Administrative Appeals Tribunal

14 July 2021

Senator the Hon Sarah Henderson
Chair
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Henderson,

Public interest immunity claim in respect of questions asked by Senator the Hon Kim Carr

I write to you in relation to certain questions asked of the Administrative Appeals Tribunal (AAT) by Senator the Hon Kim Carr at the 2020–21 Additional Estimates and 2021–22 Budget Estimates. As Registrar, I am the accountable authority for the AAT which is an independent statutory agency. At the Budget Estimates hearing conducted by the Legal and Constitutional Affairs Legislation Committee on 27 May 2021, the Attorney-General indicated that, as an independent statutory officer holder, the Registrar may make a public interest immunity claim.

In accordance with the Order of the Senate dated 13 May 2009, I wish to claim public interest immunity in relation to the answers to certain questions or parts of questions asked by Senator Carr identified in this letter. The grounds for the claims are set out below.

Questions seeking information on individual members in relation to results against benchmarks, numbers of applications finalised and numbers of hours worked

Senator Carr asked the following questions requesting the following information:

- LCC-AE21-78 and LCC-BE21-145:
  - details of how 35 specified members assigned to the Migration and Refugee Division performed against their yearly benchmarks for 2018–19, 2019–20 and 2021–21, and
  - the names of all individual members who did not satisfy their benchmarks for 2018–19 and 2019–20 with an explanation as to why
- LCC-AE21-80, LCC-AE21-81, LCC-BE21-61, LCC-BE21-62, LCC-BE21-147 and LCC-BE21-148:
  - the names of each full-time and part-time member who did not finalise a single application or application by decision in 2018–19, 2019–20 and 2020–21, and

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  - the names of, and the number of applications finalised by, each full-time and part-time member who finalised fewer than 25 applications or applications by decision in 2018–19, 2019–20 and 2020–21
- LCC-AE21-82 and LCC-BE21-149:
  - the name of each part-time member who did not work a single hour, worked fewer than 10 hours or worked fewer than 24 hours in 2018–19, 2019–20 and 2020–21
- LCC-AE21-83 and LCC-BE21-150:
  - the number of applications finalised and the number of applications finalised by decision by 29 specified members in 2017–18, 2018–19, 2019–20 and/or 2020–21.

The AAT considers that disclosure of the information sought which identifies individual members would not be in the public interest because it would be an unreasonable disclosure of personal information and have an adverse impact on the proper and efficient conduct of the operations of the Tribunal.

Disclosing the number of applications finalised by a particular member, the number of hours worked by a particular part-time member and, for those members assigned to the Migration and Refugee Division who have been allocated a yearly benchmark, the extent to which a member has met or exceeded their benchmark in a period would not give a complete or accurate representation of the member's work. As explained in the AAT's responses to LCC-AE21-78, LCC-AE21-80, LCC-AE21-81 and LCC-AE21-83, a range of factors affects these matters, including some that may be beyond the control of the member.

There is clear potential for the information to be misrepresented and result in harm to individual members and more broadly to the AAT as an institution.

Publication of the requested information, which is not otherwise publicly available, will result in simplistic judgements being made about the competence, diligence and/or effort of individual members which do not reflect a fair or proper understanding of their overall work and performance. It will unreasonably expose individual members to misinformed commentary. This could have an impact on the professional standing and reputation of members, and presents a genuine risk of negatively impacting on the mental health and morale of members.

Disclosure of the requested information will also result in an excessive focus on the volume of applications that individual members finalise. There is a genuine risk of members unduly prioritising finalisations, driving decision-making behaviours that could compromise the review process and achievement of the AAT's statutory objective set out in section 2A of the *Administrative Appeals Tribunal Act 1975*.[1]

[1] In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that is accessible, fair, just, economical, informal and quick, is proportionate to the importance and complexity of the matter and promotes public trust and confidence in the decision-making of the Tribunal.

Ultimately, the publishing of this information will undermine the objective of promoting public trust and confidence in the decision-making of the Tribunal.

