

Introduction

1.1 On 18 September 2007, the following matter was referred to the Committee of Privileges on the motion of Senator Nettle:

Whether false or misleading evidence was given to the Legal and Constitutional Affairs Committee or any other Senate committee concerning the Government's knowledge of the rendition of Mr Mamdouh Habib to Egypt, and whether any contempt was committed in that regard.¹

1.2 Senator Nettle had raised the matter with the President of the Senate, Senator the Hon. Alan Ferguson, and, in accordance with standing order 81, the President gave precedence on 17 September 2007 to a notice of motion referring the matter to the committee.² In giving precedence, the President summarised the matter as involving:

...seemingly inconsistent answers given by officers at estimates hearings about the government's knowledge that Mr Mamdouh Habib had been taken to Egypt. Some officers suggested a lack of knowledge or certainty on the part of government that Mr Habib was ever in Egypt, while other answers appeared to indicate a definite knowledge that he had been taken to Egypt.³

1.3 The President noted that the Legal and Constitution Affairs Committee had inquired into the apparent inconsistencies and tabled relevant correspondence on 11 September 2007.⁴ In considering the matter, the President had applied the relevant criteria and concluded that it clearly met those criteria which went to the seriousness of the matter, not the strength of the evidence on which the raising of the matter was based. The President then noted that the Senate and this committee had always taken very seriously any suggestion that misleading evidence had been given to a committee and concluded by outlining the Senate's immediate task, to consider the material laid before it and to determine whether the apparent inconsistencies in the evidence had been sufficiently explained or whether further inquiry by the Privileges Committee was warranted.

1.4 The Senate referred the matter the following day. In a statement the then manager of Government Business in the Senate informed the Senate that there were legal proceedings before the courts on related matters but that, in order to exhaust due process, the reference was not opposed.⁵

1 *Journals of the Senate*, 18 September 2007, p.4415.

2 *Journals of the Senate*, 17 September 2007, p.4377.

3 *Senate Debates*, 17 September 2007, p.1.

4 *Journals of the Senate*, 11 September 2007, p.4329.

5 *Senate Debates*, 18 September 2007, p.47.

Background

1.5 At the estimates hearings of the Legal and Constitutional Legislation Committee in May 2004 and February 2005, senators asked questions about the Australian Government's knowledge of the whereabouts of Mr Mamdouh Habib during late 2001 and early 2002.

1.6 Australian Federal Police Commissioner Michael Keelty gave evidence as follows:

Senator LUDWIG—Did you make any effort to ascertain where he went to after 29 October?

Mr Keelty—No. We are obviously aware that it is alleged that he went to Egypt, but we are unable to confirm that.

Senator LUDWIG—And when did you make those inquiries? Were they recent inquiries or were they made at the same time?

Mr Keelty—When Mr Habib was interviewed on 15 May 2002 in Guantanamo Bay he was unsure himself whether he had been to Egypt. All he knew was that he had been to a place where the people who were dealing with him spoke Egyptian.

Senator LUDWIG—Did the Australian Federal Police make inquiries to ascertain whether he had been in Egypt?

Mr Keelty—No, we did not.

and:

Senator ALLISON—You say there is very little evidence that Mr Habib was in Egypt. Would you expect to see something on his passport? What sort of evidence would you expect to find?

Mr Keelty—I did not say that Mr Habib was in Egypt. The AFP is not in a position to confirm whether Mr Habib was in Egypt. Mr Habib's own words were that, wherever he was, wherever he had been taken to, the people spoke Egyptian.⁶

1.7 The Secretary of the Attorney-General's Department, Robert Cornall AO, gave evidence on 24 May 2004 as follows:

Mr Cornall—My understanding is that we have a great deal of difficulty knowing what if anything occurred in relation to Mr Habib in Egypt because the Egyptians have never acknowledged that he was in their custody. I should point out that Mr Habib is a dual national of both Australia and Egypt.

and:

Mr Cornall—Senator, I will read you my briefing notes on this. They say that inquiries were made about Mr Habib's welfare upon his capture by

6 Legal and Constitutional Legislation Committee, Additional estimates, 15 February 2005, pp.8 and 12.

Pakistan authorities in 2001. The Australian government immediately sought consular access to Mr Habib in Pakistan. Australian officials were granted access to Mr Habib for nonconsular purposes on 29 October 2001 and reported that he showed no signs of physical maltreatment. Before consular access was granted the government became aware that he had likely been moved to Egypt. I do not know how the government became aware that he had been moved to Egypt. Despite numerous requests for access by the government, including at the highest levels, Egypt has never acknowledged it had Mr Habib in its custody.⁷

and again on 14 February 2005:

Senator BOLKUS—Mr Habib has made claims of torture in three environments. Let us start with his travel to Egypt. I know we have gone through some of these questions before but I do not know that we got clear answers. Were we advised that he was going to be taken to another jurisdiction?

