

# Chapter 1

## The use of CCTV material at Parliament House

### The matter of privilege

1.1 By letters dated 27 and 28 May 2014, the Chair of the Finance and Public Administration Legislation Committee, Senator Bernardi, and Senator the Hon. John Faulkner each raised essentially the same matter of privilege, concerning the use of the closed circuit television (CCTV) system in Parliament House. The President made a statement to the Senate on 17 June 2014 indicating that matter should have precedence in debate. He tabled the two letters and attachments, comprising relevant extracts of the transcript of the estimates hearing and advice from the Clerk of the Senate tabled by Senator Faulkner at that hearing.<sup>1</sup>

1.2 On 18 June 2014, on the joint motion of Senators Bernardi and Faulkner, the matter was referred to the committee for inquiry and report in the following terms:

In relation to the use of closed circuit television footage by officers of the Department of Parliamentary Services (DPS) for internal investigations involving DPS staff:

- (a) whether there was any improper interference, or attempted improper interference, with the free performance by Senator Faulkner or any other senator of their duties as a senator;
- (b) whether disciplinary action was taken against any person in connection with the provision of information to Senator Faulkner or any other senator; and
- (c) if so, whether any contempts were committed in respect of those matters.

1.3 Senator Faulkner did not participate in the consideration of the matter by the Privileges Committee.

### Background

1.4 In February 2014, CCTV images showing a DPS employee placing an envelope under the door of Senator Faulkner's office at Parliament House were used by DPS in the investigation of a staff management issue.<sup>2</sup>

1.5 Senator Faulkner raised the matter during estimates hearings on 26 May 2014. His questions focussed on two concerns:

- that the use of the CCTV system to investigate an internal staffing matter is a breach of the CCTV Code of Practice

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1 *Senate Debates*, 17 June 2014, p. 3013 The President's statement, the two letters and their attachments are reproduced at Appendix A.

2 DPS provided the committee a copy of the draft investigation report with its submission.

- that DPS was improperly monitoring interactions between its employees and his office.

1.6 The evidence provided by the DPS Secretary at the hearing was equivocal. She told the committee the matter had only come to her attention during the hearing, but that “it is possible DPS has breached the code in investigating a case to do with a staff member”,<sup>3</sup> which she explained as “an inadvertent conflict between staff management issues and the protocol of the protection of members’ and senators’ rights to do business in the building”.<sup>4</sup>

1.7 The Secretary stated that “the footage was approved to be accessed, consistent with the guidelines”<sup>5</sup> but “there may have been an inadvertent and ancillary breach of the statement of purpose” because the CCTV footage “may have captured [the employee] doing other activities in the building besides the one for which the CCTV footage was released”.<sup>6</sup>

1.8 After being told that the breach referred to by the Secretary “may involve” the use of footage of a person or people providing information to him, Senator Faulkner signalled his intention to raise the matter with the President as a matter of privilege. He expressed the view that “It is a serious breach that a senator in this parliament is being spied on in that way as they go about the proper conduct of their duties.”<sup>7</sup>

### **The matters before the committee**

1.9 Against this background, two matters were referred for the committee’s attention:

- (a) whether this use of CCTV images might *improperly interfere* with the free performance of any senators’ duties; and
- (b) whether *disciplinary action* was taken against a person for providing information to a senator.

1.10 The chief concern raised by both Senator Faulkner and Senator Bernardi in their letters to the President is that the use of the CCTV system in these circumstances might deter people from providing information to senators.

1.11 Senator Bernardi noted:

The committee is deeply concerned about the threat such conduct poses to the free performance by a senator of the senator’s duties as a senator. The committee notes that Senator Faulkner has had long periods of membership of the Finance and Public Administration Committee and has, over many years, pursued issues of parliamentary administration through estimates

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3 FPA transcript, 26 May 2014, p. 23.

