

## Chapter 4

### Conclusions and recommendations

4.1 Before turning to its conclusions, the committee makes some observations about matters raised during the inquiry

4.2 The CCTV system in Parliament House, like other security and information systems, is managed by DPS, under the authority of the Presiding Officers, on behalf of the Parliament. Its authority is clearly constrained by the powers, privileges and immunities of the Houses and their members. In any question of parliamentary administration, proper regard needs to be given to these matters.

#### Authority and accountability

4.3 As noted in the previous chapter, the committee considers that DPS has sought to use the CCTV system for a purpose which is not supported by the language of the Code of Practice. In doing so, DPS has set aside an important accountability mechanism – that of seeking the approval of the Presiding Officers for a policy change. The original protocols on management of recorded images were clear. They provided that recorded images could not be released or shown to anyone else without the approval of the Presiding Officers. One reason for this requirement was to ensure that the Presiding Officers could take advice as to whether questions of privilege were engaged, and how they ought be dealt with. When the Presiding Officers introduced CCTV security cameras into the Senate and House of Representatives wings, then President, Senator the Hon. Paul Calvert told the Senate:

The cameras in the corridors will only be activated during sitting hours if an alarm is triggered. After sitting hours motion detectors will activate them. Strict protocols have been developed to govern access to film images, and the Speaker and I will monitor these with the assistance of the Joint House Committee.<sup>74</sup>

4.4 The current Code of Practice includes a similar process which requires certain requests for the use of images to be approved by the Presiding Officers and raised with the Usher of the Black Rod or the Serjeant-at-Arms, in each case allowing an opportunity for considered advice to be sought from the Clerks about any matter of privilege which may arise. This essential element of accountability is absent in the actions of DPS in this matter.

4.5 If the department considers that it requires the use of the parliament's security systems to pursue staff management issues, it should put that proposal to the Presiding Officers. The use of the system in this incident demonstrates the hazards here, and also demonstrates the high degree of accountability required in the management and use of the system. The failure to undertake compliance reviews of the Code over the past 5 years, and the areas of non-compliance apparent in the recent audit are of concern to the committee.

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74 *Senate Debates*, 5 February 2003, p. 8565.

### **“due deference to parliamentary privilege”**

4.6 The committee turns to the statement in the DPS submission that the investigation was undertaken with “due deference to parliamentary privilege”.<sup>75</sup> The statement was based on the Secretary’s response to the discovery of the contentious CCTV footage. The response has been described in a number of ways:

...the Secretary responded that ‘contact by individuals with parliamentarians is not something we monitor...’. Accordingly, the footage relating to the visit to the Senator’s office was not investigated further and Employee X was not questioned in any way in relation to her attendance at the Senator’s office...<sup>76</sup>

...the relevant decision-maker (the Secretary) made a conscious decision *not* to take action in respect of Employee X’s approach to Senator Faulkner, by effectively instructing that DPS could not consider that conduct and had no interest in that matter.<sup>77</sup>

Once the spectre of engagement with a Senator emerged, DPS advertently shut down any inquiry into the circumstances of the visit to the Senator’s office – a step apt to avoid any interference with parliamentary matters...<sup>78</sup>

4.7 In the committee’s view this last claim of an advertent response would involve evidence of deliberation; accountability in the estimates hearing when questions arose, and to the Presiding Officers on whose behalf the system is managed; and communication of the decision to people affected by it, including the employee, who was not advised that the department “had no interest” in her contact with Senator Faulkner, and the Senator himself.

4.8 The submission states that there was no mention of the employee’s visit to the senator’s office in the brief seeking approval of a formal code of conduct process, nor in the brief appointing the investigator.<sup>79</sup> It is not clear why this information was omitted.

4.9 The committee is of the view that decisions about the application of privilege belong to the parliament and not to the department. Where matters which may involve questions of privilege arise, it is important that advice is sought on any privilege implications so that, depending upon that advice, any senator involved in the matter has an opportunity to consider whether to make an informed claim of privilege.