Mr Cornall—No, we were not.

Senator BOLKUS—When did we first find out?

Mr Cornall—Sometime after he had been transferred.

Senator BOLKUS—How did we find out?

Mr Cornall—ASIO was the source of information that he had been transferred.

Senator BOLKUS—Did we manage to ascertain how he was transferred?

Mr Cornall—Not that I am aware, no.

Senator BOLKUS—Suggestions that he was taken by plane are new to you, are they? You had no knowledge of them before?

Mr Cornall—I have read them in media reports, but we do not know how he got to Egypt, if that is in fact where he was.

Senator BOLKUS—You still cannot confirm that he went to Egypt?

Mr Cornall—My briefing is that we have never received any confirmation from the Egyptian government that he was in their custody. That is as far as I can take that matter.⁸

1.8 Evidence was also given by Mr Dennis Richardson, then head of ASIO, the lead Australian agency in this matter, to the same committee on 15 February 2005 as follows:

Senator KIRK—When did ASIO become aware that Mr Habib was no longer in Pakistan?

7 Legal and Constitutional Legislation Committee, Budget estimates, 24 May 2004, pp.16 and 17.

8 Legal and Constitutional Legislation Committee, Additional estimates, 14 February 2005, p.8. Further evidence on the same issue is at pp. 9-14 and 18-19 of the committee *Hansard*.

Mr Richardson—We formed a view in mid to late November that he was most likely in Egypt, and that was the basis of the Foreign Affairs representation to the Egyptian authorities for consular access to him. We established to our satisfaction that he was definitely there in February 2002.

Senator KIRK—As I understand it, your information about him most likely being in Egypt in mid to late November came through DFAT rather than through your—

Mr Richardson—No. It was through our own activities.

Senator KIRK—So really at this stage, in mid to late November, ASIO was keeping a watching brief on this gentleman. He was not really of any particular interest to you. You were just keeping an eye on him, so to speak.

Mr Richardson—Mr Habib had been of interest to us for some time. He was even of more interest to us following his presence in Afghanistan before, on and after 11 September 2001.

Senator KIRK—But, upon his transfer or travel to Egypt, ASIO still maintained an interest in him?

Mr Richardson—Yes, most certainly. And we retain an interest in him to this day.

Senator KIRK—But, as I understand it, it was really for DFAT to concern themselves with matters of his welfare, consular access and the like.

Mr Richardson—That is right. I think it is on the public record that DFAT made numerous representations to seek access to him from the time we formed a view that he was most likely there.

Senator KIRK—Which was around February 2002.

Mr Richardson—No. We formed the view that he was most likely there in mid to late November, and we established to our satisfaction that he was definitely there in February 2002.

Senator KIRK—When Mr Habib was moved from Pakistan to Egypt, I understand from what you are saying that ASIO was not notified of that by the Pakistani authorities or by the Egyptian authorities.

Mr Richardson—That is right.

Senator KIRK—You had to make your own inquiries in order to determine his whereabouts.

Mr Richardson—That is right.

Senator KIRK—Is that what normally happens in those circumstances? Is there usually contact with—

Mr Richardson—We had not previously had circumstances of the kind that existed following 11 September 2001 so—

Senator KIRK—It was novel.

Mr Richardson—I am not able to draw a comparison.

Senator KIRK—Is it fair to say that it was DFAT who first became aware of Mr Habib's presence in Egypt or was it ASIO?

Mr Richardson—No, it was ASIO. I think I said in answer to an earlier question that we formed a view in mid to late November that he was most likely in Egypt and that formed the basis of the representations that Foreign Affairs were making to the Egyptian authorities.⁹

1.9 On 11 June 2007, the Australian Broadcasting Corporation transmitted a *Four Corners* program entitled "Ghost Prisoners" which referred to material obtained under the Freedom of Information Act suggesting that the government had concluded that Mr Habib was in Egypt in November 2001. Brief excerpts of text from the documents so obtained were highlighted. These included the following:

- "the Australian Government is aware that Mr Habib is in Egypt, and is in the custody of an Egyptian Agency", claimed to be from a cable or other document "within days of his transfer" (transcript, page 9)
- "has been transferred to Egypt," claimed to be from a cable sent from the Department of Foreign Affairs and Trade on 19 November 2001 (transcript, page 10)
- "removed to the country of his birth," claimed to be from a document sent by the AFP's Islamabad liaison officer to his head office on 19 November 2001 (transcript, page 10)

1.10 Reference was also made to evidence given at estimates hearings by Commissioner Keelty and Mr Cornall. As Senator Nettle described in her letter to the President, the program also contained interviews with former CIA and FBI agents who both opined that it was likely "the Australian Government" would have been informed that Mr Habib had been taken to Egypt.