The Tribunal must be accountable in relation to its expenditure, operations and performance, including providing aggregated information on the performance of the membership in addition to information that is otherwise publicly available, such as published AAT decisions and decisions of the courts on appeal. We are unaware of any other courts, tribunals or statutory agencies being required to publicly release detailed information of the kind requested relating to individual statutory office holders. The requested information does not accurately reflect the AAT's performance in relation to its statutory objective nor the work undertaken by members.

The number of applications a member may finalise or the extent to which a member was able to meet their benchmark in a period are only 2 of several indicia relevant to a holistic assessment of a member's workload, output and performance. Other indicia include:

- the complexity and diversity of the member's caseload
- timeliness of reviews
- the way in which the member conducts hearings and other case events and the quality of their decision-making
- the number and outcomes of further reviews, appeals and judicial review applications, and
- the contribution that the member makes towards the management of the Tribunal, projects and professional development.

The AAT has arrangements in place across our divisions for allocating work to the members and for Division Heads, Executive Members and Practice Managers to monitor and review their workload and performance which take into account how best to meet the needs of the Tribunal in dealing with the caseload as well as the indicia identified above. The Members' Professional Development Program includes the following components for assessing how members are performing in their role:

- a periodic evaluation and development scheme for newer members which has a focus on giving feedback and identifying areas where a member may benefit from further development
- an appraisal scheme for members approaching the end of their term which, in addition to providing a further opportunity for feedback and support, assists the President to make recommendations to the Attorney-General about member reappointments.

It is well recognised that best practice in relation to performance management processes is that they be undertaken confidentially. Moreover, the AAT operates in circumstances where it does not have the usual powers of an employer in relation to its members. For example, the grounds on which a member's appointment may be terminated under the *Administrative Appeals Tribunal Act 1975* (AAT Act) are, quite appropriately, limited given the independent nature of the office. This means that our processes must necessarily rely to a greater extent on a collaborative approach to achieve their purpose and promote the AAT's statutory objective.

The disclosure of the requested information about individual members would undermine the AAT's processes for managing the workload and performance of members. Making this

selective and potentially misleading information about select individuals publicly available, will impact on the effectiveness of the confidential and collaborative engagement processes the AAT undertakes with members in relation to setting and monitoring their workload and supporting their performance on a holistic basis. In circumstances where the Tribunal has no direct power to compel participation in evaluation or appraisal processes, there is a material risk that members will be less willing to participate, thereby undermining the Tribunal's ability to effectively manage members and detracting from the quality of the review process.

The publication of information relating to finalisations, hours worked and/or results against benchmarks for individual members that may be harmful to a person's standing could also deter some candidates from seeking appointment or reappointment as members of the AAT.

The AAT considers that the harms outlined above that will or could result from the disclosure of the requested information in relation to individual members outweigh the public interest in disclosing the information.

Questions seeking information on individual full-time members in relation to leave taken

Senator Carr asked the following questions requesting the following information:

- LCC-BE21-60
  - the names of full-time members who have taken more than 4 weeks of recreation leave in 2018–19, 2019–20 and 2020–21
- LCC-BE21-146
  - the names of full-time members who took paid leave (other than recreation, sick or carers' leave) or unpaid leave in 2018–19, 2019–20 and 2020–21, the amount of leave the member took and why the member took the leave.

The AAT considers that it would be an unreasonable disclosure of personal information to provide names or other information that would identify for individual members details of paid or unpaid leave they have taken.

Full-time members of the AAT may be granted different types of paid and unpaid leave:

- paid recreation leave of 4 weeks per year of service accruing on a pro rata basis as determined by the Remuneration Tribunal
- leave without loss of pay for public holidays observed by the Australian Public Service in the location in which the member is based
- personal leave (sick and carers' leave), including paid leave of 20 days per annum, and
- other paid and unpaid leave, including community service leave, compassionate leave, defence reserve leave, long service leave and maternity leave in accordance with legislation, parental leave and other types of leave in special circumstances.

