



AUSTRALIAN SENATE

PARLIAMENT HOUSE
CANBERRA ACT 2600
TEL: (02) 6277 3350
FAX: (02) 6277 3199
E-mail: clerk.sen@aph.gov.au

CLERK OF THE SENATE

cladvsenjf_18920

26 May 2014

Senator the Hon John Faulkner
Suite S1 42
The Senate
Parliament House
Canberra ACT 2600

Dear Senator Faulkner

USE OF THE CCTV SYSTEM IN PARLIAMENT HOUSE – ISSUES OF PARLIAMENTARY PRIVILEGE

You have asked for advice about the extent to which a set of circumstances gives rise to issues of parliamentary privilege or otherwise affects the rights and freedoms of senators working in Parliament House. The circumstances do not raise any issue of comity between the Houses.

The circumstances you have asked me to consider involve the taking of disciplinary action against a parliamentary service employee for an alleged breach of the code of conduct where the evidence relied on consists almost exclusively of CCTV footage, including footage of the employee slipping an envelope under your office door. The alleged breach of the code of conduct, however, does not involve provision of information to you but the employee's alleged dealings with another employee. The context includes that you have received unsolicited information from parliamentary service employees in the past in connection with relevant inquiries by Senate committees, including estimates.

Policy on the use of CCTV information

Before addressing possible issues of privilege, the first question that arises is whether the use of CCTV footage is authorised for this purpose. Expansion of the CCTV system throughout the building occurred in 2004 as part of a suite of security measures responding to a revised security assessment of Parliament House in the wake of heightened concerns world-wide about terrorist attacks. The purposes of the CCTV system are specified in a code of practice, the public version of which can be found on the internet (copy attached) – although it is not published on the current Parliament House website, contrary to the accountability undertaking in paragraph 7. Paragraph 5 of the code lists the *only* purposes for which CCTV is to be used while paragraph 6 enumerates the key principles applying to the operation of the system. Although the key principles recognise the privacy and civil liberties of Senators, Members and

other building occupants, the policy fails to acknowledge the unique characteristics of a parliament, the law of parliamentary privilege and any relevant resolutions of the Houses.

The permitted uses of CCTV information include for public order and security purposes, investigation of criminal offences, provision of evidence for criminal and civil proceedings, management of security services, emergency responses, and compensation and insurance purposes. Although paragraph 5(j) gives the Presiding Officers the discretion to authorise "any other purpose", the uses that are specified do not refer to monitoring of parliamentary service employees for disciplinary purposes outside the permitted uses, let alone monitoring of senators' offices and persons who provide information to senators.

Nothing about the character of the permitted uses suggests that these additional purposes could be authorised by the policy. The policy is silent on the monitoring of members of parliament going about their normal business. In a parliamentary environment where each house has ultimate control of its own affairs, it is inconceivable that the use of CCTV information to identify persons providing information to senators or members could ever have been sanctioned as a permissible use of CCTV information when the system was first installed, given the inherent threat such monitoring would pose to members' and senators' freedom to go about their business without obstruction. Similarly, the monitoring of staff to find evidence of conduct other than conduct targeted by the policy was beyond contemplation when the code of practice was devised and, to my knowledge, has not subsequently been included.

The code of practice includes strict record-keeping and access controls. Records must be kept of all persons, items and incidents monitored (paragraph 19). Access to the footage is restricted to specified uses and release of images is subject to approval, including by the Usher of the Black Rod and Serjeant at Arms if images depict senators or members (paragraph 20 - 29). Presiding Officer approval is required for releases to a member of the public or for insurance or compensation purposes (paragraphs 22, 29).

There are restrictions on the making of still images from the footage and any such saved images are required to be recorded in a register (paragraphs 30 - 32). All printed copies of images are to be destroyed at the end of 31 days (paragraph 35). Still images may only be requested "where they are required for the investigation of an incident, a possible crime or administration of security at Parliament House" (paragraph 31). Printed copies of saved images must display the date of printing (paragraph 33).

