

## **Appendix 3**

### **Correspondence to Minister for Defence**





THE SENATE

**STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE**

18 December 2009

Senator the Hon John Faulkner  
Minister for Defence  
M1 41  
Parliament House  
Canberra ACT 2600

Dear Minister

**A Defence directive and Parliamentary privilege**

I am writing to you to express the committee's concern about a Defence publication—DEFGRAM no. 781/2009, dated 7 December 2009.

This document, issued by the Office of the Secretary and Chief of the Defence Force, is intended to inform ADF personnel about Parliamentary Committees and submissions and witnesses. Unfortunately, the committee is strongly of the view that this document provides advice that is unsound; a misrepresentation of the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (the Guidelines); and may constitute a breach of the *Parliamentary Privileges Act 1987*.

The committee has sought advice from Dr Rosemary Laing, Clerk of the Senate, on this matter. The Clerk has confirmed the committee's assessment that the contents of this document are misleading and inaccurate. In effect, they may involve a potential restriction on the ability of the committee to obtain the evidence it needs to discharge its functions and, therefore a potential improper interference with the free exercise by the committee of its authority.

A copy of Dr Laing's advice is enclosed for your information. I would draw your attention to her conclusions, including her view that:

The Government Guidelines which are cited in the directive do not support the crude pronouncements made in the directive (p. 2).

Two instructions in the DEFGRAM are particularly worrying:

- *the Minister must approve all Defence involvement in, or support to, parliamentary committees; and*
- *Under no circumstances should material be provided to parliamentary committees or inquiries without clearance from the Minister* (italics in the original).

In paragraph 2.14, the Guidelines state clearly that 'Submissions should be cleared to appropriate levels within the department, and normally with the Minister, in accordance with arrangements approved by the Minister(s) concerned'. Defence's directive, however, fails to take account of paragraph 2.5 of the Guidelines:

Where a committee is inquiring into the personal actions of a Minister (or official) and seeks information from officials, there may be circumstances where it is not appropriate for the requirements set out in paragraph 2.14 for clearance of evidence to be followed.

Defence's directive fails to acknowledge the distinction made by the Guidelines between inquiries into matters of policy and administration and inquiries into individual conduct.

The Guidelines also make clear in paragraph 2.3 that they should be read in conjunction with the Senate Parliamentary Privilege Resolutions and the *Parliamentary Privileges Act 1987*. Both are clear on the protection of witnesses from undue influence. For example, the *Parliament Privileges Act 1987*, 12(1) states:

A person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given before a House or a committee, or induce another person to refrain from giving any such evidence.

Clearly, Defence's directive has ignored paragraphs 2.5 and 2.3 of the Guidelines.

The committee is particularly aware of the tensions that arose between the department, the Minister's office and the select committee inquiring into 'a certain maritime incident'. You may recall, in that case an issue arose over the control exercised by the Minister's office over access to information central to the committee's inquiry. The committee would not like to see the same problems emerge.

In this regard, Defence's directive has direct and immediate implications for the committee's inquiry into equity and diversity health checks in the Royal Australian Navy. This inquiry has a strong investigative aspect requiring the committee to obtain evidence on the behaviour of officers from those involved in the incidents and to test the veracity of that evidence. Without doubt, deterring or dissuading others from contributing to the committee's work, or unduly influencing their evidence, would impede the committee's ability to perform its duties as directed by the Senate.

The committee notes that during the estimates hearing on 21 October 2009, the committee received assurances from you that if the committee were to hold an inquiry into incidents on HMAS *Success*, it would have your 'full cooperation'. The Chief of the Defence Force and Vice Admiral Crane gave similar undertakings.

Defence's DEFGRAM seems to run counter to these assurances.

The committee takes the view that the publication of this DEFGRAM was not a trivial matter and could be seen to obstruct substantially the committee in the performance of its functions and hence a potential contempt. It is also of the opinion that the misleading content of the DEFGRAM must be corrected. It seeks your cooperation to ensure that this takes place without delay.

A failure to act could invite unfortunate consequences. As Dr Laing notes at the end of her advice: 'Failure by Defence to correct the directive will almost certainly lead to matters of privilege arising in the course of the HMAS *Success* inquiry'.

The committee looks forward to receiving a prompt response to the concerns raised in this letter.

Yours sincerely

Senator Russell Trood  
Chair, Foreign Affairs, Defence and Trade References Committee