Like full-time employees, full-time members of the AAT accumulate paid recreation, personal and long service leave and are entitled to take that leave which contributes to the maintenance of their health and wellbeing. Qualifying members are entitled to take maternity and parental leave. Members may also seek and be granted other types of paid or unpaid

leave related to their particular circumstances. In circumstances where this leave has been approved by the AAT and does not give rise to any question in relation to unauthorised absences, publicly disclosing the types and amounts of leave and reasons for that leave for individual members would involve an unreasonable intrusion into their personal affairs. It could also result in the disclosure of more sensitive personal information where leave has been taken because of adverse health or other intimate personal circumstances of the member or their family. The information is not otherwise publicly available, and there would not be a reasonable expectation that this type of information at this level of individual detail would be open to public scrutiny as a corollary of membership.

The AAT considers that the public interest in a reasonable expectation of privacy for individual members relating to their leave outweighs the public interest in the disclosure of the requested information. The AAT is responsible for ensuring that members' leave is managed in accordance with applicable entitlements. Information about types and amounts of approved leave has been and can be provided without identifying particular members.

Accordingly, I claim public interest immunity in relation to the answers identified above on the grounds and for the reasons expressed. In our view, the harm that could result from the disclosure of the requested information identifying particular members outweighs the public interest in its disclosure.

Yours sincerely,

Sian Leathem
Registrar

THE SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

12 August 2021

Senator the Hon Michaelia Cash
Attorney-General

Parliament House
CANBERRA ACT 2600

Sent via email:
CC: parliamentary@ag.gov.au

Dear Attorney-General,

In response to a number of written questions on notice submitted by Senator the Hon Kim Carr during Budget estimates 2021-22, the Administrative Appeals Tribunal (AAT) has advanced a claim of public interest immunity (PII). The PII claim cites the unreasonable disclosure of personal information/breach of privacy and the adverse impact on the proper and efficient conduct of the operations of the AAT as grounds for refusing to disclose the information sought. The PII claim is attached in full. You will also find attached advice from the Clerk of the Senate, sought by Senator Carr.

Senate Procedural Order of Continuing Effect No. 10 states that a refusal to provide information to a committee on the basis of harm to the public interest ought to be referred to the relevant minister. It is not apparent from the AAT's PII claim that the claim has been referred to you.

Therefore, consistent with Procedural Order of Continuing Effect No. 10, the Legal and

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Constitutional Affairs Legislation Committee is bringing the AAT's PII claim to your attention, for your consideration and advice.

Yours sincerely,

Senator the Hon Sarah Henderson
Chair

Administrative Appeals Tribunal

14 July 2021

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Chair
Senate Legal and Constitutional Affairs Legislation Committee
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Accordingly, I claim public interest immunity in relation to the answers identified above on the grounds and for the reasons expressed. In our view, the harm that could result from the disclosure of the requested information identifying particular members outweighs the public interest in its disclosure.

Yours sincerely,

Sian Leathem
Registrar

DEPARTMENT
OF THE SENATE

Clerk of the Senate
Parliament House, Canberra ACT 2600

D21/75796

5 August 2021

Senator the Hon Kim Carr

Parliament House

By email:

Dear Senator Carr

Public interest immunity claims raised by AAT

You have asked for advice about a purported claim of public interest immunity (PII) made by the Registrar of the Administrative Appeals Tribunal (AAT) in respect of questions you asked during the Budget estimates round in the Legal and Constitutional Affairs Legislation Committee earlier this year.

In essence, your request goes to two matters:

- whether it is appropriate or in accordance with Senate precedent for the AAT to make the PII claim
- whether there are precedents for the Senate accepting or rejecting PII claims of the kinds raised in the Registrar's letter.

These are discussed below.

Who may make a PII claim?

Odgers' Australian Senate Practice identifies that the Senate has repeatedly asserted by resolution the principle that:

> while statutory authorities may not be subject to direction or control by the executive government in their day-to-day operations, they are accountable to the Senate for their expenditure of public funds and have no discretion to withhold from the Senate information concerning their activities. [14th ed., p. 671]

This principle underpins in particular the accountability of statutory authorities to the Senate through its estimates process. As you know, any questions going to the operations or financial positions of agencies are within the scope of questions that may be asked at estimates. Your questions going to the performance of members of the AAT in their duties clearly come within the established scope of estimates questions as they go to the operations of the tribunal.