None of the permitted actions or uses refer to the conduct of internal disciplinary proceedings by parliamentary departments (although an assumption is required that the proper investigation of breaches of the code may involve access to parts of the system). It is the responsibility of the Assistant Secretary Building Services to appoint persons to conduct such investigations. Paragraphs 43 and 44 of the code provide:

- 43 Any use of the CCTV system or materials produced which is frivolous, or for private purposes, or is otherwise inconsistent with the objectives and procedures outlined within this Code is not permitted and will be considered misconduct.

- 44 Any DPS or AFP-UP staff member involved in incidents of this type will face investigation and appropriate disciplinary action in accordance with the relevant departmental policies.

It is not clear from the circumstances on what basis the use of CCTV information has been authorised, or whether the correct process for access and use has been followed. Indeed, it is not clear how the code could authorise use of CCTV footage in the identified circumstances under *any* circumstances unless a security incident were involved or an incident otherwise permitted by the policy to be monitored.

The identified circumstances reveal that parliamentary employees have used the CCTV system to obtain information about persons providing information to senators. It is irrelevant that the information obtained and used may have been incidental to the investigation of an alleged code of conduct breach. Disciplinary action has been taken against an employee on the basis of CCTV information that also shows the employee providing information to your office. The latter forms part of the evidence in the disciplinary action.

If the taking of disciplinary action is in this sense indistinguishable from the provision of information to the senator, then there is a reasonably strong possibility that a contempt of the Senate may have been committed by the initiation and conduct of disciplinary proceedings against the employee and by the unauthorised surveillance of your office. At the very least, the use of the CCTV system to conduct surveillance on a senator's office and to identify persons providing information to that office could be seen as an attempt to deter the senator from pursuing matters of public importance by restricting the flow of information to the senator. It could also be seen as a betrayal of trust by officers misusing CCTV information in this way, and eligible for disciplinary action under the code of practice, not to mention the code of conduct under the *Parliamentary Service Act 1999*. Contempt and disciplinary actions are not mutually exclusive and there is no rule against double jeopardy when it comes to parliamentary privilege (see *Odgers Australian Senate Practice*, 13th edition, page 86).

Parliamentary privilege

There are at least two issues of parliamentary privilege raised by the set of circumstances.

The first is the protection of persons who provide information to senators. The second is interference with the free performance by a senator of the senator's duties as a senator.

- *protection of persons providing information to senators*

The first issue, though very serious, is not the principal focus of this advice, although supplementary advice can be provided on this point if you require. There is no absolute privilege attaching to persons who provide information to members of parliament. However, privilege may attach if it can be established that the provision of information was for purposes of, or incidental to, proceedings in Parliament within the meaning of section 16 of the *Parliamentary Privileges Act 1987*. This is a question of statutory interpretation and application of the statute to the circumstances of the case.

A separate question is whether – regardless of whether the provision of information is covered by absolute privilege – the Senate might nonetheless treat the imposition of a penalty on a person who provides information to a senator as a contempt, as it did in the Rowley, O'Chee and Armstrong case which is the subject of the [67th Report](#) of the Committee of Privileges. By adopting the report, the Senate made a finding of contempt against Mr Michael Rowley for taking legal action against Mr David Armstrong, an informant of Senator O'Chee's. No penalty was imposed in this case as the Committee considered it inappropriate to recommend a penalty against a person who, having taken legal advice, regarded himself as exercising his legal rights.

It is a matter of great concern if people who provide information to senators about their grievances or allegations of malfeasance are deterred from doing so because of punitive action taken against them. I draw to your attention a paper by Harry Evans on "[Protection of Persons who Provide Information to Members](#)", prepared for a Presiding Officers' and Clerks' Conference and published in Papers on Parliament No. 52 (December 2009)

- *interference with the free performance by a senator of the senator's duties as a senator*

The other issue of parliamentary privilege is the question of interference with the free performance by a senator of the senator's duties as a senator.

