

## Chapter 4

### Conclusions and recommendations

4.1 Before turning to its findings and conclusions, the committee makes some observations about the clarity of evidence and the accountability of witnesses to Senate committees. At the end of the report, the committee also makes some comments about the conduct which led to the first referral, that is the covert surveillance of a member of the Australian Senate.

#### The importance of clear evidence

4.2 As has been noted above, committees rely upon the integrity of the evidence presented to them. If evidence is deceptive or misleading, the value of the inquiry process is compromised. The committee notes that some of the evidence provided to the select committee, which has been referred to in this report, was unclear. For instance, the department made conflicting statements about whether it had conducted an investigation into the surveillance, Wilson Security made confusing statements about whether camera footage of the July 2013 disturbance existed and in relation to the use of body cameras, and Transfield Services heavily qualified its evidence about when it first became aware of the surveillance. The committee reminds all witnesses of their obligations to correct evidence promptly where it is found to be incorrect.

4.3 As noted in chapter 2, the lengthy delay in reporting the surveillance incident impaired the ability of the department to properly discharge its accountability obligations.

4.4 The committee considers it would have been appropriate for Wilson Security and Transfield to provide evidence about what they knew of the surveillance incident to the select committee, regardless of the emergence of media reports and anonymous submissions about it, both on the basis that the surveillance involved an Australian senator and because the matter was well within the terms of reference of the select committee. It is not unreasonable to expect an entity which is undertaking roles connected to activities of government to deal with an incident like this transparently.

#### Findings

4.5 The focus of the committee's inquiry was whether false or misleading evidence may have been provided to the former Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, and whether any contempt may have been committed in that regard. Chapter 1 sets out the principles which apply to contempt matters, and the criteria the committee take into account in determining whether a contempt has been committed. In particular, Privilege Resolution 6 provides that a witness shall not:

... give any evidence which the witness knows to be false or misleading in a material particular, or which the witness does not believe on reasonable grounds to be true or substantially true in every material particular.<sup>1</sup>

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1 Privilege Resolution 6(12)(c). *See also* paragraphs 1.11 to 1.18, above.

4.6 Among other matters, the committee must consider whether a person who committed an act which might be held to be a contempt did so knowingly, or had any reasonable excuse for doing so. The practice in cases involving possible false or misleading evidence is that the committee does not make a recommendation of contempt unless it can be determined that a witness intended to give misleading evidence.<sup>2</sup> The committee's findings apply these principles.

### *Surveillance matter*

4.7 The chief concern identified by Senator Di Natale was that false and misleading evidence may have been given to the select committee in relation to the surveillance of Senator Hanson-Young, in light of the two conflicting accounts that had emerged. The committee considered that the primary focus of this part of the reference was the question whether the surveillance had been authorised by Wilson Security managers and, if so, whether – by denying that the surveillance was authorised, or by denying knowledge of the surveillance and/or its authorisation – any person knowingly gave false or misleading evidence to the select committee.<sup>3</sup>

4.8 After considering the evidence available to it, the committee was unable to conclusively determine the matter, partly because of its inability to elicit additional evidence to corroborate the version of events alleging wide-ranging, authorised surveillance. The committee determined that it should not make findings against Wilson Security on the basis of evidence it is not able to test. Neither was the committee in a position to conclusively determine whether the evidence submitted to the select committee in submissions 62 and 99 is false or misleading.<sup>4</sup>

4.9 The committee considers that the evidence before it does not establish the contention in the terms of reference that false or misleading evidence may have been given to the former Nauru select committee in relation to the apparent surveillance of a senator. On that basis, the committee therefore **finds** that no contempt was committed in this regard.

4.10 The committee also considered evidence relating to the reporting and investigation of the surveillance incident, but makes no findings as to whether that evidence ought formally be dealt with as misleading evidence. The committee has published the evidence it received, with minor redactions made for reasons of privacy.

### *Recording of disturbance*

4.11 The chief concern identified by the chair of the former select committee, Senator Gallacher was that false and misleading evidence was supplied to the select committee in relation to a disturbance at the Regional Processing Centre on 19 July 2013.

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2 See paragraphs 1.11 to 1.188, above.

3 See paragraph 2.7, above.

4 See paragraphs 2.28 to 2.32, above.

4.12 The committee considers that the further response provided by Wilson Security clarifies the matter, and accepts on the evidence before it that the errors in the evidence provided to the select committee were inadvertent. The committee has no basis on which to challenge that contention. The record now having been corrected, and accepting that Wilson Security's representatives did not knowingly provide misleading evidence on the matter, the committee **finds** that no contempt was committed in this regard.

