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19 August 2002

Mr Speaker:

On 15 May 2002, you presented to the House copies of my correspondence with the Chair and Secretary of the Senate Select Committee on a Certain Maritime Incident, including relevant documents from the Clerk of the Senate. The papers related principally to the question of compulsion of former Members of the House to appear before Senate committees.

**Advice by Professor Geoffrey Lindell**

Before I passed my views to the Senate Committee, I asked that they be tested privately, without intention of publication of the private advice. Professor Geoffrey Lindell, Adjunct Professor of Law at the University of Adelaide, agreed to provide advice on this basis. Professor Lindell is the author of the highly regarded *Parliamentary Inquiries and Government Witnesses* (***Melbourne University Law Review***, vol. 20, 1995,pp384-91). Professor Lindell provided the advice dated 22March and 1 April 2002. However, he requested me not to make it public at the time. He gave his full permission for me to make use of the reasoning and arguments contained in his advice, and I did so in the material I provided to the Senate Committee. In summary, the advice I provided was that:

- There appeared to be an agreed immunity for current members of each House from being compelled to attend before the House of which they were not a member, or its committees;
- This immunity probably extended to former Senators and Members; and
- The immunity may extend to ministerial staff.

Professor Lindell has now given permission for his advice to be published, and I have attached a copy. As will be apparent, I included many elements of his advice in the material I provided to the Senate committee.

**Advice to the Clerk of the Senate by Mr Bret Walker SC**

Since then, the Select Committee has received, by means of the Clerk of the Senate, an opinion by Mr Bret Walker SC on former Ministers and ministerial staff being called as witnesses before a Senate committee. The Senate Committee has authorised the publication of that opinion. A copy is attached. The conclusion of Mr Walker's advice is that former Ministers and Ministerial staff have no immunity from compulsory attendance to give evidence and produce documents to a Senate committee.

**Opinion from Mr Alan Robertson SC and Professor Lindell on the Walker Advice**

I have also sought advice from Mr Alan Robertson SC on the initial questions and on the Walker advice. A copy of his opinion, dated 26 June 2002 is attached. Professor Lindell also provided me with advice on the Walker opinion. A copy of Professor

Lindell's advice, dated 16 August 2002, is attached. I will refer to specific aspects of these opinions where relevant.

***Ministerial staff***

Much of the Walker opinion, and much of the subsequent action by the Senate Select Committee on a Certain Maritime Incident, relate to the position of ministerial advisers. It is not within my area of administrative responsibility to pursue the situation as regards ministerial staff. I only provided the Senate Committee with my views because I was invited to do so.

However, if a House of Representatives committee asked my advice about the power of compulsion in relation to an adviser for a minister in either House, my response would be that it would not be appropriate to attempt to compel the attendance of the staff person.

***Current Members of the House***

Mr Walker's opinion at paragraph 20 indicates that the immunity against being compelled to appear before the other House or its committees is centred on the concept of 'elaborate expressions of comity- symbolised by a number of ceremonies' of the two Houses at Westminster in 1901 and Canberra in 2002. However, it has been my contention that the immunity is based on something much more solid than a loose agreement or observance. I have maintained that is something closely akin to a legal immunity, based on the Constitution (sections 49 and 50).

The need for the independence and any consequential immunity is as stated in Hatsell, which is of course relevant in determining the position as it relates to the United Kingdom House of Commons in 1901:

... any other proceeding would soon introduce disorder and confusion; as it appears actually to be done in those instances, where both Houses, claiming a power independent of each other, have exercised that power upon the same subject, but with different views and to contrary purposes.

Senator Ray made comment, in the Senate Finance and Public Administration Committee considering Department of the Prime Minister and Cabinet Estimates, relating to the practical effect of proceeding otherwise. Senator Ray said:

We do not want an internecine warfare between the two houses of parliament, with tit-for-tat calling of witnesses. (Hansard 27/5/02, page F&PA119).

This point has been reinforced by Professor Lindell's opinion of 16 August.

The Senate has given recognition of the principle in its resolution of 2001 containing reference to "the rule, applied in the Senate by rulings of the President, that one House of Parliament may not inquire into or adjudge the conduct of a member of the other House". However, the end result is that the immunity for current members is based on something, I believe, much more concrete than a loose sentiment of comity.

Professor Lindell and Mr Robertson both believe that the immunity for current Members has a legal basis and does not rest merely on comity. Professor Lindell has reinforced the view in his advice of 16 August 2002. The concept is important in the terms of its probable extension to former Members of the Parliament.

***Former Members of Parliament***

Mr Walker's advice suggests that all of the material necessary for the formation of a sound opinion may not have been made available to him. For example, his discussion of comity does not refer to the quotation from Hatsell made available to the committee, and it does not refer to the Senate resolution of 2001. He suggests that there is a contention that a minister might forever trail an immunity against accountability. However, the belief I expressed, in the context of advice from Professor Lindell, was that a former member retained responsibility to the house of which he or she was a member.