At the same time, Odgers notes that "it has not been settled whether the executive government may seek to make a claim of public interest immunity in respect of, or on behalf of, statutory authorities or statutory office-holders." [p. 671] Practice in this area continues to develop, particularly in relation to agencies responding to orders for the production of documents directed to them.

The practice in relation to Senate committees is determined by the Senate's order of May 2009 on the process for raising and determining PII claims. That order also envisages that there will be circumstances in which it will be appropriate for statutory officers, rather than portfolio ministers, to make a PII claim. However, the order specifies in paragraph (8) that it is for the minister in the first instance to form a view on whether a claim "should more appropriately be made by the head of an agency, by reason of the independence of that agency from ministerial direction or control".

It is not clear that the Attorney-General has been consulted or given the opportunity to form a view whether it is appropriate that the Registrar make such a claim in the current matter. The only precedent of which I am aware of this matter arising as between an Attorney-General and a Registrar of the AAT is the example from Odgers included in your request for advice:

> In 2017, the Registrar of the Administrative Appeals Tribunal (AAT) sought to resist a request to produce an email attachment to her briefing notes. While the Registrar of the AAT is a statutory office-holder, **the Attorney-General advised the committee that it was for him to make a claim of public interest immunity and that on this occasion he would not make one**. On that basis, the document was provided to the committee: 2017-18 Budget estimates hearing of the Legal and Constitutional Affairs Legislation Committee, 25/5/2017, transcript p. 130. [Odgers supplement, 2021; **your emphasis**]

There are other circumstances – involving for instance the Official Secretary to the Governor-General, the Australian Parliamentary Service Commissioner – in which ministers or their equivalents have readily accepted the right of the office-holder to make such claims. In other matters – I recall one involving the Human Right Commission – there has been a difference of views between office-holders and ministers as to the responsibility, and the recommendation to the committee has been to make its assessment based on the degree of control (or lack thereof) the minister ordinarily exercises over the office. It is hard to consider the Registrar of the AAT as having the level of independence that might automatically suggest that it is not for the minister to make such claims. The position might be different if individual AAT members were making claims, given their greater statutory independence.

It is for the committee in the first instance (and ultimately for the Senate) to determine whether to accept a PII claim. Accordingly, it is also for the committee (and then the Senate) to determine whether in all the circumstances it is appropriate for the Registrar rather than the Minister to make such a claim. The committee may wish to seek the Attorney-General's view on the matter. However, as noted above, the only specific precedent on the matter has the committee accepting in 2017 that such claims are a matter for the attorney rather than the registrar.

You have also asked whether it is appropriate for the Registrar to make PII claims in relation to information concerning other statutory office-holders, noting the status of members of the AAT.

I am not aware of any precedents for such claims being made, let alone accepted.

To summarise, by reference to your specific questions:

1. having regard to precedent, whether it is appropriate for the Administrative Appeals Tribunal – rather than the Attorney-General on the Tribunal's behalf – to raise this particular public interest immunity claim in the first place **– as noted above, on the only occasion on which this specific matter has been raised, the committee accepted the Attorney-General**
2. noting that the supposedly "private information" referred to by the Registrar of the Tribunal is not information about the Registrar, or about the Tribunal, but about other individual statutory officer-holders, whether there is precedent for the Senate accepting – or rejecting – a public interest immunity claim made by a statutory agency in relation to the private information of individual statutory officer-holders – **I am not aware of any such precedents**

Are there precedents for the claims made?

Before turning to your specific questions here, it is worth noting the Senate's requirements for public interest immunity claims. That is, they are generally required to be raised on established grounds – termed "potentially acceptable" grounds throughout the relevant part of Odgers; and they must specify the harm to the public interest that might be occasioned by the provision of the information sought. In a non-estimates setting, consideration should also be given to the question whether the harm to the public interest could be avoided by the provision of the information in camera. Legislation committees have sometimes found ways to receive such information in camera, for instance by initiating a reference into the performance of the agency in question.

