CURRENT AND FORMER MEMBERS AND MINISTERS (AND THEIR MINISTERIAL STAFF: IMMUNITY FROM GIVING EVIDENCE TO PARLIAMENTARY INQUIRIES ESTABLISHED BY HOUSES OF PARLIAMENT IN WHICH THEY WERE NOT MEMBERS

Paper by Professor G J Lindell

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Introduction

This paper is prompted by the circumstances which gave rise to the refusal of a former Commonwealth Minister to give evidence before the Senate Select Committee on a Certain Maritime Incident. That Committee was appointed to investigate his conduct and that of others during the 2001 Federal election campaign in relation to the child overboard affair.[1] This was also accompanied by the failure of the re-elected Government to allow one of the former Minister's advisers to give evidence on the same matter before the same Committee. The conduct of the former Minister in question concerned the extent of his awareness of whether there was not evidence to support the allegation that asylum seekers threw their children overboard as part of their attempt to gain entry into Australia. The allegation had been made by the Prime Minister and other senior Ministers during the election campaign. The particular Minister in question was the Hon Mr Peter Reith who had been the Member of the House of Representatives for the electorate of Flinders and also the Minister for Defence. By the time the inquiry was established and began its hearings he was no longer a Minister or a Member of the House of Representatives having failed to contest his re-election at the general elections held in 2001.

This paper addresses important and controversial issues arising out of this affair concerning the possible existence of an immunity of former members of one House of the Parliament from being forced to answer questions about their conduct as Ministers and Members of that House in a parliamentary inquiry established by the *other* House of the same Parliament. It also involved although far less clearly the possible existence of an immunity enjoyed by their Ministerial staff. It is important to emphasise that these issues arose out of a desire by the relevant Senate Committee to examine the conduct of Mr Reith as the former Minister of Defence *after* the House of Representatives had been formally dissolved and during the period immediately preceding the holding of the general elections which followed the dissolution of the Parliament. The conduct in question may not have been strictly related to any proceedings of the House of Representatives or his duties a member of that House.

These issues are still important despite the decision taken by the Senate Committee not to pursue its request for the persons referred to above to give evidence to the Committee. In the *Foreword* prepared by the Chair of the Committee it was stated that "Mr Reith was not entitled to immunity from the inquiry as he was no longer a serving member of the House of Representatives". Attention was drawn to the conflict of opinion on this matter and it was noted that by a majority the Committee accepted the views of the Clerk of the Senate who denied the existence of any such immunity. However, again by a majority, the Committee decided "that any summons to Mr Reith would have been contested in the courts with the taxpayer having to foot the bill and with the inquiry having to mark time until the issue". [2]

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[1] It was established on 13 February 2002 and published its report in October in the same year: *Report of Senate Select Committee on a Certain Maritime Incident*, October 2002 ("*SSCCMI Report*"). Minor revisions were made to this paper in the light of the Report which was published after the presentation of the paper at the Annual Conference of the Australasian Study of Parliament Group on 11 October 2002, and also to take account of other matters including some of the comments made at the same Conference.

[2] *SSCCMI Report* above n 1 at p xv. The writer was unable to find the acceptance of the Clerk's view explicitly replicated elsewhere in either the Majority or the Minority (Government Members') Reports of the Committee although, as regards the latter report, see para 7 at p 479. The Clerk of the Senate

I should acknowledge at the outset that this paper is based on and reproduces the views I expressed in advice provided to the Clerk of the House of Representatives, Mr Ian Harris, on these issues and now tabled with advice provided by others in the same House. [3]

The issues addressed in this paper can be conveniently summarised in the following ways:

(i) The immunity enjoyed by current members of one House of the Parliament, and, in particular, members who were also Ministers, from being forced to give evidence before parliamentary committees established by another House of the same Parliament (‘*Issue (1)*’).

(ii) The continuation of any such immunity after the retirement of the Ministers from Parliament in respect of matters which were relevant to their conduct as Ministers (‘*Issue (2)*’).

(iii) The application of the same kind of immunity to the staff employed in the Minister’s office in relation to the same matters, both before and after the Minister’s retirement (‘*Issue (3)*’) .

(iv) The availability of public interest immunity as a ground for refusing to answer questions (‘*Issue (4)*’).

(v) Whether the existence of the immunities referred to in *Issues (1) – (3)* should not be recognised because of certain wider considerations, namely, the implied freedom of political communication, responsible government and Executive accountability to the legislature *(‘Issue (5)’*).

No attempt is made to canvass in any detail *Issue (4)* and, in particular, whether public interest immunity could have been successfully raised by the former Defence Minister in the particular circumstances that arose in his case apart from making some

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had previously indicated that the claim of immunity was not accepted by any members of the Committee, although they disagreed about whether the former Defence Minister should be summoned*:* *Odgers Australian Senate Practice* (10th ed, 2002) *Supplement – Updates to 3June 2002* at p 12 (“Odgers Supplement”).

