

The Senate

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Foreign Affairs, Defence and Trade  
References Committee

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Report on Parliamentary Privilege—possible  
interference in the work of the committee

Inquiry into matters relating to events on HMAS  
Success

March 2010

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# **Report on parliamentary privilege**

## **Inquiry into matters relating to events on HMAS *Success***

### **Referral of inquiry and terms of reference**

1.1 On 26 November 2009, the Senate referred matters relating to incidents that occurred on board HMAS *Success* and subsequent events to the Foreign Affairs, Defence and Trade References Committee for inquiry and report by 18 March 2010. During the initial stage of the inquiry, the Department of Defence published a document that, in the committee's view, may have been in contempt of the Senate. In this report, the committee is concerned only with this possible breach of parliamentary privilege.

### **Conduct of inquiry**

1.2 The committee advertised its inquiry on its website and in the *Australian* calling for submissions to be lodged by 21 December 2009. It should be noted that this inquiry was different from most inquiries undertaken by the committee in that it was inquiring into the administrative processes within Defence that started with an equity and diversity health check on board HMAS *Success*. The committee was seeking information on a range of matters including but not limited to:

- the reasons and factual evidentiary basis for the ship's Commanding Officer resolving to land a Chief Petty Officer and two Petty Officers (the senior sailors) at Singapore on 9 May 2009 from *Success* and the circumstances of that landing and removal from the ship including whether the Commanding Officer acted under the direction of any superior officer;
- whether the senior sailors were informed of the full nature of the allegations and factual evidentiary basis for the subsequent landing in a timely fashion or at all, and whether procedural fairness was provided to those senior sailors;
- the circumstances and events that led to the Commanding Officer of HMAS *Success* addressing members of the crew in relation to the landing of the senior sailors, whether the Commanding Officer referred to the senior sailors by stating words to the effect of 'there was a rotten core on this ship and the core has now been removed' and if so, the extent that those comments may have prejudiced any subsequent inquiry;
- whether the Inquiry Officer as appointed pursuant to terms of reference, dated 15 May, and as set out in Minute S1804843, dated 10 July 2009, declined to interview any relevant witnesses in circumstances where the senior sailors were prohibited from attending *Success* and or contacting any of the ship's company;
- the way in which the inquiry into the events on *Success* was conducted, whether the method of questioning witnesses and gathering evidence was conducted according to the principles of justice, whether the inquiry process

2830 No. 102—24 November 2009 was free from any perception of bias, and whether any witnesses were threatened with disciplinary or other action during the course of giving evidence;

- whether the senior sailors requested access to evidence gathered during the inquiry into the events on *Success*, whether any such request was denied, and whether any subsequent finding is reasonable in the circumstances;
- the facts and circumstances of the treatment of the Legal Officer (the lawyer) assigned to the management and defence of the case of the senior sailors including any threats, bullying, adverse conduct and prejudice generally, including any threat of posting to Western Australia, and whether any such conduct constituted an attempt to compromise the lawyer's capacity to represent the best interests of the senior sailors without fear or favour; and
- the knowledge and awareness of the ship's Commanding Officer, the Australian Defence Force Investigative Service investigators and the broader naval chain of command of the facts and circumstances relating to the Channel 7 News reports on 4 July and 7 July 2009 (the media reports) and the dates and times of such personnel being availed of such knowledge and awareness.

1.3 The nature of this inquiry meant that the committee was not only seeking a contribution from Defence but also from a range of ADF members who had direct involvement in, or knowledge of, the events under investigation. People in a position to assist the committee would most likely include the Commanding Officer of HMAS *Success* and his superiors; those responsible for authorising, planning, conducting and reviewing the equity and diversity health check; the three sailors landed from the ship in Singapore; the legal officer representing the three sailors; and those associated with the Investigating Officer Inquiry. In its correspondence to the Minister for Defence (the Minister) and Chief of the Defence Force (CDF), the committee made clear its intention to contact such people. Indeed, at the beginning of the inquiry, the committee actively sought the department's help in identifying those most likely to be of assistance to the committee. In its letter to the Minister and the CDF, the committee requested that:

Through the department, all persons known to be concerned with, or directly affected by, the findings of the equity and health check on board HMAS *Success* and subsequent events are notified of the committee's inquiry and of the committee's call for submissions.<sup>1</sup>

1.4 The committee also sought the Minister's support to obtain documentation relevant to its inquiry. For example, to help the committee obtain necessary background information before the inquiry process started in earnest, it asked for a timeline of events leading to the equity and diversity health check on HMAS *Success*

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1 Chair of the Foreign Affairs, Defence and References Trade to the Minister for Defence, 27 November 2009.



and subsequent events. The committee also indicated that it would like to be provided with all documentation relevant to the committee's terms of reference. The committee understood that some of this material may have to be treated in strict confidence and suggested that any request for evidence to be received *in camera* should be clearly indicated.