The grounds raised by the Registrar are that disclosure of the information sought which identifies individual members would not be in the public interest because:

- it would be an unreasonable disclosure of personal information and
- it would have an adverse impact on the proper and efficient conduct of the operations of the Tribunal.

Neither of these is a ground that has previously been accepted by the Senate. They are discussed in turn below.

"disclosure of personal information"

Although the Senate has not accepted "unreasonable disclosure of personal information" as the ground for PII claims, it has accepted the somewhat similar "unreasonable invasion of privacy". Odgers notes here that "it is in the public interest that private information about individuals not be unreasonably disclosed." [14th ed., pp. 664-5] However, the context referred to relates to infringing the privacy of people who have provided the information sought, for instance on the basis that it was collected on the condition of confidentiality. It is difficult to see how that applies in the current matter.

As you point out in your request for advice, it is difficult to imagine the circumstances in which information about the performance of individual statutory office-holders such as members of the AAT could be held to be private information.

There may be a case for the AAT to argue that the provision of specific information in relation to one of your questions – requiring the reasons why members took leave – to amount to an unreasonable invasion of privacy in particular cases. However, that is not an argument the Registrar has made. The blanket claim that the provision of information in response your questions would unreasonably disclose private information does not appear to me to have a firm basis.

I might also make an observation about statements made throughout the Registrar's letter that, for example, "There is a clear potential for the information to be misrepresented and result in harm to individual members and more broadly to the AAT as an institution". There is nothing to prevent the AAT in providing the information sought to also provide contextual information to mitigate this harm.

"adverse impact on the … operations of the Tribunal"

I am not aware of the Senate ever having accepted anything along these lines as the ground for a public interest immunity claim.

To summarise, again, by reference to your specific questions:

3. whether there is precedent for the Senate accepting – or rejecting – a public interest immunity claim in relation to information about the performance of individual statutory office holders (such as a member of the Administrative Appeals Tribunal) is "private information" **– I am not aware of any such precedents**

4. more generally, whether there is precedent for the Senate accepting – or rejecting – a public interest immunity claim in relation to information about the performance of individual statutory office holders (such as a member of the Administrative Appeals Tribunal) – **I am not aware of any such precedents**

5. whether there is precedent for the Senate accepting – or rejecting – a public interest immunity claim in relation to information about the performance of individual statutory office holders on the basis that disclosure of the information would "have an adverse impact on the proper and efficient conduct of the operations" of the relevant statutory agency – **I am not aware of any such precedents**

6. noting that the Tribunal's claim that disclosure of the information would have an "adverse impact on the proper and efficient conduct of the operations" is based on a prediction of how the information might be interpreted, or reported on, whether there is precedent for the Senate accepting – or rejecting – a public interest immunity claim where the supposed "harm to the public interest" is the potential for information to be misrepresented (and not that the disclosure of the information would, in itself, cause harm to the public interest) – **I am not aware of any such precedents; there is nothing to prevent the agency providing contextual information to mitigate this supposed harm.**

Parliamentary oversight of the AAT

Finally, I note the point that you have raised about section 13 of the *Administrative Appeals Tribunal Act 1975*, which confers on the Parliament a role in overseeing the performance of individual tribunal members. That section contains what is a fairly standard provision by which the appointment of office-holders may be terminated (for instance, as here, by the Governor-General) by resolution of each House of the Parliament, on grounds of proved misbehaviour or incapacity.

Although this is a standard provision, it is rare for such matters to be put before the Houses. The most recent case involved the then Employment minister commissioning a report on the performance of a Deputy President of the Fair Work Commission to table in the Senate, to enable the Senate to consider whether his appointment would be terminated. Although the matter did not proceed, following the Deputy President's resignation, it does support the proposition that information about the performance of statutory office holders is not "private information", and that there are circumstances in which it is well within the public interest to provide such information to the Senate.