[3] Advices dated 22 March, 1 April and 16 August 2002. At the request of the writer, the advice was originally given on a confidential basis subject to its publication at some future time. The Clerk was however given permission to use and publish whatever contents of the advice he thought appropriate without disclosing the identity of the writer. The latter advice accords with the advice subsequently given to the Clerk by Mr A Robertson SC, dated 25 June 2002 and also the view expressed by the Clerk. A contrary opinion was given to the Clerk of the Senate by Mr Bret Walker SC, dated 16 May 2002 and also the view expressed by the Senate Clerk. All the opinions along with the comments of the Clerk of the House, were tabled in the House of Representatives: Commonwealth, *Parliametary Debates,* House of Representatives, 21 August 2002 at p 5369. The full text of the opinions may be found in the *SSCCMI Report* above n 1, under “Correspondence received Clerk of the Senate and Clerk of the House of Representatives” which also includes the views and opinions of both the Clerks of the Australian Parliament, at pp 347 ff. The present writer also wishes to acknowledge the valuable assistance he received from the Clerk and Deputy Clerk (Mr Bernard Wright) of the House of Representatives and their staff, especially with the provision of the contents of some of the sources which are cited in nn 12 - 13 below.

passing and very general observations on that subject. In addition no attempt was made to deal comprehensively with the corresponding position which exists with *State* and *Territory* Parliaments. [4]

After addressing the above issues the paper will touch briefly on the question of reform.

Issue (1): Immunity of current members

As will be apparent from what follows it is not possible to understand the position of *former* Members and Ministers without first considering any possible immunity enjoyed by *current* Members. Also it needs to be emphasised that the issue discussed here concerns the obligation of such persons to answer questions (and produce documents) raised in parliamentary inquiries conducted by the *other House* ie the House of the Parliament in which those persons were not members. There is of course no doubt as to their obligation to respond to such requests for information at parliamentary inquiries conducted by the House in which they are members.

It is as well to acknowledge at the outset that the matters dealt with in this paper are not covered by the *Parliamentary Privileges Act* 1987 (Cth) which however is not meant to be exhaustive. [5] As will be mentioned later, neither are these matters the subject of judicial authority. It would be surprising if there was such authority given the exclusive control of parliamentary proceedings vested in the Houses of the Commonwealth Parliament by virtue of s 49 of the Australian Constitution. It is only since the enactment of the *Parliamentary Privileges Act* 1987 (Cth) and, in particular ss 4,7and 9 of that Act, that such matters have become capable of coming within the scope of judicial review, even if only in a limited way. Such review would only arise *if and once* a warrant of imprisonment is issued for a breach of parliamentary privilege so as to attract the jurisdiction of the courts as a result of the combined operation of ss 4, 7 and 9 of the *Parliamentary Privileges Act* when read in conjunction with the remarks of the High Court in *R v Richards Ex parte Fitzpatrick and Browne.* [6]

Turning now to the first issue foreshadowed above, the present writer adheres to the view expressed in the writer's article on the subject of government witnesses and parliamentary witnesses where reference was made to "the probable immunity of members of the of one House of the Federal Parliament from the authority of the other House of the same Parliament" and it was further stated:

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[4] As to the Victorian Parliament, see the unpublished paper by the President of the Legislative Council, Bruce Chamberlain, "Parliament verses the Executive: An Examination of a State Legislature's Claim to Privilege", paper presented at the 33rd Conference of Presiding Officers & Clerks, Parliament House, Brisbane, QLD, Tuesday 2 July 2002. Reference is made in that paper to similar issues which had arisen earlier in 2002 with the power of the Victorian Legislative Council to summon Ministerial Advisers to the Victorian Attorney - General who was a member of the Victorian Legislative Assembly: see esp at pp 4 - 6, 7 - 8.

[5] Section 5 of that Act makes it clear that [e]xcept to the extent that the same Act expresses otherwise" the Act does not "alter "the powers, privileges and immunities of each House and of the members and committees of each House" which existed immediately before the same Act was passed.

[6] (1995) 20 (1955) 92 CLR 157 at p 162 as to which see generally the article by the writer "Parliamentary Inquiries and Government Witnesses" (1995) 20 *Melbourne University Law Review* 383 at pp 413 – 8.

> " The same immunity is acknowledged to exist in relation to the Houses of the British Parliament. The immunity is likely to be based on the need for each House to function independently of, and without interference from, the authority of the other House. It appears to make good sense from a policy point of view as well from an analytical perspective since it may flow directly from the terms of section 49 of the Constitution if, as seems likely, this was an immunity enjoyed by the House of Commons at the establishment of the Commonwealth." [7]

The existence of the probable immunity is reflected in the practices and procedures followed by both Houses if a member of the other House of the Federal Parliament is to be called to give evidence before a parliamentary committee. This normally requires a request to be forwarded to the other House for that House to consent to the examination of its member. But apparently the relevant Standing Orders have not been interpreted as requiring such leave if the member is prepared to appear voluntarily. [8]

It is perhaps easier to recognise the existence of the probable immunity than it is to be sure about its precise status and justification. These matters are important since they may have an important bearing on what is in question here, namely:

(a) the application of the immunity to the examination of matters which involve the conduct of a Minister which may not have been strictly related to any proceedings of the House of Representatives or his duties a member of that House; and

(b) the continuation of any such immunity after he ceased to be both a member of Parliament and a Minister of the Crown.

The Senate Clerk has described the immunity in question as being "a matter of comity between the houses and of respect for the equality of their powers" [9] The term

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[7] See the article cited above in n 6 (1995) 20 *Melbourne University Law Review* 383 at p 395. The authorities cited in support of this view in notes 51 – 2 of the same article included earlier editions of the parliamentary practice manuals of both Houses of the Federal Parliament. A check of the later and current editions of the same works does not disclose the existence of anything that would lead the present writer to alter the view expressed in the relevant article. See Harris (ed) *House of Representatives: Practice* (4th ed, 2001) ("Harris") at pp 34 – 5, 639 - 642, 729 and Evans, (ed) *Odgers' Senate Practice* (10th ed, 2001) ("Evans") at pp 56, 440 – 3 and also now G Carney, *Members of Parliament: law and ethics* (2000) at pp 185 – 6 and also, "Reform of Parliamentary Privilege" at p9 of a paper delivered at a the Conference on Constitutional Reform for South Australia held in Adelaide on 17 – 18 August 2002. (The paper is likely to appear, along with the other papers delivered at the same conference, in a forthcoming publication, *Making Parliament Work: Constitutional and Parliamentary Reform for the Australian States* (Crawford House Publishing, 2002).

