AUSTRALIAN SENATE

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hc/let/13510

19 February 2002

Senator the Hon John Faulkner
Leader of the Opposition in the Senate
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Faulkner

COMPELLABILITY OF FORMER MEMBERS —
ADVICE BY THE CLERK OF THE HOUSE OF REPRESENTATIVES

At the estimates hearing yesterday you asked me to indicate the situation in relation to the power of the Senate Select Committee on a Certain Maritime Incident to call the former Minister for Defence, Mr Peter Reith. I indicated that a Senate committee, given by the Senate the power to summon witnesses, could summon any person in the jurisdiction of Australia, and that the only immunity related to current members of the House of Representatives and current state office-holders.

You have now asked for my comments on an advice dated 18 February 2002 provided by the Clerk of the House of Representatives, Mr Ian Harris, to Mr Reith, which appears to postulate some kind of immunity possessed by former ministers, or at least some kind of shield which former ministers may raise against being compelled to give evidence, and which therefore appears to differ from the advice I gave.

With the greatest respect to the Clerk of the House of Representatives, this advice conflates distinct concepts and then draws conclusions from a blurring of the distinction between those concepts which are not justified by the concepts standing alone.

Before proceeding to the conflations on which the advice is based, I note that the exchange at the estimates hearing was about whether Mr Reith could be compelled to attend, and did not go into the question of whether he would have any grounds for asking to be excused from answering any particular questions. Mr Harris' advice passes between each of those questions without clearly distinguishing between them.

The major confusion in the advice is between Mr Reith's status as a former member and his status as a former minister. The presumed immunity to which I referred at the estimates hearing, and which has been recognised by the Senate and by Senate committees in several past cases, is an immunity attaching to members of the House of Representatives as *members*. It rests upon the principle of comity between the two Houses, which is encapsulated in the

procedures of both Houses for having members of either House appear before the committees of the other. In short, neither House seeks to summon the members of the other House. The immunity attaches to House of Representatives ministers only because they are members, not because they are ministers. Mr Harris may be thinking of the principle that each House does not inquire into the proceedings of the other, a principle also recognised by the Senate, so that, even if a member of the House appears before a Senate committee, the committee cannot inquire into the proceedings of the House or that member's participation in those proceedings. On this principle, a former member of the House, or indeed any other witness, would not be questioned about proceedings in the House. This principle, however, has nothing to do with the former member's status as a former member. The immunity of a current member does not in any sense carry over to a former member. And as there is no immunity of a minister as a *minister,* there is no immunity to be carried over by a former minister.

The second confusion in the advice is between the ability of a House to remove, or to impose a penalty on, a minister, and the accountability of a minister, as a *minister,* to a House. It is obvious that the Senate cannot remove a minister from office (technically, nor can the House of Representatives; only the Governor-General has that power). It is also recognised by the Senate that the Senate cannot impose a penalty on a member of the House of Representatives as a *member,* even a penalty of censure. This principle also arises from the comity between the two Houses (I note in passing that the principle has not been recognised by the House of Representatives, which, on the instigation of the government of the day, has purported to impose penalties of censure on senators). This inability of the Senate to impose a penalty on a member as a *member* in effect protects from any substantive penalty members who also happen to be ministers. It has nothing to do with the status of ministers as *ministers.*

These principles are confused in Mr Harris' advice with the question of *accountability.* The circumstances that a member of the House who is also a minister cannot be compelled by the Senate to appear before a Senate committee and cannot be subjected to any penalty by the Senate does not mean that ministers as *ministers* are not *accountable* to the Senate. If it really were an accepted principle that House ministers are not accountable to the Senate, as Mr Harris suggests, governments would never answer questions about the ministries of House of Representatives ministers, or about those ministers' actions, in the Senate or in Senate committees; we would not have the estimates hearings which are going on even as I write, in which many questions are asked and answered about House of Representatives ministers' management and direction of their ministries.

