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Compellability of current and former Members in relation to parliamentary inquiries by a House of which they were not a member – Update on material from ASPG meetings, Melbourne, October 2002 –Ian Harris, Clerk of the House of Representatives

AUSTRALASIAN STUDY OF PARLIAMENT GROUP MEETINGS OCTOBER 2002

At the meetings of the Australasian Study of Parliament Group in Melbourne in October 2002, Professor Geoffrey Lindell, the Clerk of the Senate, and I led discussions relating to the compellability of a former Member of Parliament to be examined by an inquiry of the House of which they were not a member. In summary, the points made, which arose initially in relation to the inquiry by the Senate Select Committee on a Certain Maritime Incident, were as follows:

The Clerk of the Senate:

- Legislative Houses with House of Commons powers have a general power of inquiry with no limitations known in law;
- There is a probable immunity available to current Members of Parliament from appearing before an inquiry by the House of which they are not a Member;
- It is not possible to extrapolate from this probable immunity that ministers possess any kind of immunity, nor can one extrapolate from the non-existent immunity of ministers an immunity possessed by *former* ministers;
- Those who claim a law of immunity must establish its existence;
- In Australia, the system is awaiting a Watergate, which will probably arise sooner or later, when Government malfeasance and concealment will be so serious as to prompt the Senate to use its legal and/or political powers to their full extent.

The Clerk of the Senate's initial claims were supported by opinion of a leading member of the Sydney bar, Mr Brett Walker SC.

Senator Robert Ray:
Senator Ray's written presentation supported a wider view of the powers of compulsion. However, in discussion, and in view of his awareness of the practical implications, he supported a position of restraint so as not to engender internecine warfare between the Houses.

Professor Lindell:

- Current members enjoy a Constitutional immunity based on the institutional equality and independence of both Houses of the Commonwealth Parliament;
- That immunity must extend to any matter in respect of which a member could be questioned and be held to account for in the House in which he or she was a member (during and after the period of their membership);
- Non-recognition for former members of the agreed immunity for current members would make it incomplete, as illustrated by the following analogies:
    - The privilege of proceedings of both Houses does not cease simply because the actors have ceased to perform their roles;
    - The protection to committee witnesses does not cease after completion of examination of the witness;

- A judge's immunity in determining cases does not cease to operate once a judge has retired;
- Certain immunities stemming from the inability of a parliament of one level of government to impose discriminatory taxes on public servants of another level of government in Australia may extend to discriminatory taxes on pensions of retired public servants.

Mr Alan Robertson SC, another leading member of the Sydney bar, was provided with a copy of the views of the Clerk of the Senate, Mr Walker and Professor Lindell. Mr Robertson indicated that there is an immunity available to current members expressed as a lack of power in the other House. He supported the concept of its extension to former members.

The arguments of the Clerk of the Senate, Mr Walker and myself have been challenged. There have been assertions dismissing the views of Professor Lindell and Mr Robertson, but no attempt to counter or come to grips with the arguments advanced.

I agree with the views of Professor Lindell and Mr Robertson. Rather than feeling obliged to establish the existence of a law of immunity, as the Clerk of the Senate has stated, it is my belief that those who assert the existence of a power of compulsion must establish that power of compulsion in respect of former members. There was no such power vested in the United Kingdom House of Commons in 1901 (upon which the powers, privileges and immunities of the Senate and the House of Representatives are based). There is no express provision for the Commons to compel the attendance of former Lords, and as death was the most frequent way to become a former member of the House of Lords, its absence is not surprising.

Update – Senate Committee report

In terms of an update, the Senate committee's majority report contained the following statements from the committee chair:

> For his part, Mr Reith was not entitled to immunity from this inquiry, as he was no longer a serving member of the House of Representatives, but bolstered by an opinion from the Clerk of the House of Representatives, he rejected three formal requests to appear. Mr Reith was an essential witness… The Reith case has sparked a continuing exchange of conflicting opinion between the Clerk of the Senate and the Clerk of the House about Senate committee powers. I note here the Committee, by a majority, accepts the views of the Clerk of the Senate. (*Chair's foreword, page xv*)

