

The Senate

Foreign Affairs, Defence and Trade
References Committee

Matters raised by NSW Police Strike Force
CIVET

June 2017

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Committee Membership

Senator Alex Gallacher, Chair	ALP, SA
Senator Chris Back, Deputy Chair	LP, WA
Senator David Fawcett	LP, SA
Senator Kimberley Kitching	ALP, VIC
Senator Scott Ludlam	AG, WA
Senator Claire Moore	ALP, QLD

Participating members

Senator Jacqui Lambie	JLN, TAS
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Ms Shannon Ross, Administrative Officer

Table of Contents

Committee Membership	iii
Chapter 1	1
Introduction	1
Referral and conduct of inquiry.....	1
Acknowledgments	3
Chapter 2	5
Issues	5
Background.....	5
Contested evidence	6
Chapter 3	9
Conclusion	9
Committee view.....	9
Conclusion	10
Additional Comments by Senator Jacqui Lambie	13
Appendix 1	15
Submissions	15
Appendix 2	17
Additional information	17

Chapter 1

Introduction

Referral and conduct of inquiry

1.1 On 1 December 2016, the Senate referred an inquiry into matters raised by NSW Police Strike Force CIVET and other related matters to the Foreign Affairs, Defence and Trade References Committee for inquiry and report by 7 February 2017.¹ On 7 February 2017, the Senate agreed to extend the reporting date to 10 May 2017.² A further extension to 22 June 2017 was agreed by the Senate on 10 May.

1.2 The inquiry relates to the investigation of the so-called 'Jedi Council'—a group of individuals within the Australian Defence Force who were found to have been sharing and receiving inappropriate material via email. Separate investigations of Jedi Council members were conducted by the Australian Defence Force Investigative Service (ADFIS) (Operation JARRAH) and by NSW Police (Strike Force CIVET).

1.3 Matters relating to the investigation of Jedi Council members have been the subject of periodic media reporting since 2013. The particular circumstances surrounding retired Lieutenant Colonel Dubsy were also aired in the Senate in November 2016. This public airing in the Parliament substantially contributed to the inquiry being referred to this committee.

1.4 The motion to refer the inquiry to the committee noted in relation to the Jedi Council:

- (i) in a secret New South Wales Police report, prepared by Detective Sergeant Mark Carter, Strike Force CIVET found that the actions of a number of Australian Defence Force Investigative Service (ADFIS) staff and other sections of the Australian Defence Force (ADF) to deliberately lie, withhold evidence, fabricate information... [mean] the conduct of future investigations [by NSW police] into and with the ADF as [a] whole and ADFIS as a body must be viewed with caution and concern;
- (ii) the personal information of many innocent ADF members, including retired Lieutenant Colonel Dubsy, was provided to the media, in breach of their right to privacy and other fundamental human rights, and without regard for their mental and physical wellbeing;
- (iii) the original ADFIS investigation into the alleged actions of the 'Jedi Council' was limited and was conducted without direct contact with any alleged members of the 'Jedi Council';

1 *Journals of the Senate*, 1 December 2016, p. 755.

2 *Journals of the Senate*, 7 February 2017, p. 830.

- (iv) the ADFIS investigation was limited in scope and did not include appropriate follow-up regarding some of the allegations;
- (v) the ADFIS investigation did not include interviews with alleged victims of material created or distributed by the 'Jedi Council'; and
- (vi) a number of the conclusions reached by the ADFIS were not consistent with the evidence presented to the ADFIS as part of the investigation.

1.5 The committee advertised the inquiry on its website and wrote to individuals and organisations likely to have an interest in the inquiry and invited them to make written submissions. The committee received 10 submissions to the inquiry which are listed at Appendix 1. NSW Police was contacted regarding the inquiry, but did not make a submission. Due to the sensitive nature of the evidence, the committee initially agreed to receive all submissions in camera, but subsequently agreed to publish evidence that enabled it to prepare and table this report. The evidence received from individuals caught up in the Jedi Council affair remains confidential.

1.6 At the close of submissions, the committee did not have in its possession the key document at the centre of the terms of reference: a copy of the NSW Police Strike Force CIVET (post-operational assessment) report prepared by Detective Sergeant Mark Carter at Kings Cross Police Station. The committee agreed that it required a copy of the CIVET post-operational assessment report directly from NSW Police to be able to fulfil the inquiry's terms of reference.

1.7 On 13 February 2017, the committee wrote to the then NSW Police Commissioner, Mr Andrew Scipione AO APM, requesting a copy of the CIVET post-operational assessment report and relevant contextual information. On more than one occasion during March, April and early May the committee secretariat contacted the office of the Commissioner for an update. The advice provided was that it was unlikely a response would be able to be provided before 10 May 2017. Without the CIVET report or any formal communication from NSW Police over a three month period, the committee agreed it would not schedule hearings or seek further evidence.