1.5 During the first week in December 2009, the committee also wrote directly to a range of people believed to have been involved in matters covered by the terms of reference, drawing their attention to the inquiry and inviting them to make written submissions. Naturally, because of the nature of the inquiry, they included serving ADF personnel.

### **A matter of privilege**

1.6 Having actively sought the department's cooperation, the committee was disturbed to learn that Defence had taken action that, in the committee's view, effectively deterred ADF personnel from contacting it about matters relating to this inquiry. This is the matter of parliamentary privilege and possible contempt of the Senate that the committee considers below.

1.7 At this stage, it is important to highlight the distinction between an inquiry into the conduct of personnel where the committee is attempting to ascertain facts that transpired in the workplace and an inquiry into government policy or departmental engagement in, or contribution to, implementing policy. By necessity in the former, the committee would seek assistance from relevant individuals who would likely provide evidence based on their workplace experience. In this case, any individual who has relevant information would be entitled to communicate with the committee directly and freely as an ADF member and without any influence from the department. In these instances, however, the individual is only representing his or her personal view or offering his or her particular interpretation of events. In the second case, where the committee is seeking a departmental view, Defence would coordinate a whole-of-department response, normally requiring the minister's approval, and present this to the committee as Defence's official position. An understanding of the difference between official and personal capacity is a critical issue for the committee's consideration.

### ***DEFGRAM 781/2009***

1.8 The committee first became concerned when a Defence publication, issued on behalf of the Office of the Secretary and Chief of the Defence Force, came to its attention on 10 December 2009. This document, DEFGRAM no. 781/2009, dated 7 December 2009, was published on Defence's intranet. It was intended to remind staff about 'the correct procedures to be followed in their dealings with parliamentary committees, especially when called upon to prepare a submission to a committee, or to appear as a witness'. Unfortunately, it conveyed a clear message that restrictions would apply to any contribution that Defence personnel wished to make to the committee. Two instructions in the DEFGRAM were particularly worrying:

- *the Minister must approve all Defence involvement in, or support to, parliamentary committees; and*
- all material prepared for submission to parliamentary committees should be cleared by a Senior Executive Band Two or two-star officer, or above, prior to it being submitted to the Minister for approval. *Under no circumstances should material be provided to parliamentary committees or inquiries without clearance from the Minister* (italics in the original).<sup>2</sup>

1.9 The DEFGRAM also referred to the official guidelines for Commonwealth Officers (which includes military personnel) attending as witnesses to a parliamentary committee (the Guidelines). The committee considered these Guidelines closely. Paragraph 2.14 of the Guidelines states 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, failed 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.<sup>3</sup>

### ***Committee responsibility***

1.10 The Senate charged the committee, not Defence, with the responsibility to inquire into and report on matters on board HMAS *Success*. It follows logically that it was the committee's duty and role, not Defence's, to decide on the information that it needed and should be provided with and the witnesses that should be examined. Clearly, as noted earlier, this inquiry was different from most others: it was not inquiring into matters of policy or the implementation of policy but the conduct of specific individuals identified in the terms of reference. In these circumstances, it would be most inappropriate for the department and/or minister to attempt to dissuade ADF members from approaching the committee on the matters under inquiry or to endeavour to vet or clear submissions from them. It would constitute an improper interference with a witness providing evidence to the committee.

1.11 Concerned that the publication of the DEFGRAM would deter ADF members from assisting it with its inquiry and thus could be seen as a possible contempt of the Senate, the committee sought advice from the Clerk of the Senate. She confirmed the committee's preliminary assessment that the contents of the document were misleading and inaccurate, stating further:

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2 Department of Defence, 'Parliamentary Committees: Defence submissions and witnesses', DEFGRAM no. 781/2009, DEFGRAM no. 781/2009, DEFGRAM no. 781/2009, 7 December 2009. For a full copy of this DEFGRAM (with contact details removed), see Appendix 1.

3 *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, November 1989, G:/LEGCO?OFF/LWIT/89GUIDE.DOC, <http://dpmc.gov.au/guidelines/index.cfm> (accessed 3 March 2010).

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.<sup>4</sup>

1.12 The Clerk of the Senate noted that no directive can diminish a person's right to communicate with the Parliament and its committees: 'an untrammelled right, overriding all other considerations'. In her view:

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.<sup>5</sup>

1.13 The committee was satisfied that Defence's directive failed to acknowledge the distinction made by the Guidelines between inquiries into matters of policy and administration and inquiries into individual conduct. Furthermore, paragraph 2.3 in the Guidelines also makes clear that they should be read in conjunction with the Senate Parliamentary Privilege Resolutions and the *Parliamentary Privileges Act 1987* (the Act). Both are clear on the protection of witnesses from undue influence. For example, subsection 12(1) of the Act 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.<sup>6</sup>

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4 Dr Rosemary Laing, Clerk of the Senate to the Foreign Affairs, Defence and Trade References Committee, 16 December 2009. A copy of this letter is at Appendix 2.

