PARLIAMENT OF AUSTRALIA
HOUSE OF REPRESENTATIVES

PARLIAMENT HOUSE
CANBERRA ACT 2600
TEL: (02) 6277 4111
FAX: (02) 6277 2006
EMAIL:Clerk.Reps@aph.gov.au

OFFICE OF THE CLERK OF THE HOUSE

3 April 2002

Mr Brenton Holmes
Secretary
Select Committee on a Certain Maritime Incident
Room S.157
Parliament House
CANBERRA ACT 2600

Dear Mr Holmes

Request for advice on behalf of Senate Select Committee

Thank you for your letter of 28 March 2002 conveying on behalf of the Senate Select Committee on a Certain Maritime Incident a request for advice on certain powers of parliamentary committees. Specifically, you mentioned the calling, as witnesses, of former ministers and of ministerial advisers. You also mentioned the committee's particular interest in views about any immunities that might attach to these people, and about the nature and extent of any relevant precedents, in the Australian Parliament or in any comparable legislature.

I am happy to provide the points that follow. In passing them on to the committee, I would be grateful if you could inform the committee members that I am not formally trained in the law. However, I have passed my conclusions and observations before a number of legally trained people. I hope my observations will be of some help to the committee which I understand is being required to consider significant matters relating to procedure and substance.

Basic principles

The basic principles as I see them relate to:
Immunity of current members

- The immunity enjoyed by current members of one House of the Parliament, in particular, members who were also Ministers, from being forced to give evidence before a parliamentary committee established by another House of the same Parliament.
- implications of the traditional denial the House has demonstrated under the leadership of Prime Ministers of different political persuasions to the concept that House Ministers are accountable to the Senate.

Continuation of immunity

- The continuation of any immunity extending to a former Minister after her or his period of service in the Parliament in respect of matters relevant to their conduct as Ministers.

Minister's staff

- The application of a similar immunity to staff employed in the Minister's office before and after the Minister's period of service in the Parliament, and

Public interest immunity

- certain matters relating to public interest immunity.

Immunity of current members of Parliament

I propose to discuss this consideration in some detail. I believe that is important to establish the existence of the immunity, and the justification on which it is based, preliminary to discussing the situation of former Members of the Parliament.

There appears to be no doubt as to the existence of an immunity in respect of current members of Parliament. This conclusion is borne out by a perusal of *House of Representatives Practice*[1] and *Odgers Australian Senate Practice*[2], of which the relevant segments of each would be available to the committee.

Comity

There is less agreement on the justification for the immunity. The Clerk of the Senate has described an immunity of this kind as being "a matter of comity between the houses and of respect for the equality of their powers"[3]. It is my belief that the principle is a legal restriction based upon the Constitution, whereas the use of the term "comity" may suggest something falling short of a strict legal immunity. The term is derived from the Latin "comitas" and is defined as " courtesy, civility, urbanity, kindly and considerate behaviour towards others"[4]. An electronic search of the Australasian Federal Conventions of the 1890s reveals that the term was used to refer to the friendly relations between nations (and its current legal use relates to a similar meaning in international law), the colonial jurisdictions and the proposed States of the intended Commonwealth of Australia. It does not appear to be used to refer to the relations between the Houses of the proposed Commonwealth.

Nor has the House of Representatives endorsed the ramifications of the concept described by the Clerk of the Senate whereby the Senate will not censure a Member of the House of Representatives "because it is not appropriate for the Senate to seek to censure a member of the House of Representatives other than a minister acting in that capacity on the basis that only the House can examine the conduct of its members other than ministers"[5].

The House has agreed to a motion repudiating sectarian sentiments attributed to a named Senator[6], and has agreed to a censure motion in respect of a private Senator for disclosure of a tax file number, and on a separate occasion for failing to observe

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[1] *House of Representatives Practice*, 4th edition (hereafter *HRP*), pp34-5,639-42, 729.
[2] *Odgers Australian Senate Practice*, 10th edition (hereafter *OASP*), pp56, 440-3.

[3] *OASP*, p442
[4] Shorter Oxford Dictionary definition.
[5] *Senate Procedural Information Bulletin*, No. 122, for sitting period 2-12 March 1998.
[6] *Votes and Proceedings of the House of Representatives* (hereafter *V&P*), 1970-72, p981.

reasonable standards of behaviour[7]. As recently as 19 March 2002, a motion to suspend standing orders was moved in the House to enable a motion of censure in respect of a Senator[8].