1.8 On 9 May 2017, the committee agreed to seek a further extension to the reporting date and write to NSW Police Commissioner Mick Fuller insisting that the documents requested in February 2017 be provided to the committee by 9 June 2017. Coincidentally, on 11 May the Office of General Counsel, NSW Police, responded to the committee's letter of 13 February 2017 by writing to the Clerk of the Senate in relation to the letter from the committee of 13 February. The five-page letter outlined reasons why '...NSW Police respectfully declines to produce a copy of the [post operational assessment] report to the Committee'.

1.9 Citing section 49 of the Constitution, publications by former Clerk of the Senate, Harry Evans, and a Senate Select Committee from the 1990s, the letter from the Office of General Counsel expressed the view that the Senate (and by implication a Senate committee) does not have the power to compel NSW Police to produce the post-operational assessment report. It refers to what it described as a limitation to the

Senate's power to compel the production of documents which is observed in practice by the Senate:

...namely, Senate committees should not seek to summon the officers and documents of state or territory governments. This principle is predicated upon the idea that bodies which possess similar powers, such as the Commonwealth Parliament and state and territory parliaments, ought to demonstrate mutual respect for each other and it is essential for comity in the practices of all Houses of Australian Parliaments that this respect is observed.³

1.10 The letter also speculated that NSW Police could object to the production of the CIVET report 'on the basis of a public interest immunity claim', noting that providing the committee with a copy of the report could, in its view:

- prejudice the prevention, investigation or prosecution of offences;
- prejudice national security and defence;
- prejudice the proper functioning of the State; and
- prejudice the relations between the Commonwealth and the State.

1.11 NSW Police subsequently confirmed that the second letter from the committee dated 10 May '...does not change our response in our letter of 11 May 2017'.

1.12 As the report was being finalised, a partially redacted and confidential Strike Force CIVET *Post Operational Assessment* document was made available to the committee by Senator Lambie via an anonymous third party. However, the committee notes the document was unsigned and referenced four different dates. Three of the dates appear on the front title page: 23 July 2012 (immediately beneath the main title), 'version 24/06/2013' in the bottom left-hand corner, and 'Drug Unit 20 April 2014' in the bottom right hand corner. The remainder of the document refers to 'Drug Unit 16 April 2015'. The committee was unable to establish the status of the document and consider it as reliable evidence.

1.13 The committee agreed to finalise the inquiry on 'the papers', summarise the public evidence received (Chapter 2) and make some observations about the nature of the inquiry and the evidence (Chapter 3).

1.14 The committee's correspondence to NSW Police dated 13 February and 10 May 2017, and the response dated 11 May 2017, are included at Appendix 2.

Acknowledgments

1.15 The committee thanks all those who contributed to the inquiry by making submissions and providing additional information.

3 Ms Sally Webb, General Counsel, Office of the General Counsel, NSW Police, correspondence, 11 May 2017

Chapter 2

Issues

Background

2.1 Defence referred a matter regarding inappropriate use of the Defence information and communications technology system and the activities of Mr Hastings Fredrickson, a member of the Army Reserve, to Victoria Police in October 2011. It was reported that Mr Fredrickson had been a civilian contractor with Thales in Canberra. He was accused of being part of a group of up to 17 individuals who allegedly shared and circulated sexually explicit videos and photographs. He was dismissed for using the contractor's computer system in breach of their computer usage policy.

2.2 Some members of this group to themselves as the Jedi Council. It was alleged that the material was circulated via the Defence Restricted Network email system. It is believed that a further 172 soldiers may have received some of the emails without being active members of the core group.

2.3 According to Defence:

This referral followed an Australian Defence Force Investigative Service [ADFIS] investigation into the matter. Due to civilian law jurisdictional limits, Victoria Police referred the matter to the Australian Federal Police which, in 2012, referred the matter to the New South Wales Police for investigation. New South Wales Police subsequently initiated Strike Force CIVET.¹

2.4 In the absence of a submission from NSW Police the committee has relied on the Defence submission for background information and a chronology of events. In April 2013, the Australian Defence Force Investigative Service (ADFIS) initiated its own investigation called Operation JARRAH. It had a broader scope than the Strike Force CIVET inquiry, investigating the group of 17 individuals who identified as the Jedi Council. Operation JARRAH ran concurrently with Strike Force CIVET.

2.5 It is standard practice for NSW Police to prepare a post-operational assessment report at the conclusion of a major investigation, and this appears to have been the case at the conclusion of Strike Force CIVET. Apparently, these reports are provided to the relevant police commander who makes an assessment as to whether further action is required. According to Defence:

New South Wales Police has neither referred the Strike Force CIVET post operational assessment to defence nor requested that Defence investigate or take action with respect to its assertions regarding Australian Defence Force Investigative Service misconduct.²

1 *Submission 7*, p. 2.