5 Dr Rosemary Laing, Clerk of the Senate to the Foreign Affairs, Defence and Trade References Committee, 16 December 2009.

6 See also excerpt from procedural orders and resolutions of the Senate of continuing effect, Resolutions expressing Opinions of the Senate—Privilege, Interference with witnesses. It states that, the Senate—

- a) reaffirms the long-established principle that it is a serious contempt for any person to attempt to deter or hinder any witness from giving evidence before the Senate or a Senate committee, or to improperly influence a witness in respect of such evidence; and
- b) warns all persons against taking any action which might amount to attempting to improperly influence a witness in respect of such evidence. (13 September 1984 J.1129).

1.14 Paragraph 2.40 of the Guidelines reinforces the message that it is an offence to influence improperly another person in the giving of evidence to a parliamentary committee. Clearly, Defence's directive ignored paragraphs 2.3, 2.5 and 2.40 of the Guidelines and appeared to be at odds with the Act.

1.15 After careful consideration of the Act, relevant Senate resolutions and the Clerk's advice, the committee wrote to the Minister on 18 December 2009 informing him in clear and certain terms of its concerns. It stated that the committee was strongly of the view that DEFGRAM 781/2009 provided advice that was '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 letter explained that the committee had sought advice from Dr Rosemary Laing, Clerk of the Senate.<sup>7</sup>

1.16 The first matter before the committee was whether Defence's directive would have an adverse effect on its work, constituting a possible contempt of the Senate. With this in mind, it informed the Minister that:

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.

1.17 The second critical issue for the committee was the extent to which the directive interfered with its ability to carry out its duties—whether it posed a serious impediment to its work requiring immediate remedial action. In this regard, the committee had no doubt, informing the Minister that:

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'.

1.18 The observation of one submitter supports the committee's apprehension that the first DEFGRAM was intended to deter ADF members from free and unfettered communication with the committee. He stated:

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<sup>7</sup> For copy of letter, see Appendix 3.

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It is highly unlikely to be coincidental timing for the release of this DEFGRAM and the commencement of this Senate inquiry.<sup>8</sup>

1.19 On 22 December 2009, the committee received a response from the Minister, which informed the committee that the DEFGRAM had been withdrawn as soon as it came to his attention which was prior to the receipt of the committee's letter. The Minister took the opportunity to assure the committee that it would have his 'full cooperation into its inquiry into incidents on HMAS *Success*'.<sup>9</sup>

### **DEFGRAM 804/2009**

1.20 The committee did not know at the time that a second DEFGRAM, dated 17 December 2010, had been issued. This document, DEFGRAM no. 804/2009, drew a direct connection with the work of the committee with its title 'Defence's involvement in the Senate inquiry being undertaken into alleged inappropriate events that occurred in HMAS *Success*'. The contents also linked it directly to the earlier DEFGRAM 781/2009. This second document was also to remind all members of Defence of their obligations when participating in parliamentary committee inquiries and hearings in their official capacity. It said:

To this end we direct staff to the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* of November 1989. DEFGRAM 781/2009—*Parliamentary Committees: Defence submissions and witnesses* of 07 December 2009 provides specific guidance as to how the Government Guidelines will be implemented in Defence.<sup>10</sup>

1.21 The DEFGRAM explained that its predecessor 781/2009 related only to '*professional involvement* as a member of Defence'. It went on to state that 'You are, of course, able to freely participate in parliamentary committee activities as a private citizen'.<sup>11</sup> Having somewhat addressed the committee's concerns, the DEFGRAM then went on to say that if Defence personnel were considering becoming involved in the committee's inquiry or would like to discuss the inquiry further they were asked to contact the Ministerial and Executive Support Branch.

1.22 At least by acknowledging the right of Defence personnel to participate in a private capacity, the DEFGRAM was a slight improvement. It did little, however, to

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8 *Confidential submission 1*, p. 8.

9 Senator the Hon John Faulkner to the Chair, Foreign Affairs, Defence and Trade References Committee, 22 December 2009.

10 Department of Defence, 'Defence's involvement in the Senate Inquiry being undertaken into alleged inappropriate events that occurred in HMAS *Success*', *Information DEFGRAM No 804/2009*, 17 December 2009. For a copy of this DEFGRAM, see Appendix 1.