[8] Harris at pp 639 – 642; Evans at pp 440 – 3. A similar practice may usually be followed by the United States Congress:W Holmes Brown, *Jefferson's Manual and the House of Representatives of the United of the United States 99th Congress* (1985) at pp120, 152.

[9] See eg Evans at p 442 and cf the view expressed by Mr Walker SC in the opinion referred to above n 3 at paras 20 – 21 who relies on the importance of members being able to attend to their business in the House in which they are members to support the "privilege" or "expressions of comity" to explain the special procedures employed to invite members of one House to give evidence before the other

comity may suggest something falling short of a strict legal immunity, more in the nature of a custom or a convention which the Houses of Parliament may be legally free to ignore in an appropriate case. Elsewhere, however, the Senate Clerk refers to it as "probably an implicit limitation on the power of the Houses to summon witnesses" and "the probable immunity of members" [10]

It will be clear from the passage quoted above from the writer's article, that in his view it is more properly viewed as a legal restriction on the powers of both Houses of the Parliament under s49 of the Commonwealth Constitution. [11] It is suggested that this view is supported by the view taken in at least one respected source on British parliamentary practice which emphasise strongly the independence of both Houses of that Parliament from each other and the equality of their powers. Thus it is stated:

> " The leading principle, which appears to pervade all the proceedings between the two Houses of Parliament, is, That there shall subsist a perfect equality with respect to each other; and that they shall be, in every respect, totally independent one of the other. – From hence it is, that neither House can claim, much less exercise, any authority over a Member of the other; but if, there is any ground of complaint against an Act of the House itself, against any individual Member, or against any of the Officers of either House, this complaint ought to be made to that House of Parliament, where the offence is charged to be committed; and the nature and mode of redress, or punishment, if punishment is necessary, must be determined upon and inflicted by them. Indeed 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." [12]

It is also stated in the same work that:

> " The result of the whole, to be collected either from the Journals, or from the History of the Proceedings in the House of Commons, is, 1st, that the Lords have no right whatever, on any occasion, to summon, much less to compel the attendance of, a Member of the House of Commons. 2ndly, That, in asking leave of the House of Commons for that attendance, the message ought to express clearly the 'cause' and 'purpose' for which attendance is desired; in order that, when the Member appears before the Lords, no improper subject of examination may be tendered to him. 3rdly, The Commons, in answer, confine themselves to giving leave for the member to attend, leaving him at liberty to go or not, 'as he shall think fit'. And 4thly, The later practice has been, to wait until the Member named in the message is present in his place; and to hear his

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House. Neither the Senate Clerk nor Mr Walker appear to address the rationale for the immunity of current members outlined in the text which accompanies nn 11-16 below of this paper.

[10] See Evans at pp 56 and 443 respectively. As to the denial of any such convention in relation to the Victorian Parliament which also follows the law of parliamentary privilege observed by the British House of Commons see Chamberlain above n 4 at p 6.

[11] This view accords with that expressed by Mr A Robertson SC in the opinion he gave cited above n 3 at paras 5-6, 18.

[12] Hatsell, *Precedents of Proceedings in the House of Commons* (1818) Vol 3 at p 67. See also Harris at pp 34 – 5 ("Hatsell").

> opinion whether he chooses to attend or not, before the House have proceeded even to take the message into consideration.
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> As it is essential to the House of Commons, to keep itself entirely independent of any authority which the Lords might claim to exercise over the House itself or any of the Members, they ought to be particularly careful, on this and on all similar occasions, to observe and abide by the practice of their predecessors." [13]

It is interesting to note in the same connection that a book consulted in relation to the Indian Parliament indicated that at least as at 1967 the same position may have prevailed there with reliance being placed on precisely the same passage from Hatsell as was set out above. One point of difference with the Australian Federal Parliament worth noting, however, is that members of either House of the Indian Parliament are not permitted to give evidence to the other House without the permission of the House of which they are members. They would be considered to be in contempt of the latter House if they acted in breach of this rule. [14]

In essence the argument advanced here is that there is a legal limit on the authority which was inherited from the House of Commons as regards the ability to compel members of the other House in a *bi-cameral* system of parliament. That limit is essentially derived from or based on both Houses being armed with equal and independent powers of investigation including the coercive authority that is necessary to make such an investigation effective. Consequently there is a need to reconcile those powers given the potential for conflict and mutual recrimination that would otherwise exist if those powers could be exercised against each other's members. In the words used by Hatsell and quoted above, that any other view would "soon introduce disorder and confusion" if both Houses exercised the same power "upon the same subject, but with different views and contrary purposes". [15] It is suggested that it is one thing for the Senate to debate and inquire into the conduct of even the highest Minister in the land. But if the Minister is not a member of the House conducting the inquiry it would I think be quite another for that House to be able to punish that Minister for contempt for failing to answer to the same House or its committees.

