



D23/23871

28 May 2023

Senator Jacqui Lambie  
Suite S1.47  
Parliament House

Dear Senator

### Letters relating to the Brereton review

You have asked for advice, ahead of Defence estimates this week, about letters to which access has been denied under a recent FOI decision. The letters are identified as follows:

- Any letters to units, since the Brereton review was completed, that related to rescinding medals/awards/citations.
- Any letters to individual service personnel (since the Brereton review was completed) that related to rescinding medals/awards/citations.

I also understand that you are happy to receive such letters with personal information redacted.

In response to notice through the FADT committee of your request that such letters be provided, Defence has indicated to the committee:

- That officials do not intend to bring the letters to the hearing
- That the letters relate to an ongoing process and contain personal information about individuals who would rightly anticipate such matters would be addressed in confidence and any disclosure of that communication would unreasonably infringe their privacy.
- That the disclosure of the letters could infringe a pending decision by Government.
- That Defence will respond as fully as possible to your questions at the Committee. However, if pressed to disclose the letters in a Parliamentary setting, a Public Interest Immunity claim will be made.

Against that background you are seeking advice about possible public interest immunity claims, and in particular whether a claim founded on 'unreasonable invasion of privacy' could reasonably be made in relation to a letter to a unit. You also ask whether letters to current and former ADF members could reasonably be redacted (e.g. names, contacts details etc) in a way that would extinguish any grounds for a PII claim based on unreasonable invasion of privacy.

The first thing to note is that it is for the committee in the first instance to determine whether to accept a public interest immunity claim. Senators and witnesses at estimates are aware of the process for raising and determining such claims, which is set out in a [resolution from 13 May 2009](#). The fact that documents might be sought through an FOI process, or that access to documents has been denied though an FOI decision is irrelevant to the determination by the committee.

The Senate has accepted that there are circumstances in which a PII claim based on unreasonable invasion of privacy might be accepted. On this point, Odgers Australian Senate Practice says:

It is in the public interest that private information about individuals not be unreasonably disclosed. It is usually self-evident whether there is a reasonable apprehension of this form of harm. It is also usually possible to overcome the problem by disclosing information in general terms without the identity of those to whom it relates. [14th ed., p. 665]

In other words, Senate practice supports the idea that harm to the public interest can be overcome by providing documents with personal information redacted.

The same principle probably applies in relation to letters to a unit, rather than to individual personnel. It may be the case that letters to 'a unit' could still contain personally identifying information. You would be able to test this question with officials – that is, ask them to explain how a general letter might nonetheless be considered to invade someone's privacy – and again to test whether this could be overcome by redacting material.

One aspect of PII claims which is not usually examined during estimates is whether a document can be provided as confidential or in camera evidence without causing harm to the public interest: paragraph (4) of the 2013 resolution. Estimates proceedings must be conducted in public session, so providing a document to the committee means it must be published. However, you may wish to test whether the letters you are seeking can be provided to the committee in camera in a non-estimates setting.

As noted above, Defence has asserted that the letters 'contain personal information about individuals who would rightly anticipate such matters would be addressed in confidence and any disclosure of that communication would unreasonably infringe their privacy'. That assertion doesn't directly answer the question whether the personnel involved would consider that the provision of the letters (or, provision of the letters with redactions) would unreasonably invade their privacy. Does Defence know this to be the case, or are they simply assuming this to be the case? There have been occasions in the past in which officials have sought permission from people to disclose material that might otherwise raise privacy concerns. Again, you may wish to test this question at estimates.

For completeness I should add that the assertion that 'disclosure of the letters could infringe a pending decision by Government' would not appear to provide the basis for a public interest immunity claim. Further, if officials intend to raise a PII claim on the basis that the letters 'relate to an ongoing process', they will need to provide more information on the apprehended harm to the public interest that might be involved, here, for instance, whether it amounts to prejudice to legal proceedings or a law enforcement investigation. There is information about these potential grounds in Odgers, at pp. 662-4.

Given that Defence has already foreshadowed a possible public interest immunity claim, the committee should be able to expect that – if the claim is to be made – then officials ought be able to articulate the basis of the claim at the hearing, rather than simply taken the question on notice. It is, of course, for the Minister (rather than officials) to make the PII claim.

Let me know if I can be of any further assistance.

Kind regards,

(Richard Pye)