4 FPA transcript, 26 May 2014, p. 25.

5 FPA transcript, 26 May 2014, p. 23.

6 FPA transcript, 26 May 2014, p. 28.

7 FPA transcript, 26 May 2014, p. 28.

hearings and other inquiries. If this incident is anything to go by, then it appears that no senator can have confidence that they are not the subject of electronic surveillance in Parliament House, a situation which has the potential to deter persons from providing information to senators in the course of their duties.<sup>8</sup>

1.12 In Senator Faulkner's words:

Over the years, I have received unsolicited information from many sources which has assisted me to carry out my duties as a senator. I imagine that numerous senators are also in this position. The value and credibility of inquiries by Senate committees, including legislation committees considering estimates, has been enhanced over many years by the capacity of senators to raise matters as a consequence of information provided to them. Accountability rests on such foundations.

If the provision of information to senators is monitored by electronic surveillance, then neither senators nor people who provide information to them can have any confidence in the security of their transactions. Improper use of electronic surveillance compromises the free performance by a senator of his duties as a senator and therefore represents, in my view, a very serious contempt.<sup>9</sup>

1.13 The possibility that disciplinary action might have been taken against the employee in connection with her provision of information to a senator was raised as an additional concern. Senator Bernardi noted that testimony to the estimates hearing on this element was inconclusive.<sup>10</sup>

### **Role of the committee**

1.14 The role of the committee is primarily inquisitorial. When the Senate refers a matter giving rise to allegations of contempt, it is the committee's role to establish the facts. Over the course of an inquiry, particular allegations or suspects may emerge. These are tested to establish what happened. The final step in the process is to consider whether any particular act may constitute a contempt.

1.15 Pursuant to section 4 of the *Parliamentary Privileges Act 1987*, any conduct may constitute an offence against a House (that is, a contempt) if it "amounts to, 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."

1.16 In considering matters involving allegations of contempt, the committee is guided by the Senate's Privilege Resolutions.<sup>11</sup> Resolution 6 declares that breaches of certain prohibitions – and attempts or conspiracies to do the prohibited acts – may be

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8 Senator Bernardi, Letter, 27 May 2014, p. 2.

9 Senator Faulkner, Letter, 28 May 2014, p. 1.

10 Senator Bernardi, Letter, 28 May 2014, p. 2.

11 Resolutions of the Senate, adopted on 25 February 1988.

treated by the Senate as contempts. The terms of reference for the inquiry draw upon the language of Resolution 6(1), concerning interference with the Senate and senators; and Resolution 6(11), concerning penalties against witnesses.

1.17 The committee is also required to have regard to the criteria specified in Privilege Resolution 3, which focus on an assessment of what action may be 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.”

### **Improper interference with senators’ duties as a possible contempt**

1.18 Privilege Resolution 6, which sets out a non-exhaustive list of matters that the Senate may treat as contempts, starts with the contempt of interference with the Senate or with a senator:

#### **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.

1.19 It is well-established that “improper” in this context does not mean “unlawful” or “unauthorised”, it refers to conduct which has the effect or tendency or tendency of obstructing the Senate or senators carrying out their functions.

1.20 The Senate has generally taken “a robust view as to whether senators have been improperly obstructed”, particularly in relation to conduct involving intimidation, force or threat.<sup>12</sup> Today, interference is as likely to arise from the use of electronic information systems as from, for instance, physical interference or the threat of legal action. In her advice to Senator Faulkner, tabled during the estimates hearing, the Clerk of the Senate cited matters in other jurisdictions involving the diversion of emails and tapping of members’ telephones where contempt findings were considered appropriate.<sup>13</sup> 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.

1.21 The committee’s task here is to determine whether the use of the CCTV system identified in this matter is likely to have the effect or tendency of obstructing senators in their duties as senators. The Privileges Committee has previously stated:

...it is vital for the proper functioning of a house of parliament that information is produced to the maximum extent possible to enable proper decision making. Any obstruction to the free flow of information may be

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12 See 125th report, paragraphs 4.27–4.29.