Mr Walker also refers to the undoubted power of the Senate or its committees to compel the attendance of witnesses to give evidence – an "undoubted general power", as he describes it. However, the power is not an unqualified power. The House of Commons' view is that the House has power over its members and the documents in their possession, but that power is not automatically delegated with the power to send for persons, papers and records ( See, for example, the transcript of the 33rd Speakers' and Presiding officers' Conference, 2 July 2002, page 27). Diana Woodhouse in "Ministers and Parliament *Accountability in Theory and Practice*" (Clarendon Press, Oxford, 1994) indicates at page 180 that Commons select committees can exercise unqualified power only with regard to private individuals.

Similarly, as Professor Lindell points out in his advice of 16 August, Mr Walker bases much of his reasoning on the absence of express constitutional or statutory provisions to support such an immunity. I would not attempt to improve on the argument advanced by Professor Lindell to counter this contention. Rather, I would suggest that much of the discussion has centred on the existence or otherwise of an immunity, whereas it is also sustainable to examine the purported power the exercise of which gives rise to the need for an immunity. There is no such express provision as to the right of either House of the British Parliament in 1901 to summon former Members of the other House. Indeed, in relation to the House of Commons in 1901, the possibility of compelling the attendance of former Members of the House of Lords was extremely remote. In the vast majority of instances, it was not possible to be a former member of the House of Lords and still be living. Retired bishops were the major exception. I have checked with colleagues in both Houses in London, and there never has been an instance of compelling the attendance of a former member of the other House. In Australia, it took 94 years before one of the Houses discovered and made use of the purported power.

The current edition of *Odgers Australian Senate Practice* contains the following passage at page 231 :

Members of another house are entitled to the protection of standing order 193(3) [relating to debate] when their house has been dissolved for an election and they are technically not members. It would be anomalous if the protection provided by the standing order were to cease simply because a house has been dissolved for election.

There would also be the anomalous distinction between a lower house which has been dissolved and an upper house which has not and the members of which would continue to attract the protection. Therefore members of a house which has been dissolved continue to attract the protection of the standing orders until such time as the successor house meets. Members who retire or are defeated at the election then cease to attract the protection when their successors are in office.

At first glance, this passage might lead to a belief that there was a ground for some extension of immunity for House Members. However, as Mr Robertson points out, the matter relates to decorum and debate. In any case, the comment is not sourced or referenced, and is one of the examples in *Odgers* where an opinion is stated as a matter of fact. This practice makes it a less than perfect guide in determining appropriate Senate practice.

The publication is updated on a regular basis by means of a supplement. The most recent supplement, updating to 30 June 2002, makes reference in this matter to a claim by the Clerk of the House of Representatives, and advice provided by the Clerk of the Senate and a senior barrister experienced in parliamentary privilege and law which made it clear that there is no such basis for any such immunity. Intellectual integrity would suggest that future updates might remove the semantic innuendo of the distinction between 'claim' and 'advice', and pay recognition to the opinions of Professor Lindell and Mr Robertson. An update of this kind might also assist in restoring the reputation of *Odgers Australian Senate Practice* as an authoritative guide to Senate practice.

***Conclusion***

In summary, Professor Lindell's opinion is:

- The existence of immunity for current Members is not in doubt and is based on a legal restriction on both Houses of the Parliament. It is not strictly confined to the Member's conduct as a member of parliament or any matter that forms part of proceedings of the House of which he or she was a Member. The immunity can extend to any matter in respect of which the Minister could be questioned and held to account in the House of which he or she is a Member.

- There are strong and persuasive arguments to support immunity for former Members in respect of compulsory attendance before the other House or one of its committees.
- A former Member remains accountable for periods while he or she was a Member to the House to which he or she was a Member.
- There are reasonable arguments to support the application of the same immunity to a Member's staff, but the position is much more doubtful.
- There is nothing in the opinion by Mr Walker that would lead Professor Lindell to alter his previously-expressed views.

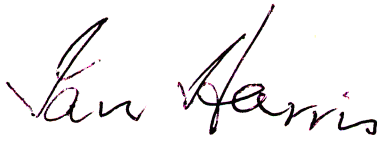
In summary, Mr Robertson's opinion is as follows:

- The immunity of current Members has a legal basis and does not rest merely in comity. It is not limited to the conduct of a Member of that House or to that which forms part of the proceedings of that House if those concepts are intended to exclude matters for which a Member who is a Minister is or has been officially responsible. Such a line of distinction would be both impractical and flawed in principle.
- Because the immunity is not merely an immunity based on the day-to-day functioning of the House, it should extend to a former Member from compelled to appear before the other House or one of its committees.

It appears at this stage that the Senate committee has not proceeded with the proposal to compel the attendance of a former Member of the House. Of course, as Mr Robertson and Professor Lindell indicate, a former Member could be compelled to attend before a Senate committee in a private capacity, as could any private citizen. However, should an attempt be made to compel a former Member to attend before a Senate committee in relation to matters for which he was responsible as a Minister during the period of membership against her or his will, I (and I trust any future Clerk of the House) would advise the Speaker that the House would be fully justified as considering such action as a breach of its privileges, and extending its protection to the former Member.

***Further action***

After you have had an opportunity to consider the contents of this note, you may care to present it and its contents to the House for the information of Members of the House.



I C HARRIS
Clerk of the House