On occasion in the past, the Senate has also applied a less stringent approach to what has been described as a matter of comity, which also extends to the officers of each House. In 1921, the Senate requested an amendment that would have reduced the salary proposed in Appropriation Bill 1921-22 for the Clerk of the House. On 19 March, the Senate agreed to a censure of the Prime Minister for his actions in respect of a Senator[9].

Legal restriction

My view is that the immunity of current members of Parliament is soundly based on the powers of the Houses of the legislature under the Constitution. The complete autonomy of the Houses from each other is primarily based on section 49 of the Constitution, and section 50 providing for each to determine its rules and orders. It is amplified in statute and common law, with each House elected on a distinct basis and given the control of its own staffing, finance, accommodation and services[10].

Professor Geoffrey Lindell has commented on the legal basis of the immunity of members of one House from the authority of the other House of the same Parliament:

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 as 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 Houses of Commons at the establishment of the Commonwealth[11].

The independence of the houses and the equality of their powers and the application of the probable powers of the United Kingdom House of Commons as at 1901 is stated in Hatsell as follows:

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 have been 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

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[7] *HRP*, p318.
[8] *V&P*,p119
[9] Senate Hansard, 19/3/02, pp 661-676.
[10] *HRP*, p34.
[11] *Parliamentary Inquiries and Government Witnesses* (1995), *Melbourne University Law Review*,383 at *395*. See also *Members of Parliament: law and ethics* , G Carney (2000) at pp185-6.

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].

May expresses a similar view as follows:

Since the two Houses are wholly independent of each other, neither House can claim, much less exercise, any authority over a Member or officer of the other, and thus cannot punish any breach of privilege or contempt offered to it by such Member or officer[13].

I conclude the section of these notes on of the immunity of current Members of Parliament being on a legal basis rather than a loose concept of comity with reference to a recent resolution of the Senate. In 2001, the Senate authorised Senators to appear before the Committee of Privileges of the House of Representatives "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"[14]. Any statement of practice deriving from this has the advantage of being based on a resolution of the Senate, and appears to confirm the view that something more than custom or convention, and something more akin to a legal immunity, is involved. The courts have not yet adjudicated on the matter, as the Clerk of the Senate has advised[15]. However, this may well occur if the penalty under an alleged breach of the senate privilege resolutions is pursued. I will discuss this matter in more detail subsequently.

Restricted immunity?
The issue remains as to whether the immunity is strictly confined to the conduct of a member of the Parliament, as a member of the Parliament. There is the related issue at to whether the immunity does not extend to the conduct of a Minister which did not form part of the proceedings of the House of which the Minister was a member.

The advice of the Clerk of the Senate to Senator Faulkner dated 19 February 2002, a copy of which Mr Evans supplied to me after he understood that Senator Faulkner had released the advice, appears to suggest that the immunity is confined in this way. However, my view is that the rights, privileges and liabilities of Members of Parliament must be construed against the background of the principles of responsible government. There is an abundance of authority to show that those principles underlie our federal Constitution, the Constitutions of the Australian States and the aspects of those constitutions which bear upon the workings and operation of the respective parliaments[16]. (I note in passing that Mr Evans' advice to Senator Faulkner commented that the immunity was based on the principle of the comity between the Houses, which I have indicated not to be the preferable basis).

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[12] *Precedents of Proceedings in the House of Commons* (1818), Vol. 3, p.67.
[13] *May*, 22nd edition,p.34.
[14] *HRP*, p35, *OASP*, p.442.
[15] *AOSP*, p442.
[16] See generally *Lange v Australian Broadcasting Commission* (1997) 189 CLR 579 at pp561-2, *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.

In the general scheme of responsible government in the federal sphere, the House of Representatives is constitutionally the predominant forum, in the sense that executive government depends on majority support in the House.

Your letter to me of 28 March specifically mentioned former Defence Minister Peter Reith, and relates to an examination of conduct which took place after the dissolution of the House of which he was a Member during the subsequent election campaign. From 8 October 2001, the time of dissolution, until 26 November 2001, when the new administration began, Mr Reith was a Minister but not a Member of the House. The Government was operating under caretaker conventions, on the grounds that the Chamber under the principles of responsible government to whom the administration should be accountable does not exist, and the nature of the next administration is unknown[17]. The immunity discussed relates to conduct for which the Minister could have been held to account in the House, but Mr Reith could not have been asked questions in a dissolved House and he was not to be a Member of the newly-elected House.

