



AUSTRALIAN SENATE

CLERK OF THE SENATE

PARLIAMENT HOUSE
CANBERRA A.C.T. 2600
TEL: (02) 6277 3350
FAX: (02) 6277 3199
E-mail: clerk.sen@aph.gov.au

rl.let.17073

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Dr Kathleen Dermody
Secretary
Standing Committee on Foreign Affairs, Defence and Trade
The Senate
Parliament House
CANBERRA ACT 2600

Dear Dr Dermody

DEFENCE DIRECTIVE ON DEALINGS WITH PARLIAMENTARY COMMITTEES

You have asked for advice on the Department of Defence directive on “Parliamentary Committees: Defence Submissions and Witnesses”.

At best, the directive is a misrepresentation of the *Government Guidelines for official witnesses before Parliamentary Committees and related matters* (November 1989). At worst, it represents a potential improper interference with the free exercise by a committee of its authority and, therefore, a possible contempt under resolution 6(1) of the Senate’s Privilege Resolutions, dated 25 February 1988.

The directive is premised on the discredited view that officers of the Commonwealth, be they public servants or ADF members, are answerable to parliament only indirectly, through their ministers. This view is presumably based on the well known doctrine of ministerial responsibility, whereby ministers are accountable to parliament for the actions of the agencies they administer. However, it ignores the inquiry powers granted to the Commonwealth Houses under section 49 of the Constitution. The power to call for persons, papers and records was an undoubted power inherited from the Commons House of Parliament of the United Kingdom under section 49 of the Constitution. As noted in Chapter 2 of *Odgers’ Australian Senate Practice*, 12th ed., 2008, pages 59 to 61, there are some possible limitations on the inquiry power of the Commonwealth Houses. It may be confined to inquiries into subjects within the legislative power of the Commonwealth and it may not extend to the ability to summon members of other Houses (including of a state or territory legislature). These matters have not been adjudicated in Australia.

There is no doubt, however, that Defence employees of whatever category are subject to the inquiry power and may be individually summoned by a parliamentary committee, subject to any claim of public interest immunity that may be accepted by the relevant House. Public servants have been issued with subpoenas in particular circumstances and particular officers have been directed to appear before committees by resolution of the Senate. As a matter of

practice, however, Senate committees do not normally summon Commonwealth public servants or ADF members, but ask the relevant ministers to send the relevant officers.

This practice does not justify the overly simplistic position taken in the directive and expressed in such statements as the following:

... the Minister must approve all Defence involvement in, or support to, parliamentary committees. (emphasis in original)

From time to time, a committee may approach Departmental officers directly either to provide material or attend as a witness ... Departmental officers should not deal directly with parliamentary committee members or staff.

Under no circumstances should material be provided to parliamentary committees or inquiries without clearance from the minister. (emphasis in original)

Clearance of proof Hansard is usually done in consultation with, and through Ministerial and Parliamentary Reporting (MPR). Similarly, if you need to provide a formal correction or clarification of your evidence this should be done in consultation with, and through, MPR as there are established procedures that must be followed for this to occur.

The practices described in these extracts all involve a potential restriction on the ability of a committee to obtain the evidence it needs to discharge its functions and, therefore, a potential improper interference with the free exercise by a committee of its authority. Practices such as these by the then Minister for Defence were the subject of explicit criticism in the report of the Select Committee on A Certain Maritime Incident as adding “a new level of complexity and red tape” (Foreword, p. xiv). My advice is that they may also have much more serious implications.

The last extract is particularly concerning as it interposes mandatory bureaucratic procedures between a witness and a committee in respect of evidence that needs to be corrected or clarified. A witness who does not provide corrections to, or clarification of, their evidence to the relevant committee at the earliest opportunity may be vulnerable to an allegation that the witness has misled the committee, a very serious matter for any person and a potential contempt. If the witness’s attempt to correct or clarify his or her evidence is seen to be subject to departmental interference, the responsible officers may be vulnerable to an allegation of improper interference with a witness, which may also be treated as a contempt.