1.11 After the *Four Corners* program was broadcast, Senator Nettle wrote to the Legal and Constitutional Affairs Committee on 18 June 2007, raising inconsistencies in estimates answers given by Commissioner Keelty and Mr Cornall, and asking the committee to investigate.¹⁰

1.12 The Legal and Constitutional Affairs Committee wrote to Commissioner Keelty and Mr Cornall, inviting them to clarify the apparent inconsistencies in the answers. Although it referred to *apparent* inconsistencies, the committee did not consider that there was any *necessary* inconsistency.¹¹

1.13 Both Commissioner Keelty and Mr Cornall provided responses to the Legal and Constitutional Affairs Committee which considered those responses and was satisfied, except for Senator Nettle,¹² that it had not been given false or misleading

9 Legal and Constitutional Legislation Committee, Additional estimates, 15 February 2005, pp.31-32.

10 Letter from the Chair of the Legal and Constitutional Affairs Committee to the Privileges Committee, dated 11 October 2007. See Appendix 1.

11 *ibid.*

12 Senator Nettle was a participating member of the committee in the 41st Parliament.

evidence.¹³ The committee then tabled the witnesses' responses as additional information on 11 September 2007.¹⁴

1.14 It was at that point that Senator Nettle exercised her right to raise the matter as a matter of privilege under standing order 81.

Conduct of the inquiry

1.15 Following receipt of the reference, the committee wrote to Commissioner Keelty and Mr Cornall, inviting them to respond to the terms of reference and, in particular, to any of the matters canvassed in Senator Nettle's letter to the President raising the matter of privilege. The committee also wrote to the Legal and Constitutional Affairs Committee seeking an account of its consideration of the matter and of its deliberations on the responses it received from Commissioner Keelty and Mr Cornall. Copies of this correspondence, and the responses, are included in Appendix 1. All responses were received within the timeframes requested by the committee.

1.16 By the time the 41st Parliament was prorogued in October 2007, the committee had not met to consider the responses. The committee was reappointed in February 2008 and, with a predominantly new membership, considered all material before it afresh. As in the majority of cases it has considered, the committee was able to reach its findings on the papers and did not need to convene a public hearing.

1.17 Senator Payne was the chair and, subsequently, a member of the Legal and Constitutional Affairs Committee in the 41st Parliament and, in accordance with this committee's usual practice when members have had an interest in the matters under inquiry, did not participate in the deliberations on this report.

Consideration of issues

Responses from Commissioner Keelty and Mr Cornall

1.18 The committee thanks Commissioner Keelty and Mr Cornall for their responses. Mr Cornall provided the committee with a clear and succinct restatement of his position, accompanied by a comprehensive set of extracts from committee transcripts, answers to questions on notice and ministerial press statements on the issue.

1.19 In essence, Mr Cornall has consistently maintained that while the government believed that Mr Habib had been taken to Egypt, there had never been any official acknowledgement of this by the Egyptian Government. As secretary of the Attorney-General's Department (which was not the lead agency in this matter), Mr Cornall had

13 *ibid.*

14 *Journals of the Senate*, 11 September 2007, p.4329. See Appendix 1.

relied on briefings from portfolio agencies or another department for the information he provided to the Legal and Constitutional Affairs Committee and its predecessor.