At its most basic, parliamentary privilege is a functional immunity. It provides houses, committees and members of parliament with immunity from the ordinary law to the extent required for them to carry out their functions without impediment or interference. Once the existence of a privilege is established at law, it is exclusively a matter for the house concerned to determine the manner of its exercise or application.

While not every "privilege" equates to a corresponding contempt, in Commonwealth law, contempt is assessed by reference to a statutory test in section 4 of the Parliamentary Privileges Act:

4 Essential element of offences

Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

Any conduct, including use of words, may constitute an offence if it satisfies this test. [Privilege Resolution 6](#) sets out a number of matters which the Senate has determined may constitute contempt but the list is not exhaustive. The resolution begins with the following explanation:

Without derogating from its power to determine that particular acts constitute contempts, the Senate declares, as a matter of general guidance, that breaches of the following prohibitions, and attempts or conspiracies to do the prohibited acts, may be treated by the Senate as contempts.

The list includes as its first item:

Interference with the Senate

- (1) A person shall not improperly interfere with the free exercise by the Senate or a committee of its authority, or with the free performance by a senator of the senator's duties as a senator. (emphasis added)

In times past, such an offence was more likely to consist of the physical obstruction of a member of parliament (for example the arrest and detention of a member) but it is a broad expression of a basic principle; namely, that members of parliament are entitled to go about their business as members and to freely perform their functions as members without improper interference. It is a pre-requisite for an effective parliamentary system.

It will be observed that both section 4 of the Act and Privilege Resolution 6(1) refer to the concept of "improper interference". "Improper" in this context does not mean "unlawful" or malicious or improper in some other context. It does not necessarily involve culpable intention. It refers to interference that has the tendency or effect of preventing the legislature or its members carrying out their functions.

The Senate has always exercised its contempt powers with great circumspection. Its most intense efforts have been directed to the protection of witnesses before its committees. In cases involving possible improper obstruction of senators, it has generally taken a robust view – usually because of the capacity of senators to protect themselves, including through their access to privileged proceedings. Cases involving improper obstruction or interference with senators include:

- alleged harassment of Senator Lt-Col John Neild (1904) by Major-General Hutton who recommended that Senator Neild be placed on the retired list of the military forces partly because of speeches he made in the Senate, and who attempted to interfere with Senator Neild in the discharge of his duties as a senator (no contempt found);
- attempts by representatives of the adult entertainment industry to influence members of the opposition and of a select committee ([43rd Report](#)) (no contempt found);
- possible threat by a property developer (Port Hinchinbrook) to sue a senator ([53rd Report](#)) (no contempt found);
- possible threat to a senator from lawyers representing a client who was the subject of a contempt finding against an informant of the senator (the Rowley and O'Chee matter) ([67th Report](#)) (no contempt found).

A 1994 case in the House of Representatives involved the question of whether general industrial action which interrupted the flow of mail to and from members' offices constituted a contempt. Disruption was widespread and significant but, as the industrial action was not specifically targeted at members, no contempt was found.

Another category of cases involved members of both Houses who were subject to search warrants executed by members of police forces. No contempt was found in any of these cases.

A case in the [ACT Legislative Assembly](#) in 2001-2 involved the diversion of emails from a member's office to an unauthorised recipient in the office of another member of a different political party. The diversion occurred because of careless work by the Assembly's IT provider and continued for some time with the knowledge of the unauthorised recipient. The Assembly's Select Committee on Privilege considered that the diversion of the member's emails could readily constitute an improper and serious interference with his ability to carry out his functions as a member of the Legislative Assembly, and concluded that the unauthorised recipient was in contempt. Failure to rectify a clearly erroneous email diversion and use of information in the emails was a serious and intentional improper interference with the member's ability to carry out his functions.