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[13] Hatsell Vol 3 at pp 20 – 1. Apparently the same procedures were adopted by the House of Commons when it wished to examine a member of the House of Lords. See also to the same effect, E May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (10th ed, 1893) at pp 402 – 3 and (21st ed, 1989) at p 677. In addition, and perhaps not surprisingly, the position of members of the South Australian Parliament being required to give evidence to the other House or its Committees, at the turn of the last century, was the same as was explained for members of the British Parliament and explained in para 11 of my earlier comments. (See Blackmore, *Manual of the Practice, Procedure and Usage of the House of Assembly of the Province of South Australia* (2nd ed, 1890) at p 156 and *Manual of the Practice, Procedure and Usage of the Legislative Council of the Province of South Australia (1889)* at p 115.

[14] See M Paul & S Shakdher, *Practice and Procedure of Parliament with particular reference to the Lok Sabha* (1967) at pp 227 – 8.

[15] Above at pp (**[000]** p 6) and accompanying n 12. The present writer's view on the existence and reason for the immunity enjoyed by *current* members accords with that expressed by Mr A Robertson SC in the opinion he gave cited above n 3 at paras 7-16, 18. Compare the contrary view expressed in relation to the Houses of the Victorian Parliament by Chamberlain cited above n 4 at pp 4-5 which however does not address the considerations referred to below in the text accompanying nn 11-16 below.

This line of argument and the authorities quoted and cited in support of it may help to explain why the Senate in 2001 authorised Senators to appear before the House of Representatives Privileges Committee:

> "subject to the rule, applied in the Senate by rulings of the President, that one House of the Parliament may not inquire into or adjudge the conduct of a member of the other House". [16]

It will be clear from the foregoing analysis that the suggested immunity is not based on Article 9 of the English *Bill of Rights* 1688 which prevents the questioning of "speech(es) and debates or proceedings in Parliament in any court or *place out of Parliament*" (emphasis added). The latter immunity is confined to the kinds of proceedings in Parliament mentioned and, moreover, to questioning that takes place in a court and "*place out of Parliament*". The Senate does not of course qualify for these purposes. This is hardly surprising since the immunity created by Article 9 was directed at executive and judicial interference with the freedom of parliamentary proceedings – and not at any interference with the equal and independent authority which each House of the Parliament enjoys as against the other House.

There remains the issue of whether the immunity is strictly confined to the conduct of a member of the Parliament, as a member of Parliament and does not extend to the conduct of Minister which did not form part of the proceedings of the House in which the Minister was a member. The present writer's view is that the immunity is not so narrowly confined.

The reason for taking that view is that the rights, privileges and liabilities of members of the Parliament must be construed against the background of the principles of responsible government. There is now an abundance of authority to show that those principles underlie the Constitutions of the Commonwealth and the Australian States and the aspects of those constitutions which bear upon the workings and operation of the respective parliaments. [17] There are problems regarding the precise extent to which the principles of responsible government are *enforceable* as distinct from merely *recognised* in the courts but those problems are not in point for present purposes. It suffices to indicate that that the responsibility of a member who is also a Minister should take account of all matters in respect of which the Minister could be questioned and be held to account. This would encompass any matters relating to public affairs with which he or she is officially connected … or to any matter of administration for which the Minister is responsible." [18]

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[16] Quoted in Harris at p 35 and see also Evans at p 442. The ruling presumably refers to the *compellability* of the member of the other House to answer questions or produce documents.

[17] See generally eg *Lange v Australian Broadcasting Commission* (1997) 189 CLR 579 at pp 561 – 2 ("constitutionally prescribed system of representative and *responsible* government" – italics added for emphasis; *Egan v Willis* (1998) 73 ALJR 75 paras [35] – [42] at pp 82 – 4, *Egan v Chadwick* [1999] NSWCA 176 (10 June 1999 paras 15 - 47) and generally G Lindell, *Responsible Government* in P Finn (ed), (1995) at p 85 n 42).

[18] Harris at p 525. The present writer's view on the scope of the immunity enjoyed by *current* members accords with that expressed by Mr A Robertson SC in the opinion he gave cited above n 3 at paras 17, 18

The result of the foregoing discussion is to suggest to the writer that current members do enjoy an immunity based on the institutional equality and independence of both Houses of the Commonwealth Parliament. That immunity, it is also suggested, is not strictly confined to the conduct of a member of the Parliament, as a member of Parliament or any matter that forms part of the proceedings of the House of which the Minister was a member. It can extend to any matter in respect of which the Minister could be questioned and be held to account for in the House in which he or she is a member.

Issue (2): Immunity of former members who were Ministers

The view is advanced in this paper that there are strong and persuasive reasons for recognising that the rationale which supports the probable immunity of current members is wide enough to sustain the continuation of any such immunity after the retirement of the Ministers from Parliament in respect of matters which were relevant to their conduct as Ministers.

Shortly stated, those reasons are that the independence and equal authority of each House of the Federal Parliament to be the sole judge of the conduct of its own members could be undermined if the other House could postpone the exercise of that authority until the retirement of the member in question. The potential ability of the other House to exercise that authority after a member's retirement could act as a significant fetter on the freedom of action of both the member and the House concerned. If, as is the case, one House of the Parliament should not be able to inquire into or adjudge the conduct of a member of the other House in relation to conduct as a member when that person is still a member, it makes no sense to allow that to happen after the person ceases to be a member. In other words the non – recognition of the immunity would render it incomplete and defeat the essential objective sought to be served by that immunity.