1.20 Commissioner Keelty also maintained that the evidence he had given was, to the best of his knowledge, true and accurate. The committee notes that Commissioner Keelty has been assiduous in providing corrections to his evidence to the Legal and Constitutional Affairs Committee when necessary. In his response to this committee, the Commissioner helpfully referenced each statement to the estimates evidence, including to an answer to a question taken on notice at the Budget estimates hearing on 23 May 2007 which was apparently still in the minister's office.¹⁵

1.21 This answer referred to a meeting on 22 October 2001 in Pakistan attended by the AFP and US authorities at which the possibility of transporting Mr Habib to Egypt, the country of his birth, was canvassed. This information had not previously been provided by the AFP over several rounds of estimates, including questioning by several different senators concerned to uncover the truth about Mr Habib's fate following his detention in Pakistan. Despite the evident concern of senators, it apparently took a very specific question to elicit the particular information.¹⁶ And despite the deadline of 6 July 2007 set by the Legal and Constitutional Affairs Committee for receipt of answers to questions taken on notice at the 2007 Budget estimates hearings,¹⁷ that committee did not receive the answer until Commissioner Keelty read it into the record at the committee's additional estimates hearing on 18 February 2008, seven months after the deadline had passed.¹⁸

1.22 Caretaker period and change of government notwithstanding, in this committee's opinion a delay of such duration in providing an answer to a question on notice, coupled with a tendency on the part of witnesses at estimates hearings to provide only so much information as is specifically requested, illustrates the kind of performance that reinforces a common perception that extracting answers from officers at estimates hearings can be like drawing blood from a stone. The committee does not intend any particular criticism of individual officers, but it regards this episode as symptomatic of a more widespread malaise.

The Four Corners program

1.23 In the committee's view, none of the "revelations" made in the *Four Corners* program is inconsistent with the estimates evidence given by Commissioner Keelty and Mr Cornall. The opinions given by former CIA and FBI agents about the Australian Government's likely knowledge of the matter are just that. Moreover, the

15 Letter to the Privileges Committee, dated 26 October 2007, footnote 1 on page 2.

16 The question was asked by Senator Ludwig, Legal and Constitutional Affairs Committee, Budget estimates, 23 May 2007, p.67. The transcript shows that the question was a reiteration of a question asked in 2005 that had not been satisfactorily answered.

17 Legal and Constitutional Affairs Committee, *Budget Estimates Report*, June 2007, p. xi.

18 Legal and Constitutional Affairs Committee, Additional estimates, 18 February 2008, p.34; copy subsequently provided to the committee as an answer to question no. 79.

program did not show the evidence of former ASIO head, Mr Dennis Richardson, quoted extensively above, which had already placed on the public record ASIO's suspicion in November 2001 that Mr Habib had been taken to Egypt, followed by its satisfaction by February 2002 that Mr Habib was "definitely there." That ASIO was certain of Mr Habib's presence in Egypt and that the Egyptian Government never acknowledged this officially are not mutually exclusive propositions.

The contempt of knowingly providing false or misleading evidence

1.24 Paragraph 12(c) of Privilege resolution 6 (which sets out a non-exhaustive list of matters constituting contempts) 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.

Furthermore, Privilege resolution 3 (criteria to be taken into account when determining matters relating to contempt) requires the committee to take into account whether a person who committed an act which may be held to be a contempt:

- (a) knowingly committed that act, or
- (b) had any reasonable excuse for the commission of that act.

1.25 The committee has no evidence before it to support any contention that either Commissioner Keelty or Mr Cornall intended to mislead the Legal and Constitutional Legislation Committee or its successor. An essential element of the contempt, therefore, cannot be established.

Evidence that leaves committees with a misleading impression

1.26 The committee has previously indicated on several occasions that evidence which leaves a committee with a misleading impression of the facts is misleading evidence for purposes of paragraph 12(c) of Resolution 6. Although the Legal and Constitutional Affairs Committee, except for Senator Nettle, was satisfied after considering further responses from Commissioner Keelty and Mr Cornall, that it had not received false or misleading evidence, this committee notes that Senator Nettle continued to assert that the evidence of those officers was misleading.

1.27 This committee has now had the benefit of additional further responses from the officers concerned and has been able to assess the evidence against the aspects of the *Four Corners* program highlighted by Senator Nettle when raising the matter of privilege. It has also had the benefit of the Legal and Constitutional Affairs Committee's conclusions.

1.28 Given the relative directness of Mr Richardson's evidence on behalf of ASIO, it is readily apparent that the lack of certainty on the part of both Commissioner Keelty and Mr Cornall as to whether Mr Habib had been taken to Egypt may have left the committee itself uncertain. However, the AFP was not the agency that established that Mr Habib was in Egypt and it did not make inquiries to ascertain whether he had been. As Commissioner Keelty explained in his response to this committee:

The AFP mandate regarding Mr Habib was to determine whether he had committed any offence contrary to Australian law;

It was not and is not the role of the AFP to monitor treatment or movement of Australian persons in the custody of a foreign government;¹⁹

Similarly, as Mr Cornall explained to the committee, the Attorney-General's Department had no operational involvement in the matter.²⁰ Neither agency had direct knowledge of Mr Habib's whereabouts after he was no longer in Pakistan. The evidence of both officers reflected the jurisdictional limits of their agencies' responsibilities and, in view of the position taken by a foreign government, the couching of the situation in terms of a *belief* that Mr Habib was probably in Egypt was not unreasonable. On the other hand, ASIO, an agency within the Attorney-General's portfolio, had expressed certainty about Mr Habib's whereabouts, and it is therefore puzzling to the committee that the departmental secretary's estimates brief was equivocal on this point.