However, I do not believe that this constitutes grounds for rejecting the operation of the immunity on this ground. To do so would constitute a narrow and technical view, especially in the light of the fact that some Minister would ultimately become answerable to one of the Houses in the new Parliament once it was convened.

Legal basis in practice – House Ministers not accountable to the Senate

The existence of the highly probable legal immunity is reflected in the practices and procedures followed by both Houses if a member of the other House of the current Parliament is to be called to give evidence to a parliamentary committee. However, the standing orders have not been interpreted as requiring consent or leave to attend if the Member or Senator is prepared to appear voluntarily[18].

Voluntary appearances before committees
Appearances by Ministers before a committee of either House may be a consequence of a wish to participate in a sharing of views. There are a number of instances over the years of a Minister of one House appearing voluntarily before a committee of the other House. It is quite common for House Members to appear before Senate committees by invitation, and many have done so. According to *Odgers Australian Senate Practice*, this informal procedure of appearance by invitation is appropriate in cases where Members are offering their views on matters of policy or administration under inquiry by Senate committees, but it has not been used where the conduct of individuals may be examined, adverse findings concerning individuals may result or disputes as to matters of fact may occur. In the latter-mentioned instances, the formal process of request for attendance by message to the House and authorisation to appear should be employed[19].

Comment on other administrations

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[17] *Cabinet Handbook*, Attachment 1 para.1, *Guidance on Caretaker Conventions*, Department of the Prime Minister and Cabinet, September 2001, para. 1.1.
[18] *HRP*,pp639-42, *OASP*, pp 440-3.
[19] *OASP*, p 441.

Your letter of 28 March sought comment on comparable legislatures.

Australian States
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 19th into the 20th century appears to have been the same as outlined in the passage from *Hatsell* quoted earlier[20]. There has not been the opportunity to check on other colonial/State legislatures in the time frame of the completion of this response.

USA I understand that a similar practice in relation to voluntary appearance may occur in the Congress in the United States of America[21].

India
A similar practice as prevails in the Parliament of the Commonwealth of Australia appears to apply in the Indian national Parliament. However, there is one significant difference. 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 she or he is a member. They would be considered to be in contempt of the House in which they hold membership if they acted in breach of this rule[22].

Compulsory attendance of serving Minister sought and not agreed to by the House
In relation to the Australian Loan Council inquiry, the then Prime Minister indicated to the House in 1992 that, whether or not a House Minister wished to agree to a suggestion that he account for himself to the Senate, the Prime Minister would forbid him going to the Senate to account for himself; no House of Representatives Minister would appear before a Senate committee of any kind while he was Prime Minister[23]. On 7 October 1993 the House considered a message requesting the attendance of Mr Dawkins before the Senate Select Committee on the Australian Loan Council. The House resolved that it was not appropriate for the Minister to appear and give evidence against his will, and declined to require him to attend[24].

Attendance of former Minister sought and not obtained
In 1981, the Chair of the Senate Standing Committee on Finance and Government Operations wrote to a former Minister regarding an apparent conflict in evidence given to the committee during the course of its inquiry into the Australian Dairy Corporation and its Asian subsidiaries. The former Minister (Mr Sinclair) was still a Member and had another portfolio. He wrote to the committee; there was still a discrepancy between the sworn evidence of a witness and the former Minister's recollections as expressed in the letter. In a personal explanation, the former Minister indicated that he did not believe it appropriate for a House Minister to appear and give sworn evidence before a Senate committee [25]. The chair of the committee informed

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[20] *Manual of the Practice, Procedure and Usage of the House of Assembly of the Province of South Australia*, Blackmore, 2nd edition, 1890, p156, and *Manual of the Practice, Procedure and Usage of the Legislative Council of the Province of South Australia*,1889,p115.
[21] *Jefferson's Manual and the House of Representatives of the United States 99th Congress*, W Holmes Brown , 1985, pp120,152.
[22] Kaul and Shakdher, *Practice and Procedure of Parliament*, GC Malhotra (ed) 5th edition at pp 304-5.
[23] *HR Hansard*, 4/11/1992, page 2547.
[24] *Votes & Proceedings*, 7/10/1993, page 342.
[25] *HR Hansard*, 7 /5/1981, page 2111.

the Senate that Mr Sinclair had made a statement (not within his current ministerial responsibility) to the House of which he was a Member. The House could treat as a contempt a false statement made to it by a Minister in relation to his area of ministerial responsibility. The extent to which the convention of ministerial responsibility extended beyond that was not clear to the committee[26].