13 Clerk of the Senate, Advice, 26 May 2014, p. 5.

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regarded as having the effect of substantially obstructing senators in the performance of their functions.<sup>14</sup>

1.22 If people apprehend that their communications with senators may be monitored, this may deter them from providing information to senators. This may, in turn, limit the information available to senators and constrain their capacity to put matters before parliamentary committees.

1.23 These concerns are heightened in this case, as the department charged with administering the CCTV system has been the subject of ongoing Senate committee investigation. The committee recognises the potential for unauthorised use of the CCTV system to affect the Finance and Public Administration committee's oversight of DPS.

1.24 Against this background, the conduct raised by Senator Bernardi and Senator Faulkner could potentially constitute a contempt.

### **The taking of disciplinary action as a possible contempt**

1.25 Privilege Resolution 6 provides:

(11) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of any evidence given or to be given before the Senate or a committee.

1.26 The matter before the committee does not involve a witness, but rather a person communicating with a senator. The protection of people providing information to senators rests on the same principles as the protection of witnesses, but applies in a narrower set of circumstances. These were identified in the committee's 67th report.<sup>15</sup>

1.27 There are two distinct ways in which the provision of information to a senator may be said to be protected by the law of privilege. First, as a legal immunity. The provision of information may be covered by parliamentary privilege if there is a sufficiently direct connection between the provision of information to a senator and the senator's use of it in "proceedings in Parliament", within the meaning of section 16 of the Parliamentary Privileges Act. This is a question for the courts.

1.28 Secondly, the Senate may in some circumstances protect the provision of information with its contempt powers. Where there is a sufficiently direct link between the provision of information and "proceedings in parliament", the Senate may treat the imposition of a penalty on a person who provides information to a senator as a contempt. It did so in the case of Mr Michael Rowley for taking legal action against

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

15 Committee of Privileges, 67th Report, *Possible threats of legal proceedings against a senator and other persons*, September 1997. See also 125th Report, *Parliamentary privilege: Precedents, procedures and practice in the Australian Senate 1966–2005*, December 2005.

Mr David Armstrong, an informant of former Senator O’Chee.<sup>16</sup> As the Clerk notes in her advice to Senator Faulkner, these are separate, but related, questions.<sup>17</sup>

1.29 The Clerk also drew attention to a paper by her predecessor, Harry Evans, entitled “Protection of Persons who Provide Information to Members”, in which he observed that in a case “where interference with the provision of information to a senator clearly had the effect or tendency of hindering a senator in the free performance of the senator’s duties, it would be lawful to treat such interference as a contempt”. That article draws heavily on advice the former Clerk provided to this committee, which was endorsed in the committee’s 67th report.

1.30 It is clear that, in such circumstances, the taking of disciplinary action against a person in connection with the provision of information to a senator may constitute a contempt.

1.31 The committee’s tasks here are to determine: (a) whether the provision of information was sufficiently connected to proceedings to warrant protection; and (b) if so, whether any action was taken against the employee ‘as a result of’ or ‘in connection with’ her providing information to Senator Faulkner.

1.32 The next part of the report outlines the committee’s approach to this inquiry.

## **Conduct of the inquiry**

### ***Background information***

1.33 The committee has before it the transcript of proceedings of the Finance and Public Administration Legislation Committee hearing of 26 May 2014, the letters from Senator Bernardi and Senator Faulkner raising the matter and the advice provided to Senator Faulkner by the Clerk of the Senate, which was tabled at the hearing.

1.34 The committee sought and received background information from the then President of the Senate, Senator the Hon. John Hogg, and the DPS Secretary about the operation of the CCTV system. These were of assistance to the committee in considering the question whether the use of the CCTV system was authorised by, and undertaken in accordance with, the Code of Practice. Members also participated in a tour of some of the security facilities of Parliament House, which was of great value in assisting the committee to understand the architecture and operation of the system. The committee particularly thanks the security staff who assisted in this regard.

1.35 This is not an inquiry about security matters, rather it is about the use of the parliamentary security system for unrelated matters.

