisions are soon to be repealed and recast in the AFP Act as part of the AFP/APS integration. These powers allow the search of a person or thing, for a thing which may do serious damage or harm to persons or property in respect of which a Protective Service Officer (PSO) has a

function. There are associated legislated requirements for the handling of any property seized under this Act, protecting the rights of the person subjected to these powers.

Surveillance Devices Bill 2004

This Bill is currently before Parliament and the provisions contained within it, if passed, will relate to surveillance devices and their use in investigations. The Bill addresses the entry of premises subject to an authorised warrant for installation, use, maintenance or retrieval of a surveillance device.

AFP Operational Practice

Ultimately, the use of entry and search powers may be the subject of judicial, external (Ombudsman) and internal (AFP Professional Standards) scrutiny.

Recent operational experience with existing legislation in the face of emerging serious crimes, such as terrorism, has caused the AFP to review its legislated capacity to effectively prevent, detect and investigate these crimes.

In the interests of producing a more effective regime, the AFP would welcome consideration of a legislative response to what it perceives are operational deficiencies in two key areas:

- a) Delayed notification search warrants; and
- b) Notices to Produce.

a). Delayed Notification search warrants

AFP operational experience in investigating serious criminal activity (including criminal activity linked to the planning in Australia of terrorist offences by Australian-based suspects) has confirmed that there are circumstances where police officers need to enter a premises to ascertain and verify evidence without necessarily seizing it. At present, there is no specific legislated power covering these circumstances. One option for addressing this issue is the creation of a delayed notification search warrant power. In effect, a delayed notification search warrant enables police to access premises in advance of the resolution phase of an investigation.

By way of example, delayed notification search warrants would permit AFP investigators to enter a house occupied by criminals associated with suspected terrorists in order to view a 'plan' of an imminent terrorist attack scheduled overseas. The plan itself might not constitute sufficient evidence to support a charge, but knowledge of its contents and its proposed execution would enable investigators to conduct further inquiries aimed at establishing the identities of criminal associates and their international links with a view to:

- preventing an attack
- effectively investigating a terrorism offence
- secure evidence to support successful prosecutions.

It is important to note that entering the premises and monitoring evidence would still be done under warrant as is currently the case. The proposed delayed notification category would cover circumstances where advising the occupier, pursuant to sections 3H and 3P of the

Crimes Act 1914, at the time the search warrant is executed may compromise the investigation, because of the risk that they could destroy or conceal evidence, or alert criminal associates to law enforcement interest with the risk to ongoing criminal and intelligence investigations. The occupier would be notified when the investigation had been resolved.

On the face of it, the *Crimes Act 1914* does not preclude an investigator from executing a search warrant without the presence of the occupier (or a representative) where there has not been a seizure of evidence. AFP practice is to inform the occupier pursuant to sections 3H and 3P of the *Crimes Act 1914*. However, there is no express prohibition on the non-disclosure of the execution of a search warrant. It should be noted that the rights of the occupier under sections 3H and 3P attach only if the occupier (or representative) is present.

Legislation is required to confirm that non-disclosure of the execution of a search warrant is available. The legislation should provide that upon application for a search warrant, the issuing officer is to be notified of the intention to execute the warrant without the presence of the occupier (or representative). The issuing officer would determine whether the circumstances (having regard to community safety – domestic and international, and related national security risks) merit non-disclosure.

Amendments to sections 3H and 3P of the *Crimes Act 1914* that expressly authorise non-disclosure of the execution of a search warrant in certain circumstances would provide the necessary security for certain investigations without eroding other existing safeguards.

Other jurisdictions have legislation which expressly allows warrants to be executed without the presence of the occupier in certain circumstances. The Committee may benefit from examining this legislation.

b). *Notices to Produce*

The AFP sees benefit in introducing a notice to produce regime for essential information from information holders such as banks and utilities. Notices to produce are not intended to replace search warrants. They are intended to facilitate essential and basic inquiries such as confirming the existence of a utilities or other account (eg, Australia Post), account holder details, account history (up to six months), and payment details.

The AFP has experienced problems in relation to obtaining information from utility providers. Utility providers often insist on a search warrant before giving basic information (eg, account holder and account information details). This places an unnecessary barrier on utilities and the AFP, and significantly delays early phases of investigations into serious criminal offences including terrorism. The unnecessary delay can potentially compromise the safety and welfare of the community.

It is proposed that the provisions will apply to electricity providers, gas companies and councils. Utilities and agencies including State Registrars (eg, Births, Deaths and Marriages) Medicare, Departments of Transport, airlines and Australia Post have indicated that they would welcome an appropriate notice to produce provision to facilitate enquiries.

The information sought would include account holder name/s and personal information, account history (usage), operation of the account, and payment methods.

The AFP would advocate provisions similar to Part 3-3 of the *Proceeds of Crime Act 2002* (POCA) (Notices to financial institutions). This model restricts the authorisation for notices to produce to AFP Senior Executive Employees who are nominated in writing by the Commissioner.

The *Proceeds of Crime Act 2002* (POCA) model has appropriate safeguards which could be reflected in the proposed Crimes Act provisions. POCA notices to produce may only be authorised by the Commissioner, Deputy Commissioner, or a Senior Executive Officer nominated in writing.

The proposed provision should create offences for failure to comply with a notice or request (similar to section 218 of POCA) and for disclosure of the existence of a notice or request (similar to section 217 of POCA).

The AFP continues to examine legislative options and welcomes further consultation regarding the development of legislation in these areas.

2.3 A review of the provisions in Commonwealth legislation that authorise the seizure of material and, in particular:

- (a) The extent and circumstances surrounding the taking of material that is not relevant to an investigation and the use and protection of such material; and**
- (b) Whether the rights and liberties of individuals would be better protected by the development of protocols governing the seizure of material.**

In relation to part (a), the AFP operates under clear legislated directions on the retention of material seized and the subsequent use of it in any criminal proceedings. If the material seized is not required for the prosecution then it is returned to the owner, or if it is a forfeitable item an order can be sought to have it destroyed or otherwise dealt with.

The AFP is not well placed to comment on part (b).

CONCLUSION

The AFP welcomes the review of search and entry provisions under Commonwealth legislation, as the national and international crime and security environment has changed so dramatically in recent years.

The AFP sees benefit in modernising Commonwealth search and entry legislation that relates to law enforcement to ensure that the AFP and other agencies are adequately equipped with the necessary tools to prevent, detect, and investigate Commonwealth offences, and to protect Australians and Australian interests.