Senate Censure motions
Appearance before a parliamentary committee is one demonstration of the concept of parliamentary accountability. The asking of parliamentary questions is another. However, the greatest demonstration of parliamentary accountability in the House of Representatives resides in a motion of want of confidence or censure. The successful passage of a House motion of this kind would normally be followed by severe action, resignation in the case of a want of confidence resolution. There have been successful Senate motions censuring Senate Ministers, House Ministers, House and Senate Ministers representing them, the Prime Minister and the Government. However, *House of Representatives Practice* indicates that while action of this kind in the Senate may contribute to the pressure, the passage of a censure motion in the Senate would appear to have no substantive effect[27].

The situation is therefore that the House has adopted the attitude over successive administrations that its Ministers are not accountable in their own right to the Senate or its committees.

Continuation of immunity

It is my firm belief that the rationale which supports the probable legal immunity of current Members of Parliament is sufficiently wide to sustain the continuation of immunity in respect of matters relevant to their conduct as Ministers after their cessation of membership. My belief is principally based on the consideration that to regard the immunity otherwise would render it incomplete and defeat the essential objective of that immunity.

The independence and equal authority of each House of 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. This could prove to be a significant fetter on the freedom of action of both the member and the House concerned.

The failure to observe the continued operation of the immunity in relation to former members could lead to the same sort of friction and recrimination which underlies one of the reasons for continuing the immunity in relation to current members. It would do nothing to reduce the potential for damaging the harmonious and good relations between the two Houses of Parliament.

For either House to act in a way which disregards the continuation of the immunity would not advance the public perception of the parliament. A number of people politically disinterested in the current inquiry have made comments to the effect that

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[26] *Sen. Hansard*, 14 May 1981, page 2040.
[27] *HRP*, page 317.

the compulsory attendance of a former Minister of the House before the committee would have quite unfortunate connotations, and that, whatever the intentions of the committee members, there could be a perception of inevitable risk or prejudice to the former Minister. Terms stemming from the Tudor monarchy have been used. I would never use those terms, but I can understand the perception that leads to a description of this kind. I am certain that in any situation in which I was called upon to provide advice, particularly if the future provided for minority governments in the House of Representatives or for committee inquiries following changes of government, my approach would be that it is not appropriate to act in this way.

There is also the comparison of immunities enjoyed by certain persons or office-holders by reason of their position in relation to the performance of their duties and functions must continue to operate after they cease to hold office. The following comparisons come to mind:

- certain privileges attaching to the proceedings of either House do not cease after a Member of Parliament ceases to be a Member. For example the protection provided by the privilege of freedom of expression in the Houses, their committees or matters incidental to those proceedings;
- the power, ability and obligation of a House to protect witnesses appearing before it or one of its committees does not apply only when the appearance or matters incidental to it are occurring;
- the absolute immunity of judges from any liability in relation to anything said or decided by the judge in determining a case does not cease to operate after a judge has retired;
- the immunities which may exist for federal reasons as regards the inability of a parliament at one level of government to impose discriminatory taxes on public servants employed on the other level of government under Australia's federal system may extend to discriminatory taxes levied on pensions paid to retired public servants[28].

Practice in relation to former Ministers not Members of the House

In the Sinclair instance, the former Minister was still a Member of the House (and still a Minister). The Senate appear to be in no doubt that a serving Member cannot be compelled to appear before a Senate committee. In the 1992 Dawkins case cited above, the Clerk of the Senate provided advice that the Senate did not possess the power to compel Members of the House to appear. *Odgers Australian Senate Practice* states that the probable immunity does not apply to former Members[29], using the Print Media Committee as the example to prove the case. In 1994, during an inquiry by the Senate Select Committee on the Print Media, two former Treasurers and a former Prime Minister gave evidence after they had ceased to be Members of the House. Former Treasurer Dawkins appeared voluntarily, former Treasurer Kerin and former Prime Minister attended following the issue of a summons.

Limitations of precedent

However, this is a strictly limited precedent, and the basis of this Senate claim in respect of former Members has not been tested. All were former Ministers and former Members (Mr Dawkins had only recently resigned). Mr Dawkins appeared

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[28] See *West v Commissioner of Taxation (NSW)* 56 CLR 657 eg at pp 666,668,681 and 687.