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

Yours sincerely,

(Richard Pye)

Senator the Hon Michaelia Cash
Attorney-General
Minister for Industrial Relations
Deputy Leader of the Government in the Senate

Reference: MC21-043415

Senator the Hon Sarah Henderson
Chair
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: LegCon.Sen@aph.gov.au

Dear Senator Henderson Sarah

Thank you for the Committee's letters dated 12 August 2021 and 17 August 2021 with respect to public interest immunity (PII) claims by the Administrative Appeals Tribunal (AAT) over Questions on Notice asked by Senator Carr during the 2021-22 Budget Estimates.

In relation to your letter of 12 August 2021 and the reference to Senate Procedural Order of Continuing Effect No. 10, I refer to my statement at the Estimates hearing on 27 May 2021 that the AAT is an independent agency and it is entirely appropriate that the AAT should make their own decisions concerning PII claims over operational matters. I have forwarded the Committee's letter to the AAT and asked that due consideration be given to the claim of public interest immunity, taking into account the advice of the Clerk of the Senate enclosed in that correspondence.

With respect to the Committee's letter of 17 August 2021, I have also asked the AAT to respond to the Committee in due course, providing detailed reasons for its decision to make a PII claim, should it wish to make such a claim.

Thank you for bringing these issues to my attention. I trust this information is of assistance.

Yours sincerely

Senator the Hon Michaelia Cash
8 / 9 / 2021

Perth
44 Outram Street, West Perth WA 6005
Ph 08 9226 2000

Canberra
Parliament House, Canberra ACT 2600
Ph 02 6277 7300

THE SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

28 September 2021

Ms Sian Leathem
Registrar
Administrative Appeals Tribunal
GPO Box 9955
SYDNEY NSW 2001

Sent via email
CC: parliamentary@ag.gov.au

Dear Ms Leathem,

In response to a number of written questions on notice submitted by Senator the Hon Kim Carr during Budget Estimates 2021-22, the Administrative Appeals Tribunal (AAT) advanced a claim of public interest immunity (PII). The PII claim cited the unreasonable disclosure of personal information/breach of privacy and the adverse impact on the proper and efficient conduct of the operations of the AAT as grounds for refusing to disclose the information sought.

The committee unanimously rejects the AAT's claim of PII and insists that the AAT answers the outstanding questions on notice, in accordance with the rules applicable to Senate Estimates, by 8 October 2021 (noting that the answers were initially due by 16 July 2021).

The committee does not consider that the AAT outlined acceptable grounds in support of its PII claim. The committee suggests that the AAT familiarises itself with the potentially acceptable grounds for PII claims outlined in *Odgers' Australian Senate Practice* and also summarised in the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*.

During its deliberations on the matter, the committee considered advice from the Clerk of the

Senate. That advice is attached for the AAT's information.

Yours sincerely,

Senator the Hon Sarah Henderson
Chair

DEPARTMENT
OF THE SENATE

Clerk of the Senate
Parliament House, Canberra ACT 2600

D21/75796

5 August 2021

Senator the Hon Kim Carr

Parliament House

By email:

Dear Senator Carr

Public interest immunity claims raised by AAT

You have asked for advice about a purported claim of public interest immunity (PII) made by the Registrar of the Administrative Appeals Tribunal (AAT) in respect of questions you asked during the Budget estimates round in the Legal and Constitutional Affairs Legislation Committee earlier this year.

In essence, your request goes to two matters:

- whether it is appropriate or in accordance with Senate precedent for the AAT to make the PII claim
- whether there are precedents for the Senate accepting or rejecting PII claims of the kinds raised in the Registrar's letter.

These are discussed below.

Who may make a PII claim?

Odgers' Australian Senate Practice identifies that the Senate has repeatedly asserted by resolution the principle that:

> while statutory authorities may not be subject to direction or control by the executive government in their day-to-day operations, they are accountable to the Senate for their expenditure of public funds and have no discretion to withhold from the Senate information concerning their activities. [14th ed., p. 671]

This principle underpins in particular the accountability of statutory authorities to the Senate through its estimates process. As you know, any questions going to the operations or financial positions of agencies are within the scope of questions that may be asked at estimates. Your questions going to the performance of members of the AAT in their duties clearly come within the established scope of estimates questions as they go to the operations of the tribunal.