The fact that immunities enjoyed by certain persons or officers by reason of their position in relation to the performance of their duties and functions must continue to operate after the relevant persons or office holders cease to hold office is also illustrated by the following analogies:

(a) the privilege which attaches to the proceedings of either House does not cease to operate merely because the actors involved have themselves ceased to be members (or officers) of that House eg as regards the absolute privilege which attaches to statements made in the course of the proceedings of the parliament [19] **;**

(b) the power and the ability of either house to protect witnesses who appear before parliamentary committees does not cease to operate after the examination of the witness has been completed;

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[19] Compare the remarks made in a different context by McPherson JA in *O'Chee v Rowley* (1997) 150 ALR 199 at p 211: "Indeed if the immunity or prohibition only operated prospectively, and not retrospectively, it would have little utility. Taking as an example freedom of speech or debate, it would mean that a member of either House would be protected before and during the making of a speech but not after it, which, as experience shows, is the very time when the protection or immunity is needed".

(c) a judge's absolute immunity from any liability in relation to anything said or decided by the judge in determining a case, at least when acting within jurisdiction, does not cease to operate once the judge has retired; and

(d) the immunities which may exist for federal reasons as regards the inability of a parliament of one level of government to impose discriminatory taxes on public servants employed by the other level of government under Australia's federal system of government may extend to discriminatory taxes levied on pensions paid to retired public servants. [20]

It is suggested that in each of these cases the protection sought to be accorded to the relevant position or office would be defeated if the immunity only operated while a person occupied the position or office sought to be protected.

It is also agued here that the failure to observe the continued operation of the immunity in relation to *former* members could lead to the same kind friction and recrimination which underlies one of the reasons for recognising the immunity in relation to *current* members. It seems generally desirable to avoid damaging the harmonious and good relations between the two Houses of the Federal Parliament.

One possible obstacle in the way of accepting the view I have advanced relates to the application of the immunity to the examination of conduct which took place after the dissolution of the last Parliament and during the period of the election campaign which followed the dissolution. The immunity asserted here relates to any conduct for which he would have become answerable in Parliament. [21] But because of his retirement from the Parliament he could not have been asked questions in the Parliament which was of course dissolved; and when the government of the day would have been operating under the so – called "caretaker conventions" of government. To reject the operation of the immunity on this ground seems somewhat narrow and technical, especially as some Minister would ultimately become answerable for the same matter once a new Parliament was convened.

Another matter which gives pause for thought relates to the expression of the contrary view by the Clerk of the Senate. [22] He has flatly asserted that "the probable immunity of members of parliament does not apply to former members". Reference was made in that connection to the appearance of, and the evidence given by, two former Treasurers and a former Prime Minister before the *Senate Select Committee on Certain Foreign Ownership Decisions in relation to the Print Media* in 1994. All of those persons had by then ceased to be Members of the House of Representatives. It seems that one former Treasurer appeared voluntarily but the other two former members appeared only in response to summonses with the former Prime Minister subsequently reappearing before the same Committee voluntarily. With respect, the discussion of the Clerk's view, at least as I have read it, does not go beyond making the assertion and supporting it by reference to the incident referred to above. As

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[20] As to which see generally *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 eg at pp 666, 668, 681 and 687.

[21] See above at pp (**[000]** p 8).

[22] Evans at p 443. That view was re-affirmed in *Odgers Supplement* at p 12 and also the various letters written by the Clerk that were published in the *SSCCMI Report* at pp 347ff under "Correspondence received Clerk of the Senate and Clerk of the House of Representatives".

regards that incident the matter is not one of mere convention or practice and thus the mere fact that some former members appeared under summons does not necessarily mean that the act of summoning them was lawful.

The expression of the contrary view by the Clerk (and also learned Counsel, Mr Brett Walker SC[23]) does not dissuade me from the view advanced in this paper [24] on this matter. Nevertheless, the fact does remain that in the absence of direct judicial or other authority on the matter, there can be no certainty that either the Senate or ultimately a Court, will uphold the immunity we have supported. It should also be added that even if the immunity discussed above is soundly based, 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.

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.

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. [25] The present writer 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

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[23] Mr Walker's opinion given to the Senate Clerk and cited above in 3 at paras 14 – 15 and elaborated at paras 16 - 30. As to whether that view was supported by the Senate Committee which inquired into the children overboard affair see n 2 above and the accompanying text. The contrary view is also tentatively taken by Professor Carney in the paper cited above n 7. Those who have supported the contrary view have not addressed the rationale put forward in this paper to explain why any immunity enjoyed by a current member would be ineffective if it could not continue to operate after the retirement of the member.

[24] Which view accords with that expressed by Mr A Robertson SC in the opinion cited above n 3 paras 19, 23 – 24 and also that of the Clerk of the House of Representatives in the memorandum by him cited above in n 3.

[25] Letter to Senator P Cook dated 14 October 2002 published in *SSCCMI Report* at pp 347ff under "Correspondence received Clerk of the Senate and Clerk of the House of Representatives". The present writer 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 Counnsel, 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.

Parliament under ss 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

Finally, in regard to the immunity discussed above regarding former members of Parliament, it is worth re-iterating 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 Article 9 of the English Bill of Rights. [26]

In conclusion on this issue, the writer 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.

Issue (3) Immunity of Ministerial staff

There remains the far more tendentious possibility that the immunity discussed above may apply to the members of the Minister's staff both before and after the Minister's retirement. If the immunity did not exist in relation to the Minister's staff before the Minister retired from Parliament it was hardly likely to apply after that retirement.