11 Department of Defence, 'Defence's involvement in the Senate Inquiry being undertaken into alleged inappropriate events that occurred in HMAS *Success*', *Information DEFGRAM No 804/2009*, 17 December 2009.

undo the damage caused by the first one. The new directive neither withdrew nor contradicted the contents of DEFGRAM 781/2009 and sent a rather confused message about the distinction between professional and private roles. Indeed, as noted in the above quote, it directed personnel to refer to the original but flawed DEFGRAM 781/2009.

1.23 Since receiving submissions, the committee now has concrete evidence that at least two ADF members, who lodged late submissions because of the DEFGRAMS, were dissuaded initially from communicating with the committee by the directives. They clearly believed that, based on the contents of the DEFGRAMs, they were not permitted to provide a submission to the committee and consequently lodged their submissions after the DEFGRAMs were withdrawn.<sup>12</sup> One stated:

On 7 December 2009, DEFGRAM 781/2009 was released prohibiting the submission of any material to the Committee without clearance from the Minister. As a result of the prohibition contained within DEFGRAM, I informed my chain of command on 7 December 2009 that I would comply with the directive and refrain from making my submission.<sup>13</sup>

1.24 It would appear that at no stage before mid-January 2010 did Defence attempt to correct the member of his mistaken belief that he was not permitted to make representations to the committee. On 18 January, Ministerial Support and Public Affairs informed him finally that both DEFGRAMS had been withdrawn.<sup>14</sup>

1.25 At a private meeting on 3 February 2010, the CDF apologised to the committee on behalf of himself and the Secretary for DEFGRAM 781/2009. He explained that the document has been issued in response to advice sought by staff who had received letters from the committee inviting them to submit to the inquiry. CDF stated that it was never the intention of Defence to attempt in any way to disrupt the work of the committee or to restrict its activities. He explained that when it became apparent that the DEFGRAM had caused concern, it was withdrawn immediately.

### ***DEFGRAM 39/2010***

1.26 During the private meeting, CDF made available a copy of a new DEFGRAM which he explained had been issued that day and cleared by senior officers, Defence Legal and the Minister for Defence.<sup>15</sup>

1.27 Again, the main thrust of this directive concerned the process and procedures to be followed by Defence personnel participating in a parliamentary committee process in an official capacity. The explanation centred on how the organisation seeks to achieve a 'whole of Defence coordination through the Minister's office prior to any

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12 *Confidential submissions 5 and 6.*

13 *Confidential submission 6.*

14 *Confidential submission 6.*

15 For a copy of this DEFGRAM, see Appendix 1.

action being taken'. The Director Ministerial and Parliamentary Reporting (DMPR) was identified as the central authority that would manage the internal consultation processes and liaise with the committee secretariat.

1.28 This DEFGRAM devotes three paragraphs to the right of ADF personnel to participate in parliamentary committee inquiries in a personal capacity. This advice, however, is tacked on at the end of a two page document. It states:

Irrespective of whether Defence is participating in an inquiry of a parliamentary committee, Defence personnel are able freely to participate in an inquiry in their personal capacity. Such personal participation may be by way of making a submission, appearing as a witness at a hearing, or corresponding with committee members or a committee's secretariat.<sup>16</sup>

1.29 It then quoted in full paragraph 2.50 of the Government Guidelines and concluded its advice with the statement:

Should Defence personnel decide to participate in an inquiry in their personal capacity, they are not obliged to inform DMPR or any other part of Defence of this decision.<sup>17</sup>

1.30 In light of the two earlier misleading DEFGRAMs, the committee is not convinced that the third DEFGRAM adequately removes the misconceptions created by its predecessors. The use of words such as private citizen and personal capacity may still lead to confusion about whether they apply to inquiries such as that related to events on HMAS *Success*. As explained earlier, the committee is inquiring into specific conduct by ADF personnel during the course of their professional duties and of necessity would need to receive evidence from a number of individuals in their capacity as serving Defence personnel.

1.31 The committee is fully aware that the Government Guidelines offer no substantial assistance for potential witnesses in clarifying the distinction between professional and private capacity. Paragraph 2.50 of the Guidelines states that there is no intention for any restriction to be placed on officers appearing before parliamentary committees in their 'personal' capacity. It noted, however, that:

...it is particularly important for senior officials to give careful consideration to the impact, by virtue of their positions, of any comment they might make. Indeed heads of agencies and other very senior officers need to consider carefully whether, in particular cases, it is possible for them realistically to claim to appear in a 'personal' rather than an 'official' capacity, particularly if they are likely to be asked to comment on matters which fall within or impinge on their area of responsibility. An officer who

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16 Department of Defence, 'Parliamentary committee inquiries: official Defence participation and your rights as a private citizen', *Information DEFGRAM No 39/2010*, 3 February 2010.

