



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.

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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, *Odgers' 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.