There is nothing in the precedents that is exactly comparable with the identified circumstances. Perhaps the most useful analogy is the Wilson doctrine that applies in the United Kingdom House of Commons. It is described in *Erskine May* (24th edition, 2011) in the following terms:

In 1966 the then Prime Minister said that he had given instructions that there was to be no official tapping of telephones of Members of the House of Commons (known as the Wilson Doctrine). In exceptional circumstances the House would be informed. The doctrine has been several times restated by the Prime Minister and most recently, in a case involving a Member, by the Home Secretary. The Committee on Standards and Privileges has concluded that in certain circumstances 'phone hacking', which it defined as 'gaining of unauthorised direct access to a remotely stored mobile telephone communication', in respect of Members' mobile phones could potentially constitute a contempt. (p. 264)

In my view, the circumstances do give rise to concerns that a contempt of interference, or attempted interference, with the free performance by a senator of the senator's duties as a senator may have been committed. Disciplinary action against a person that has the tendency or effect of hampering the provision of information to senators could readily constitute an improper interference with the free performance of a senator's duties as a senator and, therefore, a contempt. The use of electronic surveillance of a senator's office for unauthorised purposes to intimidate persons who provide information to senators is also capable of being found to be a contempt.

There are well-established criteria for assessing such matters.

The report of the ACT case referred to above contains a useful summary, based on the practices of the Commonwealth Houses, of the requirements necessary to constitute the contempt of improper interference:

- (i) *improper interference* in the free performance by a member of his or her duties as a member;

- (ii) *serious interference* with a member's ability to perform his or her duties as a member;
- (iii) an *intention* by the person responsible for the action to improperly interfere with the free performance by a member of his or her duties as a member; and
- (iv) *that the interference related to the member's duties as a member* of the Assembly not to any other area of responsibility or activity.

These requirements need to be read together with the Senate's criteria to be taken into account when determining matters relating to contempt, which are contained in Privilege Resolution 3:

The Senate declares that it will take into account the following criteria when determining whether matters possibly involving contempt should be referred to the Committee of Privileges and whether a contempt has been committed, and requires the Committee of Privileges to take these criteria into account when inquiring into any matter referred to it:

- (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.

Applying these criteria to the identified circumstances, disciplinary action has been taken against a person for an alleged breach of the code of conduct. The evidence mainly consists of information and images from the CCTV system that showed the person placing an envelope under your door, among other things. Use of the CCTV information for an unauthorised purpose that involves possible obstruction and improper interference with the free performance by a senator of the senator's duties as a senator is a very serious matter. That the source of the possible obstruction and improper interference is an electronic surveillance system operated by parliamentary employees for public order and security purposes is particularly unacceptable. Action in this case to stop the abuse and ensure the correct application of the CCTV code of practice in the future would be necessary to provide reasonable protection to you to carry out your functions as a senator.

The next issue is whether there is any remedy, aside from invoking the contempt power, for dealing with the conduct. In the first instance, you may wish to use existing avenues to explore

the facts of the matter. These include estimates hearings and the capacity of legislation committees to inquire into the performance of agencies. However, there is a strong case for proposing a Privileges Committee inquiry, not least because such an inquiry is conducted with heightened regard to the rights of witnesses and may be a more satisfactory way of establishing the facts of the matter.

The most difficult aspect of any contempt inquiry is usually the establishment of culpable intention. The Privileges Committee has on occasion expressed reluctance to make findings of contempt in the absence of culpable intention even though a culpable intention is not necessarily required by the terms of section 4 of the Parliamentary Privileges Act. Ultimately, however, it is for the Senate to determine what this means in the context of its contempt jurisdiction. In appropriate circumstances, it may be that reckless ignorance or indifference on the part of officials whose job it is to serve the Parliament is a sufficient indicator of culpable intention for the purpose of establishing whether conduct represents improper interference and may therefore constitute a contempt.

Please let me know if I can provide any further assistance. In particular, I can advise you about the process for raising a matter of privilege should you require.

Yours sincerely

(Rosemary Laing)