Having deduced an immunity of House of Representatives ministers from *accountability* in Senate forums, Mr Harris then says that it would be anomalous if former ministers were to account for their conduct of their former ministries. There is no anomaly because the premise on which it is based does not exist. There is no immunity of House of Representatives ministers as *ministers* from accountability, therefore no reason why former ministers should not answer for their conduct as *ministers* in Senate forums.

Mr Harris' advice then passes, without clear distinction, from the supposed immunity of ministers and former ministers from Senate inquiries to a supposed ability of former ministers to decline to answer questions about their conduct of their ministerial responsibilities. Of course, governments and ministers may *claim* that there are grounds on which they should not answer particular questions in a public forum, grounds which are now generically called public interest grounds because they are based on a submission that the public interest may

suffer from the public revelation of certain information. Here the advice confuses *claims* with accepted immunities. A claim does not become an immunity until it is accepted by the body seeking the information. Governments and ministers have made claims which have not been accepted by the Senate, and the claims have therefore remained claims. Sometimes claims have been made and have been accepted, and have thereby become applications of immunity. The fact that the Senate has procedures to enable witnesses to make *claims* of immunity, and to have those claims considered, does not mean, as Mr Harris concludes, that claims automatically become immunities, even when they are made by former ministers.

In all the controversy which has surrounded the subject into which the Senate Select Committee is to inquire, no claim has yet been made that there are grounds on which questions about the subject should not be answered because of apprehended damage to the public interest, such as by disclosure of secret operations of the Defence Force, or of internal government deliberations. No minister having raised a claim of public interest immunity in relation to this subject, it is strange indeed that a Clerk of the House of Representatives should suggest to a former minister that such a claim might be raised by the former minister. Current ministers are the ones to make any such claims relating to the public interest. A former minister could submit that he is bound by a claim made by the current ministry in relation to information about government operations in his possession. There is one precedent for a similar submission. But such a submission cannot be made until the current ministry has made such a claim. If the government does not seek to conceal government information, a former minister can hardly do so.

Mr Harris' advice, having mixed up distinct principles, draws out of the mixture a new and hitherto undiscovered power of former ministers to withhold information of which they are no longer the custodians.

As I indicated at the estimates hearing, former House of Representatives ministers, including a former Prime Minister, were summoned to appear and give evidence to a Senate committee. They appeared and gave evidence, reluctantly, under summons. At that time (1994) the presumed immunity of serving House of Representatives members from summons by the Senate was raised by advice to the Senate committee, and was accepted and recognised by the committee and the Senate. If there is also another immunity, an immunity of former ministers from summons or questioning by the Senate or Senate committees, it is strange that it was not discovered at that time.

Please let me know if I can be of any further assistance in relation to this matter.

Yours sincerely

(Harry Evans)

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21 February 2002

Senator the Hon John Faulkner
Leader of the Opposition in the Senate
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Faulkner

COMPELLABILITY OF FORMER MEMBERS —
FURTHER ADVICE BY THE CLERK OF THE HOUSE OF REPRESENTATIVES

The Clerk of the House of Representatives has indicated that he has given the attached further advice to Mr Reith, and that Mr Reith has released it.

The further advice does not require any elaboration or clarification of the points I made in my note to you of 19 February 2002. I make one supplementary point only: when witnesses who have declined invitations to appear then appear under summons and answer questions, it cannot be said that they have appeared by compulsion but have answered the questions voluntarily.

At the estimates hearing of the Department of Defence yesterday, the current Minister for Defence, Senator Hill, twice stated that Mr Reith should be given the opportunity to respond to evidence which has been given by officers of his former department about his conduct as a minister. This reinforces the point I made about accountability, and also the point that, if the government makes no claim that evidence which Mr Reith might give about his conduct as a minister should not be given, there is no ground on which Mr Reith can decline to give that evidence.

Yours sincerely

(Harry Evans)