[29] *OASP,* pages 442-3.

voluntarily following a request by the committee. The committee found it a matter of regret that Mr Hawke and Mr Kerin had only attended following the issuing of a summons[30]. However, both Mr Hawke and Mr Kerin appear to have given evidence voluntarily once they appeared, Mr Hawke successfully seeking the committee's consent to appear before the committee on a second occasion to respond to evidence which he perceived to have reflected adversely on his interests[31].

Cited authority for precedent
The Clerk of the Senate has provided Senator Faulkner with advice that the probable immunity of former Members of Parliament does not apply.
This reflects a flat assertion in the current edition of *Odgers Australian Senate Practice*[32]. The discussion of the Clerk of the Senate does not go beyond making the assertion and supporting it by reference to the incident relating to the former Prime Minister and two former Treasurers in the Print Media inquiry. I believe with respect that committees of either House do not have the power to establish the practice of the House in respect of a matter, and that, in the absence of decisions of the House, unelected officials do not have the power to assert with any finality the practices of the House in question are. My attitude would always be to regard myself as the servant of the House for which I work, and not as a determiner of its practices. This is for the House itself to decide. I do not believe the Senate has made a decision on the matter, despite the flat assertions.

Immunity of Minister's staff

Persons employed under the Public Service Act
There are a number of comments I wish to make concerning witnesses before parliamentary committees who are employed under the *Public Service Act 1999*[33]. The first relates to the values of the Australian Public Service under section 10 of the Act. Paragraph 10(1)(e) of the Act indicates that:

the APS is openly accountable for its actions, ***within the framework of Ministerial responsibility*** to the Government, the Parliament and the Australian public; *(emphasis added).*

Subsection 10(6) of the Act provides that:

An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.

The *Parliamentary Privileges Act 1987*[34] contains a provision at subsection 6(2) to the intent that subsection 6(1) of the Act does not apply to actions or words in the presence of a House or a committee. The absence of such a disclaiming provision in the Public Service Act, passed after the Privileges Act, could well be interpreted to mean that it was the intention of Parliament not to relieve persons employed under the

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[30] *First Report of the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media*, June 1994, page 20.
[31] Ibid, pages 20, 27 and 35.
[32] OASP,p443.
[33] Act No. 147 of 1999.
[34] Act No.21 of 1987.

Public Service Act of their obligation to observe the terms of subsection 10(6), even when appearing before a House or one of its committees.

Persons employed under the MOP(S) Act

It is my understanding that most persons employed in the offices of Ministers are employed under the *Members of Parliament (Staff) Act 1984*[35]. A reasonable case could be made out for the immunity operating in respect of Ministers who are current Members of the Parliament also applying to their staff, based on a Minister's need for the assistance of staff to perform their roles and functions, especially in the modern complex world of government and administration. Support for this argument can be derived from the following:

- In former times it seems that parliamentary privilege attached to the personal servants of members of the Lords and the Commons, and to their agents or other persons acting on their behalf (eg freedom from arrest or molestation while Parliament was sitting). This particular privilege was abolished by the *Parliamentary Privilege Act 1770* (UK). The status of other privileges not specifically abolished by that enactment has not been determined.
- In *Holding v Jennings*[36] it was held that the typing of a statement to be made by a member of parliament attracted absolute privilege. However, under the terms of the Parliamentary Privileges Act it would seem that actions of this kind must relate to matters incidental to proceedings in Parliament, and would not automatically extend to an interpretation that the immunities enjoyed by a Member of Parliament necessarily attach to their staff.

Of course, there is a consideration relating to difficulty in distinguishing members of a Minister's personal staff and public servants employed in the Minister's department. However, the distinction may be found in the fact staff are employed under the MOP(S) Act by the Minister and other Members of Parliament. The employing Member is responsible for their conduct. Moreover, as I have indicated above, statutory restrictions apply to staff employed under the Public Service Act in their dealings with Ministers and their offices.

I believe that committee members would have available to them the response of the Prime Minister in question time on 12 March 2002 concerning the appearance of ministerial staff. In that response, Mr Howard quoted the view of then Senator McMullan that ministerial staff were accountable to the Minister and the Minister was accountable to the Parliament, and ultimately, the electors[37].

If there is an acceptable argument in relation to the staff employed by current members, the same argument would apply to the former staff of former members.

