



**Australian Government**  
**Attorney-General's Department**  
**Criminal Justice Division**

04/6245

22 July 2004

Mr Richard Pye  
Secretary  
Senate Standing Committee for the Scrutiny of Bills  
Parliament House  
CANBERRA ACT 2600

Dear Mr Pye

**ENTRY AND SEARCH PROVISIONS IN COMMONWEALTH LEGISLATION**

Thank you for your letter of 6 July 2004, acknowledging the submission by the Criminal Justice Division of the Attorney-General's Department on the Government's response to the Senate Standing Committee's *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation*.

Following discussions with the Committee Secretariat, this supplementary submission contains additional information on some recently enacted entry and search powers and how those powers compare with the views expressed in the 'Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers' (the Guide). The new entry and search powers are contained in the *Australian Protective Service Amendment Act 2003* (APSA Act) and the *Aviation Transport Security Act 2004* (ATS Act).

The Guide is an attempt to consolidate policy, principles and precedent relevant to the framing of Commonwealth offences, civil penalties and enforcement powers. Promulgation of the Guide is a significant step in the development of a transparent and coherent criminal law and civil penalty policy framework. However, departures from the Guide occur where it can be supported with sufficient justification. The criminal law and civil penalty policy framework must be flexible enough to address other policy and operational objectives as they emerge.

Before a Bill can be introduced into Parliament, it is necessary for the sponsoring Minister to obtain the agreement of the Minister for Justice and Customs to the criminal law and civil penalty aspects of the Bill, including entry, search and seizure powers. It is normal for the sponsoring agency to consult with the Criminal Justice Division and settle the bill at a departmental level before the agreement of the Minister for Justice and Customs is sought. When seeking the agreement of the Minister for Justice and Customs, the sponsoring Minister should outline the criminal law and civil penalty aspects of the Bill and explain why the amendments are necessary. Where a legislative proposal departs from the principles set out in the Guide, the Minister sponsoring the legislative proposal will need to explain and justify the departure to the Minister for Justice and Customs.

The development of the ATS Act followed the process outlined above. The development of the APSA Act was a little different because the Minister for Justice and Customs was the responsible Minister. In both cases, the Guide (it was a draft at the time) was taken into consideration during the development of the legislation and departures were addressed.

The new powers in the APSA Act depart from the general policy position expressed in the Guide because they permit protective service officers and Australian Federal Police (AFP) members to stop and search persons without a warrant or the consent of the relevant person. This departure was justified on the basis that protective service officers and AFP members needed such powers to operate effectively and cooperatively to remove potential threats to national security.

In addition, significant safeguards were included in the APSA Act to avoid abuses of power. Before exercising powers conferred by the Bill, a protective service officer or an AFP member is required to have reasonable grounds to suspect the prescribed circumstances necessary for the exercise of those powers exist. That is, the exercise of the powers is based on an objective standard, not a subjective one. In addition, the power can only be exercised at locations where the protective service officer or the AFP member is performing their protective service functions. Personal searches must be conducted by a person of the same sex as the person being searched, and a protective service officer or person who conducts a search must not use more force, or subject a person to greater indignity than is reasonable and necessary to conduct the search. The legislation also imposes strict obligations on protective service officers and AFP members about the handling of items seized during a search.

The ATS Act also departs from the normal policy position because it authorises private screening officers working at airports to conduct frisk searches (section 95A). The Guide recommends that the exercise of coercive powers should generally be limited to government employees who are subject to a wide range of accountability mechanisms to ensure that they do not abuse such powers. Ordinary citizens and private sector organisations are not usually subject to the same level of transparency or scrutiny. Because of the unique nature of the airport security environment and the practical difficulties of having government employees conducting all frisk searches at airports, it was considered necessary to depart from the normal policy position in this instance.

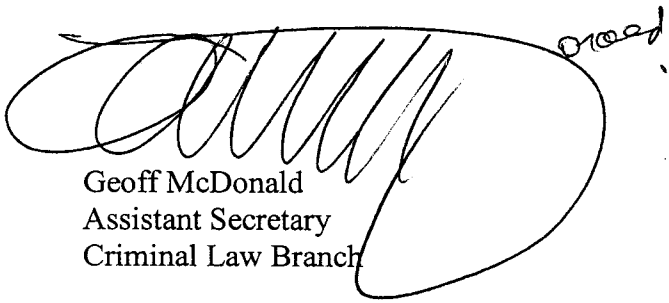
The Criminal Justice Division worked closely with the sponsoring agency (the Department of Transport and Regional Services) to develop a regime that satisfied their policy and operational objectives, but included appropriate safeguards. Those safeguards include a requirement to obtain the consent of the person before a frisk search can be conducted, and a requirement that the frisk search should be undertaken by a person of the same sex as the person being searched. When exercising any of his or her powers, a screening officer must not use more force or subject a person to greater indignity than is necessary or reasonable, and a screening officer commits a criminal offence if the officer does not exercise the power in accordance with the legislation. It was also agreed that screening officers would be required to undergo training and have appropriate qualifications as prescribed in the regulations.

Regardless of whether the Criminal Justice Division is dealing with its own legislation or that of other agencies, the Division continues to promote the development of good criminal and civil penalty law, ensuring that there is an appropriate balance between individual rights and effective law enforcement. Given many competing policy objectives in a rapidly changing world, it is very difficult to draw a line in the sand and say that is how the criminal law should be framed. The Guide attempts to do just that, but the Division recognises that compromises need to be made to

ensure the best possible outcome in the circumstances. The Guide will be updated regularly to ensure it continues to be a meaningful document.

Any queries about this submission should be directed to Karen Bishop or Anthony Seebach in the Attorney-General's Department, who can be contacted on 6250 5604 or 6250 5732 respectively.

Yours sincerely

A large, stylized handwritten signature in black ink, enclosed in a large oval. The signature is written in a cursive, somewhat illegible style. To the right of the signature, the name "Geoff" is written in a smaller, more legible hand.

Geoff McDonald  
Assistant Secretary  
Criminal Law Branch

Telephone: (02) 6250 6395  
Facsimile: (02) 6250 5918  
Email: [geoff.a.mcdonald@ag.gov.au](mailto:geoff.a.mcdonald@ag.gov.au)