Several Ministerial advisers declined to appear before the Senate Committee which inquired into the children overboard affair following a ban placed on their appearance by Cabinet. It seems that that the Committee decided not to exercise the power to compel their attendance and thereby expose those advisers to the risk of being in contempt of the Senate. It was stated that part of its reason not to summon was based on the previously expressed view that it would have been unjust for the Senate to impose a penalty on an officer who declines to provide evidence on the direction of a Minister. [27]

Although far more doubtful, it is suggested here that a reasonable case can also be made to argue that the immunity which operates in relation to Ministers who are currently members of the Parliament should also apply to their staff. The case would need to rely on the inability of Ministers to perform their roles and functions,

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[26] Above at pp ([**000**] at p 8).
[27] *SSCCMI Report* para 7.146 at pp 182 – 183 (Majority Report).

especially in the complex world of modern government and administration, without personal staff and advisers to assist them.

Some slight support for this notion can be derived for this argument by *two considerations*. The *first* relates to the fact that in former times apparently the privilege of Parliament used to attach to the personal servants of peers and of members of the House of the Commons, and also to other persons acting as their agents or upon their behalf. Consequently no such persons could be arrested or otherwise molested whilst Parliament was sitting or during the time when the privilege of the Parliament was in operation. This particular privilege was abolished by reason of s2 of the *Parliamentary Privilege Act* 1770 (UK). [28] But its abolition still left in place the general notion in relation to privileges and immunities not dealt with by that enactment.

The second consideration flows from the decision in Holding *v Jennings.* [29] It was held in that case that the typing of a statement to be made by a member of parliament is covered by the absolute privilege from liability in defamation which attaches to statements that form part of the proceedings in Parliament. [30] This should not be taken as suggesting, however, that the case decides that the immunities enjoyed by a member of parliament necessarily attach to the staff employed by the member of parliament.

If and once the argument is accepted as regards staff employed by *current* members of parliament then the same immunity should apply to the staff employed by *former members* in relation to matters that related to the conduct of the member whilst being a member. The same reasons that were advanced for the continuation of the immunity enjoyed by the member after the same person ceased to be a member would then apply for its continuation in relation to the staff employed by such a member after the member retired from Parliament. [31]

There are however a number of grounds that may cast considerable doubt in relation to the view advanced above. *First*, it is difficult to draw a principled distinction between members of the Minister's personal staff and public servants employed in the Departments of State administered by the Minister. As was indicated in the writer's article referred to earlier it is quite possible that those public servants would not enjoy the same immunities as those enjoyed by the Minister. [32] It is not easy to draw a principled distinction between the two classes of public employees. Perhaps the answer to this objection is that such staff employed under the *Members of Parliament (Staff) Act* 1984 are solely responsible for their conduct to the Ministers and other members of Parliament who employ them. The employment of such persons terminates once the Ministers and other members of Parliament who employ them die or cease to hold the respective offices mentioned. Their employment may be terminated at any time at the pleasure of the same Ministers and members of

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[28] See *Halsbury's Laws of England* (2nd ed, 1937) n (t) at pp 348 – 349 and E Campbell, *Parliamentary Privilege in Australia* (1966) at p68.
[29] [1979] VR 289.
[30] Under Article 9 of the *Bill of Rights* 1689.
[31] See above at pp (**[000]** pp 9 - 12).
[32] Cited above n 6 (1995) 20 *Melbourne University Law Review* 383 at p 395.

Parliament. [33] This is so even though the same employees are employed at public expense.

Secondly, there is the rejection of the possible immunity by both Mr Walker SC [34] and also the Clerk of the Senate who cites an instance where the Senate ignored a claim based on the same immunity in 1995 as regards the appearance of the Director of the National Media Liaison Service. It is significant to remember however that it appears that it was stated in debate that the relevant resolution in relation to that incident did not set a precedent in summoning ministerial staff. In the view of the Clerk such persons "have no immunity ... either under the rules of the Senate or as a matter of law". [35] It may be true that the rules of the Senate do not at present refer to the position of such persons or indeed even that of *former* Ministers and members of Parliament. But if the immunity flows from the constitutional relationship between both Houses of the Parliament then the failure of those rules to recognise that immunity could not avail against the Constitution.

But be that as it may, all this means that the position in relation to such persons is much more doubtful than that occupied by a Minister.

The possible existence of this immunity poses serious implications for the effectiveness of parliamentary inquiries in the future In the view of the writer this gives rise to the need to both clarify and remove the immunity, either by waiver in individual cases or by more far ranging measures. In that regard the writer shares the concerns expressed in the Majority Report prepared by the Senate Committee which inquired into the children overboard affair. The members of the Committee who wrote that Report recommended that the time had come for a serious, formal re-evaluation of how ministerial staff might properly render accountability to the parliament and thereby the public. [36]

In conclusion on this issue, it will be clear from the foregoing discussion that the writer believes that are also reasonable arguments to support the application of the same immunity to a member of the Minister's staff, both before and after the retirement from Parliament of the Minister who employed the member of staff. But as indicated before the position in relation to such persons is much more doubtful than that occupied by the Minister. [37] Furthermore the acceptance of the arguments poses

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[33] See ss 9, 16 and 23 of that Act.

[34] Opinion given to the Senate Clerk and cited above n 3 **at** paras 14 – 15 and elaborated at paras 16 – 30.