The Clerk of the Senate has rejected the existence of an immunity extending to ministerial staff on the basis of the 1995 appearance before a Senate committee of the Director of the National Media Liaison Service[38]. However, *Odgers Australian Senate Practice* indicates that it was raised in debate on the resolution requiring the Director to appear that the resolution did not set a precedent for the appearance of ministerial

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[35] Act No. 64 of 1984.
[36] [1979] VR 289.
[37] *HR Hansard*, 3/12/02, p939.
[38] OASP, p 443.

staff. Again, *Odgers Australian Senate Practice* indicates that such persons have no immunity either under the rules of the Senate or as a matter of law[39]. It may be true that the resolutions of the Senate do not refer at present to the position of such persons, or even former Ministers and Members of Parliament. However, if the immunity flows from the constitutional relationship between the Houses of Parliament, the failure of Senate rules to recognise the immunity could not avail against the Constitution.

Power to compel attendance
There is **precedent** for a Senate committee empowered to summons persons, papers and records, to compel the attendance of anyone who is not a current Member of the House. This is consistent with legal advice to the Senate Print Media inquiry in 1994 provided by Mr D Jackson QC of Snedden Hall and Gallop[40].

Conduct of committee hearing

However, notwithstanding the Kerin/Dawkins/Hawke precedent, it is my firm belief that someone who is a former Minister could be requested to appear in a personal capacity only, not as a former Minister of the Crown, or if so called, could be constrained in the responses that he or she could make to the committee's questions. I believe that the 1994 view expressed by Mr Jackson QC in relation to the consequences of a person simply refusing to answer a question properly put at a meeting of a Senate committee is subject to the qualification of parliamentary experience. Mr Jackson cites the Senate privilege resolution:

(12) A witness before the Senate or a committee shall not:
(b) without reasonable excuse, refuse to answer any relevant question put to the witness when required to do so.

I believe that a response relating to parallel considerations to public interest immunity or a duty not to provide information would constitute an answer. However, it would be for the committee to decide and for the Senate itself to take any action if it thought it appropriate.

Public interest immunity
The responses to be provided by a former Minister could well be constrained by considerations related to an extension of what has been called Crown or Executive Privilege, now usually known as public interest immunity. Vested in the Executive, the government may, under this philosophy, seek to claim immunity for requests or orders by a committee for the production of certain oral or documentary evidence on the grounds that the disclosure of the evidence would be prejudicial to the public interest[41]. The category of submissions precluded on these grounds include:

- the advocating, defending or canvassing the merits of government policies (including policies of previous governments),

[39] Ibid.
[40] *HRP*, pp 642-3.
[41] *HRP*, page 642.

- describing policies and administrative arrangements and procedures involved in implementing them,
- considerations leading to government decisions or possible decisions, in areas of any sensitivities, unless those considerations have already been made public or the Minister authorises their identification[42].

The Senate's resolutions on parliamentary privilege of 25 February 1988, in providing that witnesses may raise objections to the giving of evidence, implicitly acknowledge the right to make claims for public interest immunity[43].

The matter of public interest immunity remains a contentious issue on which there is no judicial resolution, at least as regards inquiries conducted by the Houses of the Commonwealth Parliament and their committees. There have been two important cases dealing with the powers of the NSW Legislative Council to compel Ministers to produce documents. The High Court left open the question as to whether public interest immunity could restrict the legal powers of the Legislative Council in *Egan v Willis*. The NSW Court of Appeal decided in *Egan V Chadwick* that the immunity did not restrict the powers of the Council, except as regards for the production of Cabinet documents and Cabinet deliberations. It was acknowledged that the powers of the NSW Parliament were those implied by reference to what was reasonably necessary to enable a legislature to function. The powers of the Commonwealth Parliament may be more extensive by reason of section 49 of the Constitution. However, the general issue remains unresolved for the Commonwealth Parliament[44].

Of course, it is the current Minister who normally claims public interest immunity, not a former Minister. The guidelines for their application normally apply to official witnesses, and a former Minister is not normally an official witness (unless subsequently employed in a public service capacity). However, there is a strong possibility that a former Minister would be asked questions relating to decisions or deliberations that took place in an official capacity.

There is also the consideration of documents and other intellectual property of a previous administration. As mentioned previously, the official guidelines make reference to the decisions of a previous government.