At the same time, Odgers notes that "it has not been settled whether the executive government may seek to make a claim of public interest immunity in respect of, or on behalf of, statutory authorities or statutory office-holders." [p. 671] Practice in this area continues to develop, particularly in relation to agencies responding to orders for the production of documents directed to them.

The practice in relation to Senate committees is determined by the Senate's order of May 2009 on the process for raising and determining PII claims. That order also envisages that there will be circumstances in which it will be appropriate for statutory officers, rather than portfolio ministers, to make a PII claim. However, the order specifies in paragraph (8) that it is for the minister in the first instance to form a view on whether a claim "should more appropriately be made by the head of an agency, by reason of the independence of that agency from ministerial direction or control".

It is not clear that the Attorney-General has been consulted or given the opportunity to form a view whether it is appropriate that the Registrar make such a claim in the current matter. The only precedent of which I am aware of this matter arising as between an Attorney-General and a Registrar of the AAT is the example from Odgers included in your request for advice:

> In 2017, the Registrar of the Administrative Appeals Tribunal (AAT) sought to resist a request to produce an email attachment to her briefing notes. While the Registrar of the AAT is a statutory office-holder, **the Attorney-General advised the committee that it was for him to make a claim of public interest immunity and that on this occasion he would not make one**. On that basis, the document was provided to the committee: 2017-18 Budget estimates hearing of the Legal and Constitutional Affairs Legislation Committee, 25/5/2017, transcript p. 130. [Odgers supplement, 2021; **your emphasis**]

There are other circumstances – involving for instance the Official Secretary to the Governor-General, the Australian Parliamentary Service Commissioner – in which ministers or their equivalents have readily accepted the right of the office-holder to make such claims. In other matters – I recall one involving the Human Right Commission – there has been a difference of views between office-holders and ministers as to the responsibility, and the recommendation to the committee has been to make its assessment based on the degree of control (or lack thereof) the minister ordinarily exercises over the office. It is hard to consider the Registrar of the AAT as having the level of independence that might automatically suggest that it is not for the minister to make such claims. The position might be different if individual AAT members were making claims, given their greater statutory independence.

It is for the committee in the first instance (and ultimately for the Senate) to determine whether to accept a PII claim. Accordingly, it is also for the committee (and then the Senate) to determine whether in all the circumstances it is appropriate for the Registrar rather than the Minister to make such a claim. The committee may wish to seek the Attorney-General's view on the matter. However, as noted above, the only specific precedent on the matter has the committee accepting in 2017 that such claims are a matter for the attorney rather than the registrar.

You have also asked whether it is appropriate for the Registrar to make PII claims in relation to information concerning other statutory office-holders, noting the status of members of the AAT.

I am not aware of any precedents for such claims being made, let alone accepted.

To summarise, by reference to your specific questions:

1. having regard to precedent, whether it is appropriate for the Administrative Appeals Tribunal – rather than the Attorney-General on the Tribunal's behalf – to raise this particular public interest immunity claim in the first place **– as noted above, on the only occasion on which this specific matter has been raised, the committee accepted the Attorney-General**
2. noting that the supposedly "private information" referred to by the Registrar of the Tribunal is not information about the Registrar, or about the Tribunal, but about other individual statutory officer-holders, whether there is precedent for the Senate accepting – or rejecting – a public interest immunity claim made by a statutory agency in relation to the private information of individual statutory officer-holders – **I am not aware of any such precedents**

Are there precedents for the claims made?

Before turning to your specific questions here, it is worth noting the Senate's requirements for public interest immunity claims. That is, they are generally required to be raised on established grounds – termed "potentially acceptable" grounds throughout the relevant part of Odgers; and they must specify the harm to the public interest that might be occasioned by the provision of the information sought. In a non-estimates setting, consideration should also be given to the question whether the harm to the public interest could be avoided by the provision of the information in camera. Legislation committees have sometimes found ways to receive such information in camera, for instance by initiating a reference into the performance of the agency in question.