2 *Submission 7*, p. 4.

2.6 The Inspector-General Australian Defence Force (IGADF) conducted two inquiries in 2013 into the management of unacceptable behaviour within the ADF as they related to the Jedi Council matter. The first inquiry focused on whether Defence's investigation and management of the incidents of unacceptable behaviour in the Army was 'timely and appropriate'. The second inquiry was a comprehensive professional standards review of the original ADFIS investigation. According to the IGADF submission:

Both the first IGADF inquiry and the second IGADF inquiry are rigorous and detailed inquiries conducted according to law. They are evidence-based work, the reports of which speak for themselves. In both instances their conclusions are logical and supportable. Both inquiries made findings of shortcomings on the part of ADFIS. The second IGADF inquiry contains recommendations where appropriate to address identified shortcomings³

2.7 In June 2013, the then Chief of Army, Lieutenant General Morrison, made a public statement relating to the conduct of this group. The Defence submission stated: 'Action taken against the Defence members associated with...Operation JARRAH investigation was initiated following this statement'.⁴ The then Chief of the Defence Force, General Hurley, made the final determination in each case where Lieutenant General Morrison had issued a notice proposing the termination of a member's service. At the conclusion of the process:

...General Hurley decided to terminate the service of nine members and to retain the service of the other seven. Of the seven members retained, six were issued with a censure. Lieutenant General Morrison relieved the remaining individual...of command of his unit.⁵

2.8 According to Defence, the situation of the 176 additional Defence members and employees identified in the second phase of Operation JARRAH was independently assessed by each person's chain of command. In the majority of cases action taken against them involved administrative sanction.

Contested evidence

2.9 The most serious allegations included in the terms of reference are that:

- ADFIS staff and others within Defence deliberately lied, withheld evidence and fabricated evidence in its dealings with NSW Police; and
- Defence leaked the personal information of ADF members to the media without regard for their physical or mental wellbeing.

2.10 The terms of reference also include a number of other allegations against ADFIS: that its investigation into the Jedi Council did not contact or interview any members, was limited in scope and reached conclusions that were inconsistent with the evidence available to it.

3 *Submission 6*, p. 3.

4 *Submission 7*, p. 2.

5 *Submission 7*, p. 7.

2.11 The committee received in camera evidence from several of the individuals who had received notices proposing the termination of their service, based on the final determinations made by General Hurley. Submitters recounted their experience in the Jedi Council affair and told the committee they were wrongly accused of being associated with the Jedi Council, with serious personal and professional consequences. They commented on each of the allegations made against ADFIS and were of the view that Defence was responsible for leaking personal information to the media which publicly identified one or more of them. The submitters overall accepted the allegations referred to in the CIVET post-operational assessment report.

2.12 The IGADF submission questioned the provenance and status of the CIVET report given that the document in its possession bears each of the following dates: 24 June 2013, 20 April 2014, 16 April 2015 and 20 April 2015. Furthermore, the submission noted the 'paucity of evidence within the document to support its many serious allegations' and highlights its author's 'significant misunderstanding and misrepresentation of Defence and IGADF processes'.⁶ The submission concluded on an emphatic note:

The IGADF as an independent statutory officer takes very seriously the execution of his statutory functions at the highest professional standard. The serious and unfounded allegations contained in the SF CIVET document threaten the reputation and standing of the Office of the IGADF, and confidence in the important work undertaken impartially by that office.

The suggestions of impropriety of any sort as made against the IGADF...in the SF CIVET document are without foundation, are rejected by the IGADF and ought to be rejected by the Senate inquiry.⁷

2.13 The Defence submission also raised serious questions about the CIVET document and the allegations it made. It observed that the basis of the inquiry's terms of reference appears to be a document more than three years old which makes unsubstantiated allegations of serious misconduct that have not been tested. At the time of making the submission to committee's inquiry in January 2017, Defence neither had in its possession a signed copy of the post-operational assessment for Strike Force CIVET (apparently signed by the Commander of Kings Cross Local Area Command on 9 September 2015) nor at any stage had NSW Police discussed with Defence the 'factual inaccuracies...misunderstandings and misrepresentations of Defence processes' in the unsigned copy of the CIVET report.⁸ In fact, Defence only became aware of the CIVET report in June 2016 as a third party to an application for public access to New South Wales Government information.⁹

2.14 Defence stated that it is not aware of any evidence to support the allegations raised in the terms of reference. The submission noted that NSW Police had:

6 *Submission 6*, p. 1.

7 *Submission 6*, p. 9.

8 *Submission 7*, p. 2.

9 *Submission 7*, p. 3.