[35] See Evans at p 443 ad re – affirmed in *Odgers Supplement* at p 12 where reference is also made to an instance in 1975 of the Prime Minister's private secretary and that of the Minister for Labour and Immigration appearing before the Senate Standing committee on Foreign Affairs and Defence in the course of its inquiry into the matter of South Vietnamese refuges. It is also stated that in the United States various administrations have claimed that it is not appropriate for presidential staff and advisers to give evidence to congressional committees. But apparently many such persons have appeared, both voluntarily and under summons.

[36] *SSCCMI Report*, para 7.149 at p 183. See also the concerns expressed by Senator Rae in Commonwealth, *Parliamentary Debates,* Senate, 25 September 2002 at pp 4623 – 4625.

[37] Compare the contrary view expressed as regards Ministerial Advisers in relation to the Houses of the Victorian Parliament: Chamberlain cited above n 4 at pp 5-6. See also the discussion of the issue in terms of "conventions" when referring to advisers being excused from giving evidence, rather than legal immunities in the Majority Report prepared by the Senate Committee which inquired into the children overboard affair: *SSCCMI Report above n 2* in paras 7.136 – 7.149 at pp 180 – 183.

serious threats to the effectiveness of parliamentary investigations in the future which may call for reform.

Issue (4) Public interest immunity – passing observations

There remained the possibility of the former Defence Minister claiming public interest immunity or, as it is sometimes called, executive privilege. [38] In the article by the present writer it was concluded that the question of the extent, if any, to which such immunity or privilege operates as a legal restriction on the power of the Houses of Parliament to require official witnesses to answer questions or produce documents, remains an open question. The view expressed in that article was that it should not operate as a restriction of this kind. There is no need here to repeat the extensive analysis of this issue in that article. [39]

It remains the case that there is no judicial resolution of this contentious issue, at least as regards inquiries conducted by the Houses of the Federal Parliament and their committees. However, there have been two important cases which have dealt with the powers of the New South Wales Legislative Council to compel Ministers to produce documents. The High Court left open whether public interest immunity could restrict the legal powers of the Legislative Council in *Egan v Willis* [40] The New South Wales Court of Appeal decided in *Egan v Chadwick* [41] that the immunity did *not* restrict the powers of the Legislative Council, *except* as regards for the production of Cabinet documents and also the deliberations of Cabinet. There may be other exceptions based on the principles of collective and individual responsibility of Ministers, the nature of which was not, however, made clear. The existence of the latter exceptions was upheld only by a majority (Spigelman CJ and Meagher AJ) with the remaining member of that Court dissenting on the existence of that qualification (Priestley AJ). The relevance of the position of the Houses of the New South Wales Parliaments needs to be approached with some caution since it was acknowledged that the powers of the same Parliament in this regard were those implied by reference to what was reasonably necessary to enable a legislature to function. The powers of the Houses of the Federal Parliament may be more extensive by reason of s49 of the Commonwealth Constitution. [42] In addition the cases in question were only concerned with the powers of the Legislative Council to compel a Minister to produce certain documents when the Minister was himself a member of the same Council. [43]

Even if, contrary to my view, the immunity did operate to constrain the powers of a Senate Committee, it would of course still have been necessary to substantiate whether the immunity was attracted by the former Minister's conduct. No view is

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[38] The availability of the claim of public interest immunity in relation to the position of Ministers appearing before parliamentary inquiries is also discussed in the opinion given by Mr Walker SC cited above n 3 at paras 28, 31-35.
[39] See the article cited above n 6 (1995) 20 *Melbourne University Law Review* at pp 394 – 404 and esp pp 398 - 9. The present writer has not seen any reason to alter that view. It seems to accord with that expressed by Mr Walker SC in the opinion cited above in n 39.
[40] (1999) 73 ALJR 75 at pp 86 – 7, 117, 120.
[41] [1999] NSWCA 176 (10 June 1999).
[42] See *Egan v Willis* (1999) 73 ALJR 75 at pp 81 – 2.
[43] See also generally, J McMillan, "Parliament and Administrative Law" in G Lindell and R Bennett (eds), *Parliament: The Vision in Hindsight* (2001) Ch 8 at pp 371 - 5 who also confirms that the general issue remains unresolved for the Federal Parliament.

expressed here on that issue apart from offering two few brief comments. First, any attempt to invoke the immunity based on any possible harm that could result to national security and defence and also the conduct of foreign affairs may at the very least require the support of the relevant Ministers who are currently responsible for those matters in the Parliament. Secondly, the general impression formed by the writer regarding the state of the judicial authorities is that merely because the disclosure of evidence would discourage candour on the part of public officials, would not by itself be sufficient to attract the immunity. This means that the law has departed from the days which treated the secrecy of the Counsels of the Crown as inviolate; or that it can continue to be assumed that advice given by senior public officials to Ministers will always attract the immunity. The same will probably be also thought regarding communications between Ministers. Cabinet documents and deliberations will no doubt, however, continue to attract the immunity absent any breach of the criminal law or the need for evidence in a criminal trial. [44]

Issue (5) Possible objections to the existence of the immunity based on wider considerations

So far the discussion of the possible immunities has concentrated on the law of parliamentary privilege which operates as a result of s 49 of the Australian Constitution and the equal powers enjoyed by both Houses of the Commonwealth Parliament. It is now necessary to consider possible objections to the existence of the immunity discussed in this paper based on other aspects of the Australian Constitution. Those aspects concern the implied freedom of political communication, responsible government and Executive accountability to the Legislature.