### **Legal advice**

4.10 The question DPS sought to have answered in its legal advice was “the likely position a court would take to questions of parliamentary privilege and contempt

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75 DPS submission, paragraph 3.

76 DPS submission, paragraph 21.

77 DPS submission, paragraph 40.

78 AGS Advice, paragraph 77.

79 DPS submission, paragraph 22.

arising out of the use of ...CCTV footage in a particular instance within the parliamentary precincts". As this committee has previously noted, the courts can have only a limited role in adjudicating contempt matters.<sup>80</sup> The Clerk of the Senate explains that:

...until a house imposes a penalty of imprisonment upon a person and the person is committed to custody...a court has no role in questions of contempt. It is entirely a matter for the House concerned. Even if a House does impose a penalty of imprisonment, the role of the court is limited to examining whether the ground for the imprisonment – the type of conduct complained of – was sufficient in law to amount to a contempt of a House. It does not involve re-running the investigation and adjudication of the allegations.<sup>81</sup>

4.11 As the Senate's delegate in contempt matters, the committee is required to determine the matters put before by assessing what action may be required to protect the Senate and senators against actions which might obstruct their work. This will often require different considerations than those a court might take into account.

4.12 The committee has noted an aspect of the legal advice which appeared to elevate administrative action under the Presiding Officers' authority above the powers of the parliament, setting aside the clear intention and well-established operation of the 'ordinary' law.<sup>82</sup> The committee does not accept the advice. The administrative activities of the parliamentary service are necessarily constrained by the powers of the Houses.

4.13 As has also been noted, the advice and the submission did not deal extensively with the matter of improper interference, and with the specific concern about interference with the provision of information to senators. A large part of that advice – dealing with the transacting of business – was undermined by the documents provided to the committee on 11 November 2014.<sup>83</sup>

### *Proportionate response*

4.14 The committee questions whether the response of DPS to this incident has been proportionate, given that the incident that sparked the investigation related to a distressing note. In this, the committee is not suggesting that DPS ought not have commenced its investigation, but it appears that the department has gone to great lengths to pursue the matter, particularly when it is remembered (according to the evidence provided to the committee) that the CCTV system has not been used to investigate such staffing matters before. As far as the committee can tell, the information contained in the CCTV footage would have been of little assistance in the investigation.

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80 See 150th report, at paragraphs 2.32 to 2.39.

81 Clerk of the Senate, Assessment of AGS Advice, p. 4.

82 See paragraphs 2.54–2.55 and 3.10–3.19.

83 See paragraphs 2.33–2.45.

## Conclusions

4.15 When determining matters relating to contempts, the committee is required to have regard to the criteria in Privilege Resolution 3:

- (a) the principle that the Senate's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for senators against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate;
- (b) the existence of any remedy other than that power for any act which may be held to be a contempt; and
- (c) whether a person who committed any act which may be held to be a contempt:
  - (i) knowingly committed that act, or
  - (ii) had any reasonable excuse for the commission of that act.

4.16 The chief concern identified by the Finance and Publications Administration Committee and by Senator Faulkner was that use of the CCTV system to identify persons providing information to senators may interfere with the performance of senators' duties. If people apprehend that their interactions with senators are monitored, they may be deterred from providing such information, limiting the information available to senators and constraining their capacity to put matters before parliamentary committees. The other concern they raised was the question whether disciplinary action was taken against a person in connection with her providing information to a senator.

4.17 Having considered the criteria set out above, the committee has concluded that it should not recommend that a contempt be found. As both matters have arisen from the same conduct, the committee may deal with them here together.

### *critterion a*

4.18 In both cases, the committee considers that paragraph (a) is satisfied, in that the committee considers action is required to protect the Senate, its committees and senators against improper interference.