...informed Defence that it considered in 2015, when the Strike Force CIVET investigation was finalised, that the matters raised in the post operational assessment 'had already been addressed'.¹⁰

2.15 The submission stated that the administrative actions taken by Defence, in conjunction with the prosecutions brought by NSW Police, were fair and considered: '[t]he outcomes reflected the different nature of the evidence about the behaviour of each individual involved and the various levels of responsibility each was expected to take for their actions'.¹¹

2.16 The Defence submission also rejected outright the allegation that Defence had provided the personal information of ADF members to the media:

Defence at no time in its public announcements regarding the investigation and resolution of this matter named any individuals involved, whether as an alleged participant, witness or victim...

Defence's internal inquiries and investigation did not identify any Defence member or individual who may have disclosed this information to the media.¹²

10 *Submission 7*, p. 2.

11 *Submission 7*, p. 3.

12 *Submission 7*, pp 6-7.

Chapter 3

Conclusion

Committee view

3.1 At the outset of the inquiry, the committee had reservations about the terms of reference and the allegations made, which if examined in a public inquiry would have the potential to further harm individuals caught up in the Jedi Council affair. A number of submissions received by the committee referred to documents described as the NSW Police Strike Force CIVET report or the post-operational assessment. Some submissions referred to different versions of the document or to documents with different dates. It was suggested the report was an internal working document reflecting only the views and opinions of the police officer at Kings Cross Police Station who wrote it.

3.2 Importantly, the committee was unable to establish the status of the 'confidential' CIVET report as NSW Police did not provide it, or any other relevant contextual information, to the committee as requested by the initial tabling date. Further, it took NSW Police until 11 May to formally advise the committee that it would not provide it with a copy of the CIVET report.

3.3 The committee is surprised by the content of the letter from NSW Police and the lengths taken by General Counsel to draw the committee's (and the Clerk of the Senate's) attention to aspects of Senate practice and procedure as a basis for refusing to comply with the committee's request to access the CIVET report. At no time did the committee consider ordering the production of the CIVET report, and no such order was ever made. The committee is fully aware of its powers and the possible limitation on its ability to exercise them. It would have been entirely appropriate for NSW Police to cooperate with the committee and assist its inquiry by making relevant documents available. That it did not is entirely a matter for NSW Police. Speculation on the committee's power to compel the production of documents is irrelevant.

3.4 While a draft CIVET report was made available to the committee by Senator Lambie via an anonymous third party, the document was redacted, unsigned and variously dated. The committee is unable to rely on this document to make findings.

3.5 Collectively, these factors made it difficult for the committee to proceed with the inquiry as it was unable to assess the evidence raised in submissions and establish the provenance of versions of the CIVET report referred to in evidence.

3.6 The evidence the committee received was conflicting and incomplete with the potential to further harm the reputation and wellbeing of individuals. The committee would not normally inquire into unsubstantiated allegations arising from internal police investigations and Defence reviews, unless they pointed to systemic failure or a pattern of institutional behaviour warranting further scrutiny. Based on the evidence, the committee was unable to establish whether these issues were factors arising from Defence's handling of the Jedi Council affair. In the absence of evidence to

substantiate the allegations, the committee agreed it was not in a position to undertake further scrutiny of this matter.

3.7 In light of the evidence received from Defence and the IGADF, the committee decided it would not investigate Defence's handling of the CIVET matter or its investigation of ADF personnel. The IGADF and Defence submissions rejected outright the allegations raised in evidence. The committee is satisfied that the IGADF followed due process in its investigations, noting that the second IGADF inquiry made findings of serious shortcomings with ADFIS investigative practices and procedures. In light of this, the IGADF recommended a series of measures to address and enhance the ADF's understanding and investigation of cybercrime and ICT misuse.

Conclusion

3.8 The terms of reference raise a question mark around the value of conducting a Senate committee inquiry into a complicated matter based on allegations which are unable to be substantiated. This committee makes it clear that it does not shy away from undertaking inquiries into difficult subject matter and tabling reports with practical and unanimous recommendations. Since 2012 the committee has completed inquiries into allegations of sexual and other abuse in Defence, the Government response to the Defence Abuse Response Taskforce, the mental health of ADF serving personnel and the operation of Defence's resistance to interrogation training. The committee is currently inquiring into the issue of suicide by veterans and ex-service personnel which has generated over 400 submissions and evidence from five public hearings held across the country.

3.9 Each of these inquiries included information on the committee's website emphasising that the committee could not address individual circumstances or resolve claims of rehabilitation or compensation for veterans and ex-service personnel. To attempt to do so would exceed the committee's remit. However, the committee's findings and recommendations have been informed by individual circumstances presented in evidence, which have highlighted administrative failure and suggested where improvement is required. Committee recommendations with cross-party support have improved public administration and contributed to legislative reform in the Defence and Veterans' Affairs portfolio. Most of the evidence received was able to be published by the committee.