The 1994 Senate Print Media report contained a reference to public interest immunity claimed by Treasurer Willis in respect of certain public servants and certain documents[45]. Mr David Jackson QC advised the committee that while the executive government's views were to be respected, they were not decisive. However, 'there seems to be … no reason why that government should not tell its employees, former employees, advisers and former advisers, ***and its own former members***, that it intends to claim that the questions should not be answered or the documents not produced'.[46] [*emphasis added*].

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[42] *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters – November 1989.*
[43] *OASP*, page 482
[44] See J McMillan in *Parliament and Administrative Law*, in G Lindell and R Bennett (eds) *Parliament: The Vision in Hindsight*, pp 371-5.
[45] Op. cit., pages 21-29.
[46] Ibid, page 55.

To my mind, questions that might impinge on public interest immunity or material from a previous administration should be directed to a serving Minister who is in a position to make decisions about them and to be accountable to the legislature.

Odgers Australian Senate Practice makes it clear that the Senate has been unable to provide a definitive statement of agreed procedures or criteria for determining whether a claim for public interest immunity should be granted, despite being considered by several Senate committees. A common thread in the committees' deliberations is that the question is a political, and not a procedural one[47]. Decisions of this kind tend to be made in a political context.

Possibly, there is an **obligation** that a former Minister should, if called, request exemption from providing responses to a Senate committee concerning policy and administrative matters during the time that they served as a Minister. In an area where accountability has never been agreed to by the House, any such obligation would be the more significant if the Minister had served as Leader of the House. This consideration is heightened by my belief that the House of Representatives has a clear and legitimate interest in protecting a former Member against any attempts by the Senate to examine that person.

Comparisons from other administrations
I have not been able to locate any direct comparisons in this regard in other administrations. However, it does appear that there has been a case in the United Kingdom where the Ministry of Defence refused to permit two former civil servants to appear before the House of Commons Trade and Industry Select Committee's inquiry into what was known as the Iraqi Supergun affair. The department apparently claimed that, as civil servants give evidence on behalf of ministers, it would be inappropriate for retired officials to appear before select committees. The subsequent Scott inquiry noted that the failure of the two retired officials may be regarded as a failure to comply fully with the obligations of accountability to Parliament[48].

The matter of penalty

It remains for me to comment on any action that may be taken should a former Member of Parliament decline to respond to an invitation or a summons to appear before a House or a committee or is deemed not to have answered a question from a committee without reasonable excuse. The House does not as yet have privilege resolutions to act as standing orders to govern proceedings of this kind. The Senate does have such resolutions.

The Parliamentary Privileges Act provides at section 4 the essential element of offences. To constitute an offence against a House, conduct, including the use of words, must amount, or be intended or likely to amount, to an ***improper*** interference with the free exercise by a House or a committee of its authority or functions, or with

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[47] *OASP*, page 482.
[48] *Government Information and Parliament: Misleading by Design or by Default*, A Tompkins in *Public Law*, 1966,p483.

the free performance by a member of the member's duties as a member (*emphasis added*). Section 7 applies to penalties for an offence against a House, and includes penalties of imprisonment or fines. The section also provides that where a fine is imposed, it may be recovered in a court of competent jurisdiction.

It is my belief that the action to recover a fine could make the circumstances surrounding the offence justiciable. Where a period of imprisonment is involved, it would probably be justiciable[49]. In this regard I cite again the article by John McMillan on *Parliament and Administrative Law*. Professor McMillan, in discussing a number of unresolved questions in *Egan v Willis* and *Egan v Chadwick*, raises the question of penalty. He indicates that the action taken by the NSW Legislative Council - one day suspension of the Minister - fell within the test of "reasonable necessity". However, he raises the question as to whether a longer suspension or punitive action such as expulsion [not available in the Commonwealth sphere] would have met the test. Professor McMillan also raised the prospect of one House passing a resolution in direct contradiction of the other House[50].

In comparable circumstances, where one House passed a resolution imposing a penalty and the other House, mindful of its clear and legitimate interest in protecting former members of the House from attempts by the other House to examine that person, could well pass a resolution to that effect. A former Member of Parliament who believed that he or she had acted in a reasonable and justifiable way might wish to have the matter considered in the judicial sphere rather than the political sphere.

In conclusion, I would ask you to thank the committee on my behalf for the opportunity to make these comments, and wish the members well in their endeavours.

Yours sincerely

I C HARRIS

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[49] See *HRP* p719
[50] Op.cit, p374.