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16 67<sup>th</sup> Report. This report is significant, in that it identifies circumstances in which the provision of information to a senator may be protected by the Senate’s contempt jurisdiction. *See also* 125<sup>th</sup> report, at paragraphs 4.79 to 4.84.

17 Clerk of the Senate, Advice, 26 May 2014, p. 4

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***Senator Faulkner's submission***

1.36 The committee wrote to Senator Faulkner to seek further details of the circumstances which gave rise to the terms of reference. Senator Faulkner provided a submission and, after receiving assurances about the confidentiality of sensitive material, provided a volume of correspondence with individuals, including the employee shown in the CCTV images. The committee considers it unnecessary to publish the additional volume of correspondence referred to at this time.

1.37 In his submission, Senator Faulkner reiterated the concerns he raised in his letter to the President:

I believe my capacity to perform my duties as a senator has been impaired irreparably by the inappropriate use of [CCTV] cameras within the parliamentary precinct. I do not accept that my movements, and the movements of the constituents I represent, within the corridors and rooms of this parliament should ever be under surveillance.<sup>18</sup>

1.38 He repeated his contention that the CCTV system has been used in a manner which is not authorised by the Code of Practice:

The only purposes of such cameras and the images they capture, are outlined in paragraph 5 of the Code. These purposes do not include tracking the movements of DPS staff members, or other citizens, properly and lawfully engaging with Senators. In my view, the use of CCTV footage and images for purposes outside the Code of Practice is an improper interference with the free performance of my duties as a senator, and an offence.<sup>19</sup>

1.39 He also reminded the committee of media allegations aired in 2011 about misuse of parliamentary security cameras to try to identify people providing him information in relation to an inquiry into DPS. These were discussed in an estimates hearing in 2012, at which DPS officers assured him there was no substance to the reports. He now submits:

I accepted in good faith the evidence [DPS] officers provided to the Committee. Two years later, evidence has emerged that the alleged improper use of CCTV footage and images has indeed occurred, leading me to be more convinced than not that it also occurred on that earlier occasion.<sup>20</sup>

1.40 As part of the current inquiry, the Privileges Committee asked DPS what the basis was, at the time, for giving the various assurances at that time, and what investigations the department had undertaken to confirm the evidence it had given, and what the outcome of those investigations had been.

The response from the Secretary of DPS, Ms Mills, indicates that the department has no significant records of any such investigation:

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18 Senator Faulkner, submission, p. 1

19 Senator Faulkner, submission, p. 1.

20 Senator Faulkner, submission, p. 3.

I regret to advise that current DPS officers are not in a position to answer these questions, as it is not within the knowledge of our officers and is not (despite extensive searches) reflected in the department's records to any great extent.<sup>21</sup>

### ***Evidence from DPS***

1.41 After considering this background information, the committee sought a submission from DPS. In doing so, the committee asked the DPS Secretary to respond to a number of questions, centring on approval processes under the Code of Practice, and also asked for copies of any internal DPS records relating to the use of the images.

1.42 The committee asked DPS what the authority was for using the CCTV system to investigate staffing matters, and for a copy of any advice DPS had relied on in forming that view. Rather than providing any advice it might have had in its possession at the time, DPS instead commissioned legal advice on the matter which provides a rationale for its actions but not an explanation of its thinking when relevant decisions were made. The advice also addressed the terms of reference more broadly. Elements of that advice appeared to run contrary to the committee's understanding of the powers, privileges and immunities of the Parliament, so the committee sought an assessment of it from the Clerk of the Senate.

### **Outline of report**

1.43 Chapter 2 deals mainly with the evidence provided by DPS. It is convenient to deal separately with the question of the CCTV Code of Practice. This is considered in chapter 3. Chapter 4 deals with the primacy of the powers, privileges and immunities of the Parliament. It also contains the committee's conclusions and recommendations.

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21 Letter to the Chair of the Privileges Committee, 19 September 2014.