3.10 The CIVET inquiry presented the committee with a different set of challenges. It surfaced from the plight of individuals whose military service was terminated by Defence for their alleged involvement in the Jedi Council, including the receipt and circulation of offensive material via Defence's email system. Most of the evidence received by the committee remained in camera due to its sensitive nature, often at the request of submitters. In making these observations, the committee in no way seeks to down play the serious personal and professional consequences which continue for individuals caught up in this matter. Defence has acknowledged that the consequences are 'life-threatening' for some.

3.11 However, consistent with past practice and focusing on achieving realistic outcomes, the committee agreed that it was unable to investigate individual cases and

the serious allegations made into Defence's conduct which could not be substantiated by the evidence.

Senator Alex Gallacher
Chair

Additional Comments by Senator Jacqui Lambie

1.1 Senator Jacqui Lambie, of the State of Tasmania, concurs with the Committee's Report on Matters raised by New South Wales (NSW) Police Strike Force CIVET, and writes separately to further address issues concerning an inability to establish the status of the 'confidential' CIVET report.

1.2 Given the national security times we live in, with an increased risk of terrorism upon our soil, it is key defence agencies; state and local governments working closely together to maintain a level of trust and good communications. While the Committee rightfully does not rely upon the draft CIVET report due to the inability to establish its status, the draft report did raise very serious concerns about the proper workings of federal agencies that have thus far evaded proper Parliamentary scrutiny. In this regard, it is most disappointing that the NSW Police Force refused to cooperate with this Committee and did not make available, even *in camera*, its final CIVET report. The final CIVET report would have certainly aided the Committee in its inquiry.

1.3 While the General Counsel of the NSW Police cites section 49 of the Constitution, and publications by former Clerk of the Senate, Harry Evans, as a proposition that the Senate should not summon officers and documents of state and territory governments for reasons of comity, the issues of these purported limitations have not yet been properly tested. Indeed, Mr Evans noted that 'there are no known limitations in law to this power . . . no authoritative court judgments establishing any such limitations [currently exist]'.¹

1.4 There are judgments that provide some authority that the Commonwealth may not act in such a way as to prevent essential functions of the states.² However, that authority is distinguishable from the present References Committee inquiry in that requiring the final CIVET report to be provided to the Committee would not place a special burden on the State of NSW, by way of legislation or regulations, nor would it curtail or weaken the State of NSW's capacity to exercise their constitutional powers or functions as was the case in *Melbourne Corporation*; the Commonwealth has not introduced an invalid Act as was the case in *Queensland Electricity Commission* nor was this References Committee seeking to introduce any Act whatsoever; nor did this inquiry involve legislation and/or rulemaking that curtailed governmental functions as was the case in *Re Australian Education Union*; and finally this matter has absolutely nothing to do with liability to pay federal tax as was the case in *Austin v Commonwealth* which involved two separate Acts and their construction.

1 Harry Evans, "The Senate's Power to Obtain Evidence", *Papers on Parliament* No. 50, March 2010, p. 3.

2 *Melbourne Corporation v the Commonwealth* 1947 74 CLR 31; *Queensland Electricity Commission v the Commonwealth* 1985 159 CLR 152; *Re Australian Education Union, Ex parte State of Victoria* 1995 128 ALR 609; *Austin v Commonwealth* 2003 195 ALR 321.

1.5 The General Counsel of the NSW Police fails to cite a single established authority where a Senate References Committee did not have the power to compel a document to aid it in its oversight power in the context of an inquiry which has nothing to do with the creation of legislation. Further, the NSW Police General Counsel speculates that it could possibly object to the production of the CIVET report on the basis of a public interest immunity claim without citing any authority to support such possible claim.³

1.6 Given the language of the terms of reference, I do not believe this inquiry would be the proper test case to address the above in the context of production of documents as it relates to a References Committee inquiry being conducted in purely oversight capacity. For these reasons I concur with the Committee's report.

Recommendation 1

1.7 That the inquiry be re-opened should the final NSW Police CIVET report and/or other credible evidence becomes available during the 45th Parliament which contradicts the Committee's reliance upon the Department of Defence's submission of background information and chronology of events.