17 Department of Defence, 'Parliamentary committee inquiries: official Defence participation and your rights as a private citizen', *Information DEFGRAM No 39/2010*, 3 February 2010.

is appearing before a committee in a personal capacity should make it clear to the committee that the officer's appearance is not in an official capacity.<sup>18</sup>

1.32 The committee understands the meaning being conveyed in this paragraph but believes that the language is so guarded that it offers somewhat confused or mixed advice.

## Summary

1.33 In brief, the committee has established the following facts:

- Defence was fully aware that the committee had approached, or was intending to approach, ADF members with regard to its inquiry into matters relating to events in HMAS *Success* and was actively seeking their assistance;
- within a matter of days of becoming aware of the committee's intention, a DEFGRAM was issued by Defence that, on the face of it, would require Defence personnel to submit any material they intended to provided to a parliamentary committee to be vetted by the chain of command and authorised by the Minister;
- this DEFGRAM did deter at least two key potential witnesses to the inquiry from lodging a submission with the committee;
- the DEFGRAM was correctly withdrawn as soon as it came to the Minister's attention;
- a second DEFGRAM, issued on 17 December, made a direct connection between DEFGRAM 781/2009 and the committee's inquiry;
- this DEFGRAM stipulated that it related only to '*professional involvement* as a member of Defence' and for guidance directed personnel to the contents of DEFGRAM 789/2009;
- almost as a postscript, the DEFGRAM added that 'You are, of course, able to freely participate in parliamentary committee activities as a private citizen';
- on 3 February 2010, the CDF apologised to the committee for the publication of DEFGRAM 781/2009 and the concerns it raised;
- on 3 February 2010, Defence issued a third DEFGRAM, which informed members that Defence personnel were 'able freely to participate in an inquiry in their personal capacity', and also reproduced paragraph 2.50 of the Government Guidelines; and
- the third DEFGRAM effectively superseded DEFGRAM 789/2009.

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18 *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, November 1989, G:/LEGCO?OFF/LWIT/89GUIDE.DOC, <http://dpmc.gov.au/guidelines/index.cfm> (accessed 3 March 2010).



1.34 Based on these facts, the committee found that the first two DEFGRAMS were directly related to the work of the committee and they did in fact deter at least two ADF members from assisting the committee with its inquiry. The committee cannot, however, determine the extent to which other people may have been dissuaded from assisting the committee. In this regard, the committee is of the view, that the Department was aware of the committee's inquiry and of its efforts to seek information from people likely to have knowledge of the events under investigation. Further, that the first DEFGRAM was an unacceptable attempt by Defence to control the flow of information to the committee. Arguably, the action by Defence in publishing DEFGRAM 789/2009 was an improper interference with the committee's functions and its ability to operate effectively and thus a possible abuse of process.

1.35 The committee formed the view, that this interference was not a trivial matter and, if not remedied, would have posed a significant impediment to its work. In this regard, the committee acknowledges that once the first DEFGRAM came to the Minister's attention, he took steps immediately to rectify the situation. A second DEFGRAM was issued on 17 December, but in the committee's assessment was unsatisfactory in undoing the harm caused by the first DEFGRAM. At a private meeting on 3 February, the CDF apologised to the committee for the publication of the DEFGRAM 789/2009 which had, by that stage, been withdrawn and a third one issued. The third DEFGRAM is a definite improvement on its predecessors but the message still remains confused.

## **Conclusion**

1.36 The committee is highly critical of the Department of Defence's initial failure to understand and exercise its responsibilities and obligations to the committee. At the moment, the committee's findings are sufficient to satisfy it that Defence now understands that the publication of DEFGRAMS 789 and 804/2009 had the potential to interfere with the work of the committee to the extent that the publication of these documents constituted a possible contempt of the Senate. The committee notes that DEFGRAM 789/2009 was withdrawn as soon as Defence became aware of the committee's concerns about it. The committee is not completely satisfied with the third DEFGRAM which appears to have done the barest minimum necessary to avoid being a contempt but which, regrettably, fails to redress adequately the initial harm caused. Although using advice provided in the Government Guidelines, the committee continues to have considerable disquiet about the third DEFGRAM.

1.37 The committee uses this opportunity to make clear that it takes the protection of witnesses seriously, and that any Defence personnel who believe that they have something to contribute to its inquiry should not hesitate to communicate with the committee. The committee wants to make absolutely clear that the Department of Defence cannot place any restrictions on the material that its personnel may wish to provide to the committee nor information they may wish to convey on their own behalf.

1.38 More broadly, the committee reasserts the principle that any individual has a right to communicate with parliamentary committees without fear of interference from another. As stated previously, this is 'an untrammelled right, overriding all other considerations'.