The report also contains other interesting information. It includes a letter of 14 October 2002 to the committee Chair from the Clerk of the Senate, written following the ASPG meeting giving the Clerk's account of a debate he had with Professor Lindell at the conference. The gist of the note to the Senate committee chair was that a concession had been gained that a Senate committee could compel a former Member in relation to consultancy matters that arise **following** a former Minister's parliamentary service, but not in respect of matters for which the Minister was accountable to the House while a member. This, said the Clerk of the Senate, meant that the immunity of current members survives when they cease to be members, but only partially survives in relation to particular subjects. The immunity was narrowed down from one unrelated to subject to a subject-based immunity. The Clerk of the Senate expressed his belief that it would be unlikely that a court would find what he described as a new legal principle which would involve it in new and essentially non-legal issues. He thought it more likely that a court would follow another legal principle, that a law should not be found that gives rise to absurdities. It would be quite unlikely that a court would make the leap from the immunity of a current member to the new, and as Professor Lindell conceded, according to the Clerk of the Senate, quite different immunity of a former Member.

Professor Lindell's comments

I have made available copies of Professor Lindell's paper to the ASPG Conference, updated in the light of the letter of the Senate Clerk and the committee's report. Professor Lindell states at page 10

that the only basis for the claim that the probable immunity of members does not apply to former members was (a) the flat assertion by the Clerk of the Senate and (b) one unlawful summoning of former members. He continues at page 11:

> "…the immunity would not have relieved the former Defence minister from having to obey a summons to attend as a witness at the Senate Committee's hearings. The immunity would however have protected him from having to answer questions which related to his conduct as a former Minister and member of the House of Representatives.
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> "The latter observation highlights the essential difference between the position occupied by *current* and *former* members of parliament. On the analysis put forward in this paper, current members could not legally be summoned or therefore be obliged to answer questions about their conduct as members (or Ministers) of the other House, whereas the extent of any immunity enjoyed by former members would be confined to being obliged to answer questions as regards their conduct as members (or Ministers) of the other House.
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> "This creates a distinction between the inability to inquire into what a member did as a member (or Minister) and the ability to inquire into things that a member did after ceasing to be a member of Parliament (and Minister). The viability of this distinction was rejected by the Clerk of the Senate at the conference at which this paper was delivered and subsequently also in correspondence with the Chair of the Senate Committee which inquired into the children overboard affair.[1] The present writer [Professor Lindell] acknowledges that the distinction may give rise to difficulties but denies that the extent of those difficulties is sufficient to destroy its existence. The writer believes that lawyers would be familiar with distinctions of this kind. For example, it would be surprising if the power of the Parliament to widen the immunities of members of Parliament under sections 49 and 51 (xxxvi) of the Constitution could be used to confer new immunities on such members in respect of any conduct undertaken by them that is not connected with or is unrelated to the role they perform *as members of Parliament.* An illustration in point would be their liability for defamatory statements made about others when the statements have no connection with the performance of their parliamentary duties. In the end, the extent to which the law will entertain the need to draw difficult distinctions will ultimately depend on the importance attached to the underlying reason for drawing the distinctions – in this case the importance that should be attached to the equal and independent authority enjoyed by both Houses of Parliament over their own affairs.
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> "Finally, in regard to the immunity discussed above regarding former members of Parliament, it is worth reiterating here the point that was previously made in regard to current members. This was that the immunity in question is not based on the freedom created by the Article 9 of the English Bill of Rights.
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> "In conclusion on this issue, the writer [Professor Lindell] believes that there were strong and persuasive arguments to support the application of the immunity to former members in regard to their conduct as former members and Ministers. But, in the absence of direct judicial or parliamentary authority on the matter (other than the contrary view expressed by Mr Walker SC, the Senate Clerk and, albeit tentatively, Professor Carney), there can be no certainty that either the Senate or ultimately a court, would uphold that immunity. The fact that the Senate did not press its request for the Defence Minister to appear and answer questions on his part in the children overboard affair does not of course prevent the Senate acting differently in the future if the same kind of issue should arise again."

COMMENTS BY CLERK OF THE HOUSE

Personal nature of immunity?