Jacqui Lambie
Senator for Tasmania

3 Ms Sally Webb, General Counsel, Office of the General Counsel, NSW Police, letter dated 11 May 2017 at p. 4.

Appendix 1

Submissions

- 1 Confidential
- 2 Confidential
- 3 Confidential
- 4 Confidential
- 5 Confidential
- 6 Inspector-General of the ADF
- 7 Department of Defence
- 8 Confidential
- 9 Confidential
- 10 Confidential

Appendix 2

Additional information

1. Letter from the Chair of Foreign Affairs, Defence and Trade References Committee, Senator Alex Gallacher, to NSW Police Commissioner Andrew Scipione AO APM, dated 13 February 2017
2. Letter from the Chair of Foreign Affairs, Defence and Trade References Committee, Senator Alex Gallacher, to NSW Police Commissioner Mick Fuller, dated 10 May 2017
3. Letter from Ms Sally Webb, General Counsel, NSW Police Force, to the Office of the Clerk of the Senate, dated 11 May 2017



THE SENATE

STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

13 February 2017

Commissioner Andrew Scipione AO APM
NSW Police Commissioner
1 Charles St
Parramatta NSW 2150

Email: secretariat@police.nsw.gov.au

Dear Commissioner Scipione

Matters raised by NSW Police Strike Force CIVET

On 1 December 2016, the Senate referred matters raised by New South Wales Police Strike Force CIVET, and other related matters, to the Senate Foreign Affairs, Defence and Trade References Committee for inquiry and report by 7 February 2017. On 7 February 2017, the Senate agreed to extend the reporting date for the inquiry to 10 May 2017.

The committee has received a number of submissions to the inquiry which refer to documents described as the 'NSW Police Strike Force CIVET report' or the 'post operational assessment'. Some submissions refer to different versions or differently dated documents.

In order to address the matters raised by the terms of reference of the inquiry, the committee has determined that it requires access to copies of these original documents. It would be appreciated if the NSW Police Force could provide copies of all relevant documents as well as a description of their purpose and a timeline of their creation to the committee.

The committee appreciates that the relevant documents may relate to sensitive matters or may be internal working documents which do not reflect the official views of the NSW Police Force. Please note that, while the committee prefers to conduct inquiries as openly as it can, any claim for privacy or confidentiality in relation to material provided will receive appropriate consideration. If the NSW Police Force wishes to request confidentiality in relation to any documents provided to the committee, please indicate this clearly.

If your office requires further information regarding this matter Mr David Sullivan, the Committee Secretary, can be contacted on (02) 6277 3535 or via email at fadt.sen@aph.gov.au. Thank you for the NSW Police Force's assistance to the committee in the conduct the inquiry.

Yours sincerely

Senator Alex Gallacher
Chair
Senate Foreign Affairs, Defence and Trade References Committee



THE SENATE

STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

10 May 2017

Commissioner Mick Fuller
NSW Police Commissioner
1 Charles St
Parramatta NSW 2150

Email: secretariat@police.nsw.gov.au

Dear Commissioner Fuller

Matters raised by NSW Police Strike Force CIVET

On 13 February 2017 I wrote to your predecessor, Commissioner Scipione, requesting a copy of the original document described as the 'NSW Police Strike Force CIVET report' or the 'post operational assessment', to enable the Foreign Affairs, Defence and Trade References Committee to address the terms of reference of its inquiry into matters raised by NSW Police Strike Force CIVET. I specifically requested copies of all relevant documents as well as a description of their purpose and a timeline of their creation.

While the committee secretariat has been in touch with your office on several occasions during April and May to progress this matter, the committee has not received a formal response or communication from NSW Police. In light of this, the committee has agreed to seek an extension to the reporting date for this inquiry to 22 June 2017.

The purpose of this letter is to insist that you provide the documents requested to the committee no later than Friday 9 June to enable it to properly conduct the inquiry. The committee appreciates that the documents may relate to sensitive matters or may be internal working documents which do not reflect the official views of the NSW Police Force. Any claim for privacy or confidentiality in relation to the documents will receive appropriate consideration. If the NSW Police Force wishes to request confidentiality in relation to any documents provided to the committee, please indicate this clearly.

If your office requires further information regarding this matter Mr David Sullivan, the Committee Secretary, can be contacted on (02) 6277 3535 or via email at fadt.sen@aph.gov.au.

Yours sincerely

Senator Alex Gallacher
Chair, Senate Foreign Affairs, Defence and Trade References Committee



NSW Police Force

Our ref: D/2017/419465

11 May 2017

Mr Richard Rye
Office of the Clerk of the Senate
Department of the Senate
Parliament House
Canberra ACT 2600

By email: clerk.sen@aph.gov.au

Dear Mr Pye

Matters raised by NSW Police Strike Force CIVET

I write to you, in relation to a letter from the Senate Foreign Affairs, Defence and Trade References Committee (**Committee**) dated 13 February 2017, addressed to Commissioner Andrew Scipione AO APM, requesting a copy of documents described as the 'NSW Police Strike Force CIVET Report' or the 'post operational assessment' (**POA Report**).