(a) Implied freedom of political communication

It may be argued by some that the immunities would restrict the ability to communicate and disclose information highly relevant to the choices electors are required to make so as to attract the operation of the freedom of political communication implied from the Australian Constitution. [45] In the writer's article referred to earlier, the view was expressed that the power of parliamentary inquiries to inquire into governmental matters and even override claims of Executive privilege was reinforced by the existence of this freedom. The freedom and the doctrine of representative government from which it was derived could only emphasise the importance of maximising the free flow of information necessary to enable electors to make informed choices about their political representatives.[46] .

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[44] See generally *Commonwealth v Northern Lands Council* (1993) 67 ALJR 405 and also p 409 as to breach of the criminal law and at pp 406 – 7 as to the candour point.

[45] See eg See *Australian Capital Television (No 2) v The Commonwealth* (1992) 177 CLR 106 and *Lange v Australian Broadcasting Commission* (1997) 189 CLR 579 ("*Lange*").

[46] See "Parliamentary Inquiries and Government Witnesses" (1995) 20 *Melbourne University Law Review* 383 at p 402. See also the explicit reference to s49 amongst the constitutional provisions which made it impossible to "confine the receipt and dissemination of information concerning government and political matters during an election period": *Lange* (1997) 189 CLR 579 at pp 558 – 559. This included "information concerning the conduct of the executive branch of government throughout the life of a federal Parliament": *ibid.* Section 49 was earlier described as providing the source of coercive authority for each chamber of the parliament to summon witnesses, or to require the production of documents, under pain of punishment for contempt: *ibid* at p 561

That said the newly discovered implied freedom of political communication has given rise to a potential clash with the exercise of powers and functions elsewhere provided in the Constitution. State appellate courts have already had to grapple with these clashes. In the view of the writer there is a strong possibility that the clash in the present context would be resolved either by treating the exercise of the power and function provided in s 49 as immune from the operation of the implied freedom; or, alternatively, that the law governing the exercise of the same power and functions constitute a reasonable regulation of the implied freedom in question. [47] In other words, it is suggested that a doctrine based on a process of *implication* that is derived from the *text and structure* of the Constitution should not be allowed to override or contradict the *express* provision of the Const in s49 or the *consequences* that may flow from such provisions principle. There is here a direct analogy with the importance ascribed to s 49 of the Constitution in rendering inapplicable some aspects of the doctrine of the judicial separation of powers in Ch III of the Constitution, as occurred in *R v Richards Ex parte Fitzpatrick and Browne.* [48]

(b) Responsible government and Executive accountability to the legislature

Reference was made earlier to the abundance of authority to show that the principles of responsible government underlie the Constitutions of the Commonwealth and the Australian States and the aspects of those constitutions which bear upon the workings and operation of the respective parliaments. [49] In *Egan v Willis* Gaudron, Gummow and and Hayne JJ suggested that they could not see anything inconsistent with the way in which responsible government operated in Australia for the Upper Houses of Australian legislatures to have the power to inquire into the conduct or matters concerning Ministers who were not members of those Houses .[50] This much may be conceded.

But in the present writer's view it would be unwise to think that their Honours meant to suggest by those remarks that an Upper House could exercise *coercive authority* over members of the other House in a bicameral parliament. A distinction can and should be drawn between the ability to *inquire* over a matter and the *authority* that can be exercised in the course of carrying out that inquiry. [51]

It may also be conceded that the immunities asserted in this paper will not enhance or help the interests of holding the Executive accountable to the Parliament. But in the view of the writer this consideration needs to be balanced or weighed against the considerations of *institutional harmony* which underlie the immunity. Moreover, the fact that the former Defence Minister (or, much less clearly, his Ministerial advisers) could not be required to answer before the Senate without the consent of the HR,

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[47] *Laurance v Katter* (1995) 141 ALR 447 (QLD Court of Appeal) and *Rann v Olsen* (2000) 76 SASR 450 (SA Full Court) esp at p 476 per Doyle CJ who stated "[a]n implication drawn from other provisions of the Constitution must give way before an express provision of the Constitution".

[48] (1995) 20 (1955) 92 CLR 157.

[49] Above n 17.

[50] (1998) 195 CLR 424 at pp 451-3, paras 42 and 45.

[51] Compare the reliance placed on the same the remarks in *Egan v Willis* in the opinion given by Mr Waker SC cited above n 3 at para 27.

certainly does *not* mean that he (or they) could *not* have been required to answer before the House in which he had been a member, namely the House of Representatives. It was at least *legally* possible for that House to have compel him (and his Ministerial advisers) to answer questions about the relevant conduct regardless of the *political* willingness or otherwise to excise this power. The significance of the latter possibility may one day be underlined if a federal government does not hold office in its own right but only governs with the support of independents as has become common place at the State level of politics.

Concluding observations and reform

Many will think that the existence of the immunities asserted in this paper may call for change especially as the institutional answer suggested for questioning the former Defence Minister and his Ministerial advisers presupposed a willingness on the part of a House which for reasons of party political considerations was unlikely to exercise. This does not reflect much credit on the current operation of responsible government. Perhaps both Houses could waive the immunities in individual cases although the enactment of legislation (pursuant to ss 49 and 51(xxxvi)) may be needed to cover the possibility that the immunities may also be personal to the members concerned.

Whether such legislation would ever be enacted as regards the position of Ministers is highly doubtful. A more fruitful and likely possibility is to address the position of Ministerial advisers in view of the growing number of such officials. The failure to do something in relation to such officials will pose a real threat to the effectiveness of parliamentary inquiries in the future.

Geoffrey Lindell
Adjunct Professor of Law
The University of Adelaide

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