My principal concern on the last letter to the Chair of the Senate committee by the Clerk of the Senate is that it personalises the aspects of the privilege considerations. The significant consideration relates to the privileges of the house in question, whether it is the Senate or the House of Representatives. In

[1] Letter to Senator P Cook dated 14 October 2002 published in *SSCCMI Report* at pp 347 ff under "Correspondence received Clerk of the Senate and Clerk of the House of Representatives". The present writer [Professor Lindell] is glad to have the opportunity to elaborate in this paper the views attributed to him by the Senate Clerk in his letter to Senator Cook. The reference in the text which follows to the power of the Parliament to widen the privileges and immunities enjoyed by members of Parliaments was prompted by advice given to the Clerk of the House of Representatives by Robert Orr, Deputy General Counsel, Attorney-General's Department, dated 7 May 1999 paras 12 and 26 published in *House of Representatives Standing Committee of Privileges: Report of the Inquiry into the Status of the Records and Correspondence of Members*, (Nov 2000) 63 at pp 65 and 67.

[This footnote is footnote 25 in Professor Lindell's paper].

this regard the Senate concentration on a minister is less appropriate than the fact that the person is or was a member of the House. In addition, the idea of individuals acting in different capacities is a common concept and is extremely unlikely to cause significant trouble to the courts.

House of Representatives Practice (4th edition, page 687) indicates "Privileges are not the prerogative of Members in their personal capacities."

In the process of defining parliamentary privilege, *May* (22nd edition, page 65) states:

Certain rights and immunities such as freedom from arrest or freedom of speech belong primarily to individual Members of each House and exist because the House cannot perform its functions without unimpeded use of the services of its Members. Other such rights and immunities such as the power to punish for contempt and the power to regulate its own constitution belong primarily to each House as a collective body, for the protection of its Members and the vindication of its own authority and dignity. Fundamentally, however, it is only as a means to the effective discharge of its collective functions of the House that the individual privileges are enjoyed by Members.

This is in a similar vein to the comments made in the report of the United Kingdom Commons' Select Committee on Parliamentary Privilege (1996-97) at page vii:

"Your Committee cannot too strongly emphasise the fundamental principle that 'privileges' are not the prerogative of Members in their personal capacities. Insofar as the House claims and members enjoy those rights and immunities which are grouped under the general description of 'privileges', they are claimed and enjoyed by the House in its corporate capacity and by its Members on behalf of the citizens whom they represent."

The report of the Commonwealth Parliament's 1984 Joint Select Committee on Parliamentary Privilege (Parliamentary Paper No.291/1984) made similar comments at page 24:

"While it is obvious that parliamentary privilege can operate for the personal benefit of the Member of Parliament- as with the defence of absolute privilege to compel the attendance of the former in defamation cases - the privilege remains the privilege of the Parliament itself."

Independent assessor

The Senate committee report also contained the following statements (page xv):

"Given the disposition of the Committee to favour the Senate Clerk's view, the Committee had to contend with the question: should it approach the Senate with a request that Mr Reith be compelled to appear before the committee by way of a summons. The Committee was divided on this issue but the majority view was that any summons to Mr Reith would be contested in the courts with the taxpayer having to foot the bill and with the inquiry having to mark time until the issue was settled. It is for this reason that the Committee took the unusual step of asking Mr Stephen Odgers SC to make an assessment of the evidence."

There are several comments on this matter:

- It contains the first public suggestion that the committee considered ***approaching the Senate*** to seek to compel the attendance of the former Member, not summonsing the former Member itself as was being advocated and as occurred in 1994;
- It concludes that Mr Reith's contest to any summons would be funded by taxpayers. This is far from certain, and possibly could have had political repercussions had it occurred;
- It recognises that the appointment of an independent assessor was an unusual step.

The committee report contains evidence that the committee was not alone in considering the step of appointing an independent assessor as unusual. The report contains a letter dated 26 June 2002 from

the then President of the Senate to the committee Chair asking that the committee reconsider the appointment of an independent assessor, as assessment of evidence and forming conclusions was the role of the committee; the independent assessor would usurp the functions of the committee. The then President wrote again the next day again expressing concern on what Senator Reid saw as a proposal flawed in a number of ways. According to Senator Reid's letter of 27 June, $38 500 of public funding was involved. It should be kept in mind that this expenditure was prompted by a desire to save taxpayers' money.

At the ASPG meeting last October, I mentioned other published assessments of the process of not proceeding down the path of seeking compulsory attendance and the appointment of an independent assessor. These are detailed in the circulated paper. In summary, they were seen as capitulation to the executive, and keeping the Parliamentary Privileges Act from judicial scrutiny.