The Government Guidelines which are cited in the directive do not support the crude pronouncements made in the directive. The Guidelines are directed for the most part at inquiries by parliamentary committees into matters of policy or administration. For these kinds of inquiries the Guidelines envisage that ministerial clearance will be sought. There are obvious exceptions to this, such as submissions made by independent statutory officers. Inquiries involving particular kinds of issues may also involve consultation with other agencies and their ministers. The Guidelines distinguish, however, between inquiries into matters of policy and administration and inquiries into individual conduct; for example, an inquiry by a committee of privileges that may lead to a finding of contempt. For such

inquiries, the Guidelines acknowledge that there may be special circumstances and procedures applying:

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 para 2.14 for clearance of evidence to be followed. (Note also that the Senate resolutions provide that a witness may apply to have assistance from counsel during the course of a hearing (r.1.14 and r.1.15). See para 2.42. (Guidelines, paragraph 2.5)

To give an example, such an inquiry may involve an investigation of the conduct of ministerial staff and whether particular communications with departmental officers took place. In these circumstances it would be most inappropriate for the department to clear its submission with the minister whose staff were under investigation or to provide copies of its submission to the minister's office. The Committee of Privileges dealt with just such a situation in its most recent report (the 142nd Report) and was forced to criticise the Treasury Secretary for taking such action. When the Treasury Secretary provided legal advice to the committee to justify his actions, the committee found that the legal advice failed to take into account the only relevant paragraph of the Guidelines (quoted above). Moreover, the committee found that the legal advice was wrong, reflected an ignorance of Senate practice and procedure, and was based on an erroneous view of the committee's function (in other words, it missed the point that the committee was inquiring into individual conduct, not matters of policy or administration).

Such is the case with the directive, which fails to acknowledge the distinction made by the Guidelines between inquiries into matters of policy and administration, and inquiries into individual conduct. According to the directive, the same blanket rule applies regardless of the circumstances: "*under no circumstances should material be provided to parliamentary committees or inquiries without clearance from the minister*". This is plainly wrong, and I would be very surprised indeed if the Minister for Defence, Senator the Hon John Faulkner, a former member of the Select Committee on A Certain Maritime Incident and a former distinguished Chair of the Senate Committee of Privileges, had personally authorised that directive.

Just how wrong the directive is may be illustrated by asking what would happen to a person who breached it. Say an official in the Department of Defence responded to an inquiry made on behalf of the Foreign Affairs, Defence and Trade Legislation Committee by providing a routine answer to a question, taken on notice at an estimates hearing, directly to the secretariat. On the face of it, this action would breach the directive and the department may well take disciplinary action against the official as a consequence. The department's action could clearly be raised as a matter of privilege for investigation of the potential contempt of a possible penalty inflicted on a witness on account of evidence given to a committee. As the Committee of Privileges found in its recent 141st Report into a possible penalty against a witness to the Legal and Constitutional Affairs References Committee:

A person's right to communicate with the parliament and its committees is an untrammelled right, overriding all other considerations. (paragraph 1.23)

No departmental directive can diminish this right.

An organisation as large and complex as the ADF and the Department of Defence must have sound administrative processes in place to coordinate its multiple activities, relationships and obligations. In my view, however, the directive is not a sound administrative process but an invitation for trouble. It is no doubt well-intentioned, but it is a heavy-handed reaction to the challenge of coordinating such matters within Defence, and it is not well-informed. The potential impact of the directive may be particularly significant for the current inquiry by the Senate Foreign Affairs, Defence and Trade References Committee into “an equity and diversity health check in the Royal Australian Navy – HMAS Success”, whose terms of reference will require the examination of individual conduct, a kind of inquiry envisaged by the Guidelines but ignored by the directive.

The references committee may therefore wish to raise these concerns directly with the Minister for Defence or the Chief of the Defence Force. Failure by Defence to correct the directive will almost certainly lead to matters of privilege arising in the course of the HMAS Success inquiry.

Please let me know if I can provide any further assistance.

Yours sincerely

(Rosemary Laing)