I draw your attention to the contents of the letter dated 13 February 2017, which is enclosed for your reference and outline the reasons why the NSW Police Force (**NSW Police**) respectfully declines to provide a copy of the POA Report to the Committee for its inquiry into matters raised by NSW Police Strike Force CIVET (**Inquiry**). I note that the Committee has requested a copy of the POA Report and has not compelled NSW Police to produce the Report.

This letter outlines the reasons why NSW Police respectfully declines to produce a copy of the POA Report to the Committee.

Senate's power to compel evidence

The Senate has the power under section 49 of the Constitution to compel evidence through the attendance of witnesses, the answering of questions and the production of documents.

Section 49 of the Constitution states:

Privileges etc. of Houses

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

OFFICE OF THE GENERAL COUNSEL

Locked Bag 5102, PARRAMATTA NSW 2124

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In the present case, we are of the view that the Senate does not have the power under section 49 of the Constitution to compel the NSW Police to produce the POA Report.

Any attempt to compel the production of any document held by a State would be inimical to the integrity of the States and has the potential to impair the functions of the State Government. There is judicial authority from the High Court to support the proposition that the States are immune from Commonwealth interference so as to protect their integrity and autonomy and that the Commonwealth may not act in a way that prevents the States from exercising their essential functions.¹

As a result, any such attempt to compel the production of the POA Report would be outside the Senate's powers.

I also note that there is a limitation to the Senate's power to compel production of documents which is observed in practice by the Senate, namely, that Senate committees should not seek to summon the officers and documents of state or territory governments. This principle is predicated upon the idea that bodies which possess similar powers, such as the Commonwealth Parliament and state and territory parliaments, ought to demonstrate mutual respect for each other and it is essential for comity in the practices of all Houses of Australian Parliaments that this respect is observed.

In his paper, "*The Senate's Power to Obtain Evidence*",² Mr Harry Evans, the former Clerk of the Senate, stated that:

"There may be a legal basis to a limitation which is observed in practice by the Senate, namely, that Senate committees should not seek to summon the officers and documents of state or territory government. As with the rule about members of other houses, this is a matter of comity between bodies which possess similar political powers and which ought to demonstrate mutual respect for each other.

No Senate committee has ever summoned a state office-holder; the practice is to ask the responsible state minister to provide relevant state public servants to give evidence and relevant documents, and to proceed by way of invitation with all other state office-holders.

There are High Court judgments to the effect that the Commonwealth may not act in such a way as to prevent the essential functioning of the states,³ and these could form the basis of a legal doctrine supporting the parliamentary practice as a matter of law."⁴

Further, Mr Evans has also stated that:

"Although the question has not been adjudicated, there is probably an implicit limitation on the power of the Houses to summon witnesses in relation to members of the other House or of a house of a state or territory legislature.

¹ *Melbourne Corporation v the Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission v the Commonwealth* (1985) 159 CLR 152; *Re Australian Education Union, Ex parte State of Victoria* (1995) 128 ALR 609; *Austin v Commonwealth* (2003) 195 ALR 321.

² Harry Evans, "The Senate's Power to Obtain Evidence", *Papers on Parliament* No. 50, March 2010.

³ See *Melbourne Corporation v the Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 152; *Re Australian Education Union, Ex parte State of Victoria* (1995) 128 ALR 609; *Austin v Commonwealth* (2003) 195 ALR 321.

⁴ Harry Evans, "The Senate's Power to Obtain Evidence", *Papers on Parliament* No. 50, March 2010, pages 3 - 4.

Standing order 178 provides that if the attendance of a member or officer of the House of Representatives is required by the Senate or a Senate committee a message shall be sent to the House requesting that the House give leave for the member or the officer to attend. This standing order reflects a rule of courtesy and comity between the Houses, and as such it ought properly to be observed in relation to houses of state and territory parliaments.¹⁵

NSW Police's Approach to the Request to Produce the POA Report

In the present case, the Committee requests that the NSW Police produce the POA Report which specifically relates to NSW Police Strike Force CIVET. In addition, the Committee seeks to inquire into the "matters raised" by NSW Police Strike Force CIVET. The POA Report is a NSW Police report prepared by, and for, NSW Police. Policing within NSW is a State responsibility and NSW Police are answerable to the NSW Police Minister who is answerable to the NSW Parliament. Therefore, it is the NSW Parliament that can hold NSW Police to account. Any purported scrutiny of NSW Police's actions which are available if the POA Report is produced should not be undertaken by the Commonwealth Parliament, including a Senate Committee, but by the NSW Parliament. In seeking to request the POA Report, it is arguable that the Committee is seeking to usurp the role of the State Parliament and potentially scrutinise the actions of NSW Police which impinges on the autonomy and integrity of the State and therefore falls outside the powers of the Committee.