1.39 The committee is particularly concerned that the current *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (the Guidelines) fail to make clear the meaning of 'private capacity'. This is especially so in the context of committee inquiries into incidents in the workplace where public servants may wish to provide evidence on their own behalf but of necessity cannot divorce themselves from their professional role. In drafting the three DEFGRAMS cited in this report, Defence relied on sections of the Guidelines to provide unsound advice to its personnel. The committee is strongly of the view that the Guidelines may need to be reviewed by the Department of Prime Minister and Cabinet.

### **Recommendation 1**

**1.40 In light of the committee's experience and its concerns with sections of the Guidelines dealing with witnesses appearing in their private capacity, the committee recommends that the Senate refer this matter, as it relates to the Guidelines, to the Standing Committee of Privileges for its consideration.**

### **Recommendation 2**

**1.41 All legal officers in Defence Legal and senior officers in the Ministerial and Executive Support Branch undertake a study of the principles governing the operations of Parliament and of the accountability of government departments and agencies to Parliament. Further, that in the future such a course of study be mandatory for newcomers to these branches.**

SENATOR RUSSELL TROOD  
CHAIR

## **Appendix 1**

**Department of Defence  
DEFGRAM Nos. 781/2009, 804/2009, 39/2010  
(with contact details and signatures removed)**



Department of Defence

## DEFGRAM NO 781/2009

7 December 2009

**Note:** DEFGRAMS need only be retained while the information is relevant. Publications can be accessed on the Defence Intranet at

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### **PARLIAMENTARY COMMITTEES: DEFENCE SUBMISSIONS AND WITNESSES**

The purpose of this DEFGRAM is to remind staff about the correct procedures to be followed in their dealings with parliamentary committees, especially when called upon to prepare a submission to a committee, or to appear as a witness.

The Minister for Defence is accountable to the Parliament for all information and material provided to a parliamentary committee or inquiry by Defence personnel. *Consequently, the Minister must approve all Defence involvement in, or support to, parliamentary committees.*

#### **Providing information to parliamentary committees or inquiries**

All requests from parliamentary committees for Defence material, assistance or witnesses are usually forwarded to Defence through the Minister for Defence, the Secretary and the Chief of the Defence Force. From time to time, a committee may approach Departmental officers directly either to provide material or to attend as a witness. These requests must be referred immediately to the Director Ministerial and Parliamentary Reporting (DMPR) for whole-of-Defence coordination through the Minister's office prior to any action being taken (DMPR contact details appear below). Departmental officers should not deal directly with parliamentary committee members or staff.

#### **Preparing submissions**

When formally tasked to prepare a submission to a parliamentary committee or inquiry, you should note that, except under special circumstances, submissions will be placed on the public record. Consequently, they should not include classified or protected material.

All material prepared for submission to parliamentary committees should be cleared by a Senior Executive Band Two or two-star officer, or above, prior to it being submitted to the Minister for approval. *Under no circumstances should material be provided to parliamentary committees or inquiries without clearance from the Minister.*

#### **Appearing as a witness**

The official guidelines for Commonwealth Officers (which includes military personnel) attending as witnesses to a parliamentary committee can be found at: [http://www.pmc.gov.au/guidelines/docs/official\\_witnesses.pdf](http://www.pmc.gov.au/guidelines/docs/official_witnesses.pdf).

Should you be required to appear as a witness before a parliamentary committee or inquiry, please ensure that your name is included in the official witness list prior to the commencement of the hearing. It is also important that your Group or Service coordination team is made aware of your appearance in plenty of time for arrangements to be made.

The transcripts of every parliamentary committee hearing or inquiry—known as Hansard—will be available in proof form from the Parliament House website: <http://www.aph.gov.au/hansard/index.htm> in the days following the hearing. If you appeared as a witness, you should check the proof Hansard to ensure that your evidence was accurately recorded or to correct mistakes in your evidence before the final Hansard is published. Clearance of the 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.

This information is updated regularly and can be sourced from the Ministerial and Executive Support Branch website

Department of Defence

## INFORMATION DEFGRAM NO 804/2009

Issue Date: 17 December 2009

Expiry Date: 11 March 2010

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### DEFENCE'S INVOLVEMENT IN THE SENATE INQUIRY BEING UNDERTAKEN INTO ALLEGED INAPPROPRIATE EVENTS THAT OCCURRED IN HMAS SUCCESS