4.13 Again, the committee has published the evidence it received on this matter.

### ***Recommendation***

4.14 The committee recommends that the Senate:

- (a) adopt the finding at paragraph 4.9, that no contempt was committed in relation to the first matter referred, relating to possible false and misleading evidence in relation to the apparent surveillance of a senator; and
- (b) adopt the finding at paragraph 4.12, that no contempt was committed in relation to the second matter referred, relating to possible false or misleading evidence in relation to a disturbance at the centre on 19 July 2013.

### **Improper interference with a senator's duties**

4.15 The committee has not been asked to consider whether the surveillance of a senator in the circumstances described in chapter 2 might amount to a contempt, but nevertheless makes the following observations.

4.16 As has been noted,<sup>5</sup> the Senate's contempt jurisdiction is intended to protect the ability of the Senate, its committees and its members to carry out their functions without improper interference. Contempt in Commonwealth law is assessed by reference to a statutory test in section 4 of the Parliamentary Privileges Act:

Conduct (including the use of words) does not constitute an offence against a House [that is, a contempt] 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.

4.17 Any conduct may constitute an offence if it satisfies this test. In this regard, the Senate has declared that:

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.<sup>6</sup>

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5 See paragraph 1.11, above.

6 Privilege Resolution 6(1).

4.18 It is well-established in this context that ‘improper’ does not necessarily mean ‘unlawful’ or ‘unauthorised’. It refers to conduct which has the effect or tendency of obstructing the Senate or senators carrying out their functions.

4.19 The committee last had cause to consider the scope of this prohibition in its 160th report, noting that ‘The Senate has always taken “a robust view as to whether senators have been improperly obstructed”, particularly in relation to conduct involving intimidation, force or threat.’<sup>7</sup> This approach recognises the capacity of senators to protect themselves, including through their access to privileged proceedings. The committee went on, however, to note circumstances in which interfering conduct might be less apparent – for instance, in the diversion of emails, the tapping of telephones or, in the matter dealt with in that report, through the use of closed-circuit television images. The committee noted that:

The action that senators may take individually to resist these less overt forms of interference should they arise is limited. In such circumstances the committee considers that greater recourse to protection through the Senate’s contempt jurisdiction may be warranted.<sup>8</sup>

4.20 It is not difficult to imagine circumstances in which the covert surveillance of a senator may amount to a contempt, and the committee would caution any person against such conduct.

4.21 In this matter, however, the committee notes the significant jurisdictional difficulties which arise from the surveillance having occurred in a foreign country. Parliamentary privilege operates within the jurisdiction of the Commonwealth of Australia to protect the work of the Australian Parliament, its committees and members. It is not generally understood to have any extraterritorial application. For example, Senate committees seeking evidence from witnesses overseas are regularly reminded of these jurisdictional limits; that witnesses are subject to the laws of the countries from which they give evidence and that Australian law cannot protect them in respect of the publication of their evidence overseas.<sup>9</sup>

4.22 Although it has not been conclusively determined, it is likely that the same jurisdictional limits would apply in relation to the investigation of the surveillance in this matter.

4.23 Quite apart from the technicalities of the Senate’s privilege powers, however, the committee considers that it is incumbent on those who undertake any role connected with government activities to deal appropriately with the Senate, its committees and its members. As part of that requirement, the committee considers that

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7 Committee of Privileges, 160th report – *The use of CCTV material in Parliament House*, December 2014, paragraph 1.20; more generally see 125th report, paragraphs 4.27 – 4.29.

8 160th report, paragraph 1.20

9 See Evans H and Laing R (eds), *Odgers’ Australian Senate Practice*, 13th edition, 2012, p. 551. In that context, committees have adopted approaches calculated to reduce the risks to their witnesses – for instance, by declining to accept evidence or by taking evidence in camera and determining that it not be published.

any such person who becomes aware of conduct of the type identified in the statutory definition of contempt – that is, conduct that improperly interferes with the functions of the Senate or the duties of senators – should promptly bring that matter to the attention of the relevant authorities, the Senate or the senator concerned. The committee also draws attention to the need for those dealing with such matters to take care to provide full and accurate information, so as to avoid the need to subsequently correct the record.

(Senator the Hon. Jacinta Collins)

**Chair**