NSW Police has formed that view that the production of the POA Report and the Inquiry's Terms of Reference specifically seeking to inquire into matters raised by NSW Police Strike Force CIVET has the potential to prevent the State and NSW Police from exercising its essential functions and has the potential to impair the functioning of the State generally. Undertaking investigations into criminal conduct occurring within NSW is an essential function of the NSW State Government through the NSW Police. If NSW Police were to disclose any aspect of its investigations, it could inhibit its power to fulfil this function in an effective manner in the future. This would also be inimical to the integrity of the State of NSW and represent an unlawful interference with the integrity and autonomy of the State of NSW.

Senate Select Committee on the Victorian Casino Inquiry

I note that, in 1996, the Senate attempted to conduct an inquiry into the Victorian Government and its grant of a casino licence to Crown Casino. The Senate Select Committee on the Victorian Casino Inquiry (**Victorian Casino Committee**) was established on 8 May 1996 to inquire into, amongst other things, the adequacy of Commonwealth legislation in relation to casino licensing and whether a full judicial inquiry, Royal Commission or other form of inquiry was required into Victoria's Crown Casino.⁶ The Victorian Government, through the Premier of Victoria at the time, made the following submission to the Senate on 30 July 1996 in response to a letter he received from the Victorian Casino Committee inviting him to make a written submission to that Committee:

"... the State of Victoria is protected by its executive privilege against actions of the Commonwealth which threaten its autonomy or curtail its capacity to function effectively. Your inquiry is such an action as it threatens to breach the

⁵ See Harry Evans, *Odgers' Australian Senate Practice* edited by Rosemary Laing, Clerk of the Senate, (2016) 14th Edition, page 79.

⁶ Senate Select Committee on the Victorian Casino Inquiry, Report, *Compelling Evidence*, December 1996, page v.

confidentiality of advice provided at the highest levels of the Victorian Public Service and possibly Cabinet confidentiality.

... Furthermore, the State of Victoria will assert its executive privilege if the Committee attempts to obtain evidence from current or former Ministers or Public Servants, either voluntarily or by compulsion of law."⁷

Ultimately, the Victorian Casino Committee prepared a report that extensively examined whether or not it had the power to compel evidence from the Victorian Government. The Victorian Casino Committee concluded that the following guidelines should be followed by Senate committees:

- "1. current and former members of State Parliaments should not be summoned or required to answer questions on matters which relate to their activities as members of Parliament or Ministers.*
- 2. current and former senior public servants, ministerial advisers and members of statutory bodies should not be summoned or required to answer questions on matters which relate to their activities as advisers to State ministers or Cabinet on policy issues.*
- 3. the production of documents which were prepared for the purpose of informing, advising or decision making by State Ministers or State Cabinets should not be demanded."⁸*

I also note that Mr Harry Evans, the former Clerk of the Senate, has stated that: *"The power to summon witnesses and the power to require the production of documents are one and the same; any limitations on one therefore apply equally to the other."⁹*

The POA report

I note that, even if the POA Report was produced, NSW Police could object to its production on the basis of a public interest immunity claim, given that the production of the POA Report could:

1. prejudice the prevention, investigation or prosecution of offences;
2. prejudice national security and defence;
3. prejudice the proper functioning of the State; and
4. prejudice the relations between the Commonwealth and the State.

Further, it is noted that one of the victims referred to in the POA Report has brought civil proceedings in the Victorian County Court in Melbourne (**County Court**) (proceeding no. CL 14-02992). As part of the proceedings, a number of subpoenas were issued, including to the NSW Police, who produced a redacted copy of the POA Report to the County Court.

⁷ Senate Select Committee on the Victorian Casino Inquiry, Report, *Compelling Evidence*, December 1996, page 5.

⁸ Senate Select Committee on the Victorian Casino Inquiry, Report, *Compelling Evidence*, December 1996, page 23.

⁹ See Harry Evans, *Oggers' Australian Senate Practice* edited by Rosemary Laing, Clerk of the Senate, (2016) 14th Edition, page 81.

As you are no doubt aware, information that is not in the public domain and was obtained by discovery or subpoena cannot be used for a collateral or ulterior purpose unrelated to the proceedings in which the information was obtained.¹⁰ Known as the "Harman principle", the NSW Police notes the implied undertaking is a substantive legal obligation owed to the party who produces the documents, and to the court, not to use information sourced from Court proceedings for any collateral or ulterior purpose.

Conclusion

I wish to emphasise that the decision not to provide the Committee with the POA Report has not been taken lightly. NSW Police do not intend on hindering the work of Committee and the Inquiry. However, we trust you recognise the difficulties associated with NSW Police complying with the Committee's request.

Yours sincerely

Sally Webb
General Counsel |Office of the General Counsel
NSW Police Force

¹⁰ [1983] 1 AC 280.