Likely attitude of the courts

The Senate Clerk's letter to Senator Cook of 14 October made a number of references to the likely attitude of the courts. Not included in the account of the Melbourne discussions in the letter of the Clerk of the Senate to Senator Cook was the assertion by the Clerk of the Senate at the Australasian Study of Parliament Group meetings that the High Court was more likely to be persuaded by the opinions of others than by the opinions of professors.

I draw attention to Professor Lindell's comments on the attitude of the courts quoted above, and endorse particularly his reference to defamation matters. There have been instances in Australia and New Zealand where the courts have found no difficulty in differentiating between comments made by members of parliament in the House and the separate publication, made outside the House. This has occurred where the Members has made no other comment than endorsing statements in the House without actually repeating them. Of course, the courts have had no difficulty in administering criminal justice to current and former members of parliament.

As for the likely attitude of the High Court to the views of learned professors, I can only say that a perusal of High Court judgements will reveal a vastly greater reference to the views of professors than to the opinions of the clerk of any legislature.

However, there is one interesting side aspect of the issue. The Senate has since 1904 departed from having recourse to the practice and procedure of the UK House of Commons in 1901 in cases where Senate standing orders were silent. The pride the Senate takes in this position is reflected in the current edition of *Odgers Australian Senate Practice* which states "It was rightly contended that the Senate, working under a new Constitution, ought to have its own practice and procedure… As it is, the Senate has for its guidance the practice of other Houses without the bondage of following procedure which may be unsuited to Australian conditions." (10th edition, page 20). The current debate has certainly seen citation of what the Clerk of the Senate sees as the situation in the UK Commons as at 1901.

Finally, the MinterEllison newsletter for February 2003 contained an article from Denis O'Brien on *Immunities assumed for former ministers and their staff.* The conclusion in the article was:

The Senate Inquiry into the 'children overboard' incident has probably established a principle that former ministers who served in a particular House of the Parliament are immune from being compelled to give evidence before a committee of the other House. Various legal opinions on this matter were obtained in connection with the Inquiry. Although they differed, the fact that former Defence Minister Peter Reith was not compelled to give evidence to the Inquiry is likely to be regarded as a precedent should a similar issue arise in the future.[2]

[2] MinterEllison *Australian Federal Reporter*, February 2003.

Awaiting a Watergate?

I mentioned earlier that the Clerk of the Senate indicated that the Australian system of government was awaiting a Watergate of such dimensions to prompt the Senate to use its powers to their full extent. The powers of the Senate are not fully defined, and there is an implicit conclusion that the Senate has such powers. Presumably, the certain maritime incident and events surrounding it did not constitute a Watergate situation of this kind.

There is also the possibility that should any attempt be made to impose a penalty in the future, a court involved in the process may be invited to determine why a matter before the court differed from the 2002 decision to appoint an independent assessor.

SUMMARY

In conclusion, I repeat the advice given to the former Member of the House in relation to the certain maritime incident investigation and repeated in Professor Lindell's advice that a former Member of one House of the Commonwealth Parliament could be compelled, as a private citizen on a matter unrelated his or her former role as a member, to appear before the House of which he or she was not a member, or one of its committees. This would have application as it would for any private citizen.

It should be kept in mind that in the current instance, the decision was taken not to compel the attendance of a former Member of the House. This was despite the fact that the majority committee report described Mr Reith as an essential witness.

However, should an attempt be made to compel a former Member of the House to give evidence elsewhere than in the House in connection with a matter for which he or she would have been accountable to the House, I would advise the Speaker that there were extremely strong grounds for the House to conclude that there had been an infringement of its privileges. I would advise the Speaker similarly if there was a suggestion that the House or one of its committees might compel the attendance of a former Senator in relation to matters for which he or she would have been accountable to the Senate. [Even with regard to accountability to the house of former membership, the traditional view by practitioners has been that matters of this kind that arise have been resolved at the political level.]

I hope that any former member of either House who is the subject of what I consider to be improper compulsion, if convinced by my arguments, might consider that there is an obligation or duty not to participate in any action that might diminish the privileges of the Senate or the House of Representatives. Should an attempt be made to impose a penalty, I would expect that a former Member of Parliament would be able to argue successfully that resistance to such compulsion in no way constituted improper interference with a legislature. Rather, a court asked to review a matter in connection with any penalty should be invited to regard action of this kind to be a most proper performance of duty.