The grounds raised by the Registrar are that disclosure of the information sought which identifies individual members would not be in the public interest because:

- it would be an unreasonable disclosure of personal information and
- it would have an adverse impact on the proper and efficient conduct of the operations of the Tribunal.

Neither of these is a ground that has previously been accepted by the Senate. They are discussed in turn below.

"disclosure of personal information"

Although the Senate has not accepted "unreasonable disclosure of personal information" as the ground for PII claims, it has accepted the somewhat similar "unreasonable invasion of privacy". Odgers notes here that "it is in the public interest that private information about individuals not be unreasonably disclosed." [14th ed., pp. 664-5] However, the context referred to relates to infringing the privacy of people who have provided the information sought, for instance on the basis that it was collected on the condition of confidentiality. It is difficult to see how that applies in the current matter.

As you point out in your request for advice, it is difficult to imagine the circumstances in which information about the performance of individual statutory office-holders such as members of the AAT could be held to be private information.

There may be a case for the AAT to argue that the provision of specific information in relation to one of your questions – requiring the reasons why members took leave – to amount to an unreasonable invasion of privacy in particular cases. However, that is not an argument the Registrar has made. The blanket claim that the provision of information in response your questions would unreasonably disclose private information does not appear to me to have a firm basis.

I might also make an observation about statements made throughout the Registrar's letter that, for example, "There is a clear potential for the information to be misrepresented and result in harm to individual members and more broadly to the AAT as an institution". There is nothing to prevent the AAT in providing the information sought to also provide contextual information to mitigate this harm.

"adverse impact on the … operations of the Tribunal"

I am not aware of the Senate ever having accepted anything along these lines as the ground for a public interest immunity claim.

To summarise, again, by reference to your specific questions:

3. whether there is precedent for the Senate accepting – or rejecting – a public interest immunity claim in relation to information about the performance of individual statutory office holders (such as a member of the Administrative Appeals Tribunal) is "private information" **– I am not aware of any such precedents**

4. more generally, whether there is precedent for the Senate accepting – or rejecting – a public interest immunity claim in relation to information about the performance of individual statutory office holders (such as a member of the Administrative Appeals Tribunal) – **I am not aware of any such precedents**

5. whether there is precedent for the Senate accepting – or rejecting – a public interest immunity claim in relation to information about the performance of individual statutory office holders on the basis that disclosure of the information would "have an adverse impact on the proper and efficient conduct of the operations" of the relevant statutory agency – **I am not aware of any such precedents**

6. noting that the Tribunal's claim that disclosure of the information would have an "adverse impact on the proper and efficient conduct of the operations" is based on a prediction of how the information might be interpreted, or reported on, whether there is precedent for the Senate accepting – or rejecting – a public interest immunity claim where the supposed "harm to the public interest" is the potential for information to be misrepresented (and not that the disclosure of the information would, in itself, cause harm to the public interest) – **I am not aware of any such precedents; there is nothing to prevent the agency providing contextual information to mitigate this supposed harm.**

Parliamentary oversight of the AAT

Finally, I note the point that you have raised about section 13 of the *Administrative Appeals Tribunal Act 1975*, which confers on the Parliament a role in overseeing the performance of individual tribunal members. That section contains what is a fairly standard provision by which the appointment of office-holders may be terminated (for instance, as here, by the Governor-General) by resolution of each House of the Parliament, on grounds of proved misbehaviour or incapacity.

Although this is a standard provision, it is rare for such matters to be put before the Houses. The most recent case involved the then Employment minister commissioning a report on the performance of a Deputy President of the Fair Work Commission to table in the Senate, to enable the Senate to consider whether his appointment would be terminated. Although the matter did not proceed, following the Deputy President's resignation, it does support the proposition that information about the performance of statutory office holders is not "private information", and that there are circumstances in which it is well within the public interest to provide such information to the Senate.

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

Yours sincerely,

(Richard Pye)