1. We were recently made aware that the Senate Standing Committee on Foreign Affairs, Defence and Trade is conducting an inquiry into equity and diversity health checks in the Royal Australian Navy as they relate to recent events that occurred in HMAS SUCCESS.
2. We have also been informed that a number of members of Defence, both military and civilian, have been directly written to by the committee seeking their involvement in this inquiry.
3. The inquiry that is being conducted into alleged events that occurred in HMAS SUCCESS is sensitive. The inquiry's Terms of Reference cover events that are already the subject of various Defence investigations and inquiries. We also respect the seriousness of the subject of this Senate inquiry and recognise the committee's right to examine these matters.
4. For this reason the Minister for Defence has approved an approach that is being managed by the Ministerial and Executive Support Branch that carefully balances this right and does not interfere with Defence's internal investigative processes.
5. Defence will provide the committee early in 2010 with a range of documents that inform how the department conducts inquiries and also provides information about the status of relevant ongoing Defence investigations and inquiries.
6. Consistent with this approach, individuals with a professional interest in the committee's inquiry will be asked to provide input.
7. At this time, we would also like to remind all members of Defence of their obligations when it comes to participating in parliamentary committee inquiries and hearings in their official capacity. To this end we direct staff to the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* of November 1989. DEFGRAM 781/2009—*Parliamentary Committees: Defence submissions and witnesses* of 07 December 2009 provides specific guidance as to how the Government Guidelines will be implemented in Defence. This DEFGRAM is available via the following link
8. Please note that the above DEFGRAM relates only to your *professional involvement* as a member of Defence. You are, of course, able to freely participate in parliamentary committee activities as a private citizen.
9. If you are considering becoming involved in the Senate's inquiry into HMAS SUCCESS or you would like to discuss this inquiry further please contact:

Director, Ministerial and Parliamentary Reporting  
Ministerial and Executive Support Branch

  
Secretary

**A Houston**  
Air Chief Marshal  
Chief of the Defence Force

**Distribution:** 1, 2, 3, 4, 5, 6, 9A, 12, 14





Department of Defence

## INFORMATION DEFGRAM NO 39/2010

Issue Date: 3 February 2010

Expiry Date: 5 May 2010

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### PARLIAMENTARY COMMITTEE INQUIRIES: OFFICIAL DEFENCE PARTICIPATION AND YOUR RIGHTS AS A PRIVATE CITIZEN

#### Scope and purpose of this DEFGRAM

1. The purpose of this DEFGRAM is to provide guidance to Defence personnel (including both civilian and military personnel) on internal Defence procedures for coordinating official participation of Defence personnel (ie participation of such personnel *on behalf* of Defence) in inquiries conducted by parliamentary committees.
2. The opportunity for Defence personnel to participate in an official capacity in a parliamentary committee inquiry usually arises at the request or demand of a committee that Defence provide information, but where the committee does not request or demand that *particular* Defence personnel provide information.
3. This advice does not apply where a committee requests or demands *particular* Defence personnel provide information. In that rare case, the particular personnel concerned should consult with the Director Ministerial and Parliamentary Reporting (DMPR), who may advise them on how they may best comply with the committee's request or demand.
4. Defence also recognises the right of all Defence personnel to participate in parliamentary committee inquiries in their personal capacity, and does not seek to deter personnel from doing so. Paragraphs 17 to 20 of this advice relate to such participation; otherwise, this advice does not apply to such participation.
5. This advice reflects the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, released in November 1989 (the Government Guidelines). The Government Guidelines can be accessed at [http://www.pmc.gov.au/guidelines/docs/official\\_witnesses.pdf](http://www.pmc.gov.au/guidelines/docs/official_witnesses.pdf). Defence personnel are encouraged to familiarise themselves with the content of the Government Guidelines.
6. The Houses of Parliament each delegate some of their functions, and the powers to carry out those functions, to committees of their members. One such function commonly delegated to committees is the conduct of inquiries, including (but not limited to) inquiries into policy-related matters, and inquiries into the performance of government agencies or programs. The Minister for Defence is accountable to the Parliament for his or her actions, and the Secretary must assist the Minister to fulfil his or her obligation to the Parliament to provide factual information, as required by the Parliament, in relation to the operation and administration of Defence.
7. It is important that Defence personnel recognise the key role that the Parliament's committee system plays in ensuring open and accountable government in Australia. Defence's engagement with parliamentary committees must be thorough and cooperative.

#### Participating in parliamentary committee inquiries in an official capacity

8. Generally, participation by Defence personnel in a parliamentary committee inquiry must be approved by the Minister.
9. However, as noted in paragraph 2.5 of the Government Guidelines, Ministerial approval of such participation may not always be appropriate. It may not be appropriate for the Minister to approve the participation of Defence personnel when the inquiry concerns the conduct of particular individuals, e.g. the conduct of the Minister himself or herself or the conduct of a member of the Minister's staff. In these cases, Defence personnel should consult DMPR, who may advise them on alternative arrangements for the approval and coordination of Defence participation in the inquiry.