1.29 Overall, however, the committee concludes that, although in certain respects the evidence of Mr Cornall and Commissioner Keelty was equivocal, it was not in fact misleading given the state of these officers' knowledge at the time and the terms of the relevant questions addressed to them.

1.30 In all the circumstances, the committee is satisfied that no contempt should be found.

Conclusion and finding

1.31 The committee concludes that neither Commissioner Keelty nor Mr Cornall knowingly gave false or misleading evidence to the Legal and Constitutional Affairs Committee in respect of their knowledge of whether Mr Mamdouh Habib had been taken to Egypt. The committee therefore **finds** that no contempt was committed in this regard.

Additional observations

1.32 Although it has not found that any contempt was committed in this case and has not concluded that evidence given by Mr Cornall and Commissioner Keelty was misleading, the committee takes this opportunity to make some general observations about the quality of evidence given by officers at estimates hearings. The issues of delay in answering questions taken on notice and the narrow focus of some answers have already been adverted to in the context of this case. The committee is also of the view that senators are entitled to expect evidence given at estimates to reflect the Government's collective knowledge and considered position on any particular matter. A situation where committees have to piece together the fragmented, and potentially

19 Letter to the Privileges Committee, dated 26 October 2007. See Appendix 1.

20 Letter to the Privileges Committee, dated 11 October 2007. See Appendix 1.

conflicting, views of different agencies, let alone agencies within the same portfolio, is not acceptable.

1.33 These general observations are made in the context of the committee's accumulated experience in the matter of possible false or misleading evidence. This is the seventeenth report of the committee relating, in whole or part, to whether false or misleading evidence was given to the Senate or a Senate committee,²¹ and the sixth concerning evidence given to committees examining estimates.²² While the committee was unable formally to find contempt in any of these matters it has regularly criticised unhelpful, unforthcoming or disingenuous responses to questions posed by senators and has expressed concern about apparent lack of awareness on the part of witnesses, including those representing departments, agencies and statutory authorities, of their obligations to the parliament and its committees. Two consequences of this concern have been:

- the inclusion in hearings of Senate committees and joint committees administered by the Senate of reminders to witnesses that false or misleading evidence may constitute a contempt of the Senate; and
- the requirement in 2000 for a response from each Commonwealth department and portfolio agency on what steps had been taken to comply with a resolution of the Senate calling for agency heads and SES officers to undertake study of the principles governing the operation of Parliaments, the accountability of departments, agencies and authorities to the Houses of Parliament and their committees, and the rights and responsibilities of witnesses before those committees.²³

1.34 The committee has continued to monitor the need for a further round of responses from agencies on steps taken to comply with this resolution. As it noted in its *119th Report*, the committee welcomed efforts by the Australian Public Service Commission to include courses on parliamentary accountability in its training calendar and to monitor and comment on the incidence of participation therein by SES officers, in its annual *State of the Service Report*.²⁴ For the past two years, however, that report has not included this information and the committee would encourage the Public Service Commissioner to reconsider its omission.

21 For analysis of the first 15 of these reports, see *125th Report*, PP3/2006. The sixteenth case was the subject of the committee's *131st Report*, PP 171/2007.

22 The previous five cases were the subjects of the following reports: *15th Report*, PP 461/1989; *26th Report*, PP 438/1990; *46th Report*, PP 43/1994; *64th Report*, PP 40/1997; *119th Report*, PP 177/2004.

23 Resolution originally adopted on 21 October 1993, on the recommendation of the committee in its *42nd Report*, PP 85/1993; reaffirmed on 1 December 1998 on the recommendation of the committee in its *73rd Report*, PP 118/1998; the responses were contained in the committee's *89th Report*, PP 79/2000. See also *119th Report*, PP 177/2004, recommendation relating to senior officers of Telstra, adopted 5 August 2004.

24 *119th Report*, PP 177/2004, p.7-8.

1.35 In the meantime, the committee intends to keep the quality of public service evidence to estimates hearings, in particular, under review.

George Brandis
Chair