4.19 In relation to improper interference, the committee returns to the position noted in chapter 1, that:

Any obstruction to the free flow of information may be regarded as having the effect of substantially obstructing senators in the performance of their functions.<sup>84</sup>

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84 Committee of Privileges, 67th Report, *Possible threats of legal proceedings against a senator and other persons*, September 1997, paragraph 2.12.

4.20 For the reasons set out in chapter 2, the committee considers that the use of CCTV images in this matter occurred without proper authorisation and in circumstances in which people may be understandably apprehensive about being monitored in similar circumstances in the future. The lack of accountability evident in the accessing of footage, in particular, is a matter of concern to the committee. The committee has considerable concerns about the evidence given about restrictions on the use of the images. The committee received the report of the KPMG CCTV Policy Compliance Review late in the inquiry and has not had the opportunity to consider it in detail. The committee intends to give further consideration to these matters.

4.21 The committee is required under this criterion to consider what action is necessary to protect the Senate, its committees and senators against acts which might obstruct them in the performance of their functions. The committee considers that action is required to remove any apprehension that the CCTV system may be used in an unauthorised manner. The committee makes a recommendation on this matter at paragraph 4.24, below.

4.22 In relation to the disciplinary matter, the committee remains concerned that the use of the system in this case has led to a situation in which decisions affecting the employee may have been influenced by information gained from the unauthorised use of the system. The committee does not make any finding here, but considers that the circumstances demonstrate the inherent risk in allowing officers access to CCTV material of the kind involved in this matter.

#### *critterion b*

4.23 It is clear to the committee that there is a suitable alternative remedy. The committee considers that corrective action lies within the power of the Presiding Officers, by initiating the development of a new Code of Practice which restores the focus on matters of security and safety, and emphasises accountability to the Presiding Officers and the Parliament, with appropriate regard for the primacy of the powers, and immunities of the Houses and their members.

### **Recommendations**

4.24 The committee considers that there are serious difficulties with the interpretation of the existing Code of Practice, and gaps in accountability in the use of the CCTV system and **recommends** that the Code be reviewed through a process involving consultations with member and senators and other building occupants.

4.25 As noted in chapter 3, a particular concern is a lack of accountability in the approval process for accessing (rather than releasing) images, and the committee would see a more rigorous process, involving external accountability, as an essential element in any new regime.

4.26 The committee has similar concerns arising from the disregard for the powers, privileges and immunities of the parliament which has been on display during the investigation of this matter. The committee considers that senior officers in the parliamentary service should have a well-developed understanding both of the operations of the parliament and the limitations of their administrative authority. In particular they must give primacy to parliamentary powers in balancing the competing

priorities to which they may need to have regard. The committee **recommends** that senior officers in DPS involved in the administration of the CCTV system and other systems managed on behalf of the Parliament undertake some structured training to acquaint themselves with the principles of privilege.

4.27 The committee also noted the comment of the Clerk of the Senate that, because the Code itself does not make reference to the requirements of privilege, it is arguably unfit for purpose. The committee considers that any new Code should deal with such matters. However, senior officers in all of the parliamentary departments should be sufficiently well versed in privilege matters to be able to seek advice when questions of privilege arise, regardless of the provisions of a Code of Practice.

**The committee recommends to the Senate that no finding of contempt be made in this matter. The committee further recommends:**

- **That the Presiding Officers instigate the development of a new Code of Practice which restores the focus on matters of security and safety, and emphasises accountability to the Presiding Officers and the Parliament, with appropriate regard for the primacy of the powers, and immunities of the Houses and their members.**
- **That the review process involve consultations with member and senators and other building occupants, and give consideration to the matters dealt with in this report.**
- **That senior officers in DPS involved in the administration of the CCTV system and other systems managed on behalf of the Parliament undertake some structured training to acquaint themselves with the principles of privilege.**
- **That the attention of the Finance and Public Administration Legislation Committee be drawn to the matters set out from paragraph 2.2, under the heading *Contradictory evidence*, relating to the misleading evidence given at its estimates hearing on 26 May 2014.**

(Senator the Hon. Jacinta Collins)

**Chair**