10. If Defence personnel are contacted by a committee, inviting or requiring Defence to participate in an inquiry, or where Defence personnel otherwise become aware of the potential for Defence to participate in an inquiry, they should contact DMPR in order to facilitate whole of Defence coordination through the Minister's office prior to any action being taken.

11. It is rare that an inquiry of a parliamentary committee will relate only to one discrete area within Defence. To ensure that all stakeholders are aware of a committee's activities, as well as to ensure the clarity and accuracy of the advice provided to our Minister and the committee, DMPR will centrally manage the internal consultation processes and liaise closely with the committee secretariat.

### **Preparing submissions**

12. DMPR, in consultation with relevant Defence area(s), will make a recommendation to the Minister on whether a submission should be made. If formally tasked to prepare a submission to a parliamentary committee, Defence personnel should note that, except under special circumstances, submissions will be placed on the public record. Consequently, they should generally not include classified or protected material. Additional guidance should be sought from DMPR where it is possible that classified or protected material will be relevant to the submission.

13. Defence personnel preparing material for parliamentary committees on behalf of Defence must ensure that such material is cleared by a Senior Executive Band Two or Two Star officer, or above, and forwarded to DMPR for action.

### **Appearing as a witness**

14. To ensure that all Defence appearances are appropriately coordinated, the relevant Group or Service coordination team should be made aware of the appearance of Defence personnel in their official capacity in sufficient time for appropriate arrangements to be made. DMPR will work with the relevant Group or Service coordination team to assist in identifying suitable witnesses and ensuring, where appropriate, that the Minister is aware of Defence's involvement and that the committee's secretariat is informed of attendance arrangements. In some cases, it will be appropriate for Defence personnel individually to contact the committee to confirm that their name appears on the relevant witness list. Normally, Defence is represented at committee hearings by personnel at the SES Band 1 or One Star rank, or above.

15. The transcripts of every parliamentary committee hearing or inquiry—known as the Hansard—are available in proof form from the Parliament House web site (<http://www.aph.gov.au/hansard/index.htm>) in the days following the hearing. If Defence personnel appear as witnesses, they must check the proof Hansard to ensure that their evidence has been accurately recorded with a view to correcting any errors before the final Hansard is published.

16. If, after perusing the record, Defence personnel consider that there are any errors in the record, or that they have omitted to give some relevant evidence, they may consult with DMPR. DMPR can advise on procedures for the correction of errors before the final Hansard is published, and for the provision of further evidence to the committee.

### **Participating in parliamentary committee inquiries in a personal capacity**

17. Irrespective of whether Defence is participating in an inquiry of a parliamentary committee, Defence personnel are able freely to participate in an inquiry in their personal capacity. Such personal participation may be by way of making a submission, appearing as a witness at a hearing, or corresponding with committee members or a committee's secretariat. Further information on Parliament's committees is available on the Australian Parliament House website, [www.aph.gov.au](http://www.aph.gov.au).

18. Paragraph 2.50 of the Government Guidelines provides guidance on the appearance at inquiries of officials in their personal capacity. This paragraph states that:

'There is no intention for there to be any restriction on officers appearing before parliamentary committees in their personal capacity. An officer so called, however, should pay heed to the guidelines relating to public comment contained in the Guidelines on Official Conduct of Commonwealth Public Servants (July 1987). As the guidelines emphasise, it is particularly important for senior officials to give careful consideration to the impact, by virtue of their positions, of any comment they might make. Indeed, heads of agencies and other very senior officers need to consider carefully whether, in particular cases, it is

possible for them realistically to claim to appear in a 'personal' rather than an 'official' capacity, particularly if they are likely to be asked to comment on matters which fall within or impinge on their area of responsibility. An officer who is appearing before a committee in a personal capacity should make it clear to the committee that the officer's appearance is not in an official capacity.'

19. The guidelines on official conduct of Commonwealth Public Servants were updated in 1995, and are available from the Australian Public Service Commission's website at the follow link: <http://www.apsc.gov.au/publications96/conduct.pdf>.

20. Should Defence personnel decide to participate in an inquiry in their personal capacity, they are not obliged to inform DMPR or any other part of Defence of this decision.

#### **Further information**

21. Further information on Defence's official involvement with the Parliament and its committees is updated regularly and can be sourced from the Ministerial and Executive Support Branch website

**IJ Watt**  
Secretary

**AG Houston**  
Air Chief Marshal  
Chief of the Defence Force

**Distribution:** 1, 2, 3, 4, 5, 6, 9A, 12, 14



## **Appendix 2**

### **Correspondence from the Clerk of the Senate**





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

16 December 2009

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*, 12<sup>th</sup> 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 142<sup>nd</sup> 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 141<sup>st</sup> 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)

## **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