

**CONCERNING THE OBLIGATION OF A FORMER MEMBER OF THE
HOUSE OF REPRESENTATIVES TO ATTEND AND GIVE EVIDENCE
BEFORE THE SENATE COMMITTEE ON A CERTAIN MARITIME INCIDENT**

OPINION

1. In this matter I am briefed to advise the Clerk of the House of Representatives. The specific points on which my opinion is sought are as follows:
 - (a) whether what is generally agreed to be an immunity between the Houses of what is known as comity has a legal basis, in Hatsell/May/the **Constitution**, or is a looser agreement;
 - (b) if there is something akin to a legal immunity for current Members, whether it could be said to extend to former Members of either House being compelled against their will to attend before the House or one of its committees and to give evidence;
 - (c) whether page 231 of the 10th edition of *Odgers' Senate Practice* provides a basis for concluding that any immunity extends to Members of a dissolved House, and to former Senators and Members in general;

- (d) whether I agree with the Opinion of Bret Walker SC dated 16 May 2002 and entitled *Australian Senate: Witnesses – Former Ministers and Ministerial Staff* provided to the Clerk of the Senate and with which I am briefed.

Question (a)

2. The first step is to identify any relevant immunity and the reasons for it. If it exists and if it is based entirely on pragmatism, that is the practical day to day functioning of each House, then this will have a substantial bearing on the availability of the immunity to a person who is no longer a member of the House of Representatives. If, as is my opinion, it is based on the independence of each House in relation to the other and if that principle extends beyond mere day to day functioning, then there is good reason to think that the independence would be adversely affected by the Member being answerable *at any time* to the other House in respect of the Member's acts while a Member. The prospect or possibility of a Member being subject to examination by the other House once the Member ceases to be a Member and in respect of the Member's acts while a Member would be inconsistent with that independence. Thus the immunity would extend beyond the period of the Member's membership of the House. The party system should not be allowed to obscure the basic distinction between the responsibility of a Member to one House only and a notion of more general accountability to the Parliament as a whole.
3. It is also important, in my view, to distinguish the present question from issues arising from any claim of public interest immunity in relation to particular information. That immunity has a different purpose and history and, although it might provide in a particular case a basis for refusing to answer a question or to provide a document, the present asserted immunity is far broader.

4. Section 49 of the **Constitution** provides, relevantly, that the privileges and immunities of the members of each House shall be such as are declared by the Parliament and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth. Since the **Parliamentary Privileges Act 1987 (Cth)** states in section 5 that privileges in force by virtue of section 49 of the **Constitution** continue in force unless that **Act** expressly otherwise provides and since no provision relevant to the present question is contained in that **Act**, in my view, the identity of the privilege or immunity is the same as the relevant privilege or immunity of the House of Commons and its members as at 1901 and as continued in operation or effect by section 49 of the **Constitution**.
5. The legal basis of the privilege or immunity is that historical position at the establishment of the Commonwealth as so continued in force. In order to identify the privilege or immunity it is necessary to examine the historical position as at 1901 in the United Kingdom. A firm basis for that task is the contemporary publications to which reference is made in Question (a).
6. Thus, in my view, the true foundation of the privilege or immunity goes beyond mere comity and has a legal basis in the **Constitution** operating upon the relevant privilege or immunity of the House of Commons and its members as at 1901 as evidenced by the contemporary publications. Any looseness comes from the difficulties inherent in the task of first identifying the relevant privilege or immunity and then of applying it out of its original context but as the source of present rights and obligations.
7. I turn next to the privilege or immunity itself and its purpose.
8. Hatsell, *Precedents of Proceedings in the House of Commons* (1818) Vol 3 at page 67 speaks of the leading principle being that there shall subsist a perfect equality between the two Houses and total independence in every respect one of

the other. He continues: *“From hence it is, that neither House can claim, much less exercise, any authority over a Member of the other....”*

9. This suggests the existence of an immunity, expressed as a lack of power in the other House. The purpose of the privilege or immunity is founded in institutional independence and not simply in the need for Members freely to perform their duties day to day. This in turn suggests that it would be inimical to that purpose for a Member to be subject to the power of the other House after the Member has ceased to be a Member.
10. *Erskine May on Parliamentary Practice* is important because the tenth edition was contemporaneous with the establishment of the Commonwealth referred to in section 49 of the **Constitution**. At pages 402-403 of that edition it is stated that:

“If the attendance of a peer should be desired, to give evidence before the house, or any committee of the House of Commons, the house sends a message “to the Lords, to request that their lordships will give leave to” the peer in question “to attend, in order to his being examined” before the house or a committee, as the case may be, and stating the matters in relation to which his attendance is required. If the peer should be in his place when this message is received, and he consents, leave is immediately given for him to be examined, if he thinks fit. If not present, a message is returned on a future day, when the peer has, in his place, consented to go. Exactly the same form is observed by the Lords, when they desire the attendance of a member of the House of Commons...Whenever the attendance of a member of the other house is desired by a committee, it is advisable to give him private intimation, and to learn that he is willing to attend, before a formal message is sent to request his attendance.”
(footnotes omitted)

11. This reference suggests a privilege in the House and in each Member but one in which the institutional interest of each House is sufficiently protected by leaving it to the Member to consent to attend the other House or not. There is reference on page 404 of the tenth edition to the course adopted by the Lords having been to permit their members, on their own request, to defend themselves in the House of Commons.

12. But the fact that each House has taken the position that independence of the House and of each Member is sufficiently protected by the discretion of each Member does not suggest that the privilege rests merely in comity, if by that term is meant that the privilege rests entirely, or at all, in the discretion of the House seeking to examine the Member of the other House. Instead, it is clear that the privilege is of each House and Member and is recognised by the other House. Neither does this fact suggest that the privilege is entirely personal with the result that each House would no longer have an interest in the matter once the Member had ceased to be a Member.

13. The twenty-first edition of *Erskine May* contains similar references. At page 629 it is said that a select committee has an unqualified power to send for persons except to the extent that it conflicts with the privileges of the Crown and of Members of the House of Lords, or with the rights of Members of the House of Commons. On the same page the following is said:

“The effect of the qualification to the powers of committees referred to above is that Members of the Commons, including of course many ministers, are not summoned to a select committee but can be invited to attend. Only an order of the House itself can require a Member to attend a committee. In the case of Peers Standing Order No 22 [HL] provides that any Lord requested by a Commons committee to attend before it or any of its sub-committees shall have leave of the House to attend if he thinks fit.”

14. At page 677, under the sub-heading “Attendance of Members of the other House” the twenty-first edition in substance restates what I have set out above from the tenth edition, that is that attendance before a committee of the other House is at the Member’s discretion if the Member or Lord thinks fit.

15. At page 616 of the twenty-second edition of *Erskine May* it is said in relation to committees of the House of Lords that members and officers of the House of Commons may give evidence to select committees but cannot be compelled to do

so. Footnote 4 states that members of the Commons are given leave to attend Lords committees or sub-committees if they think fit. Page 647 contains a passage corresponding with page 629 of the twenty-first edition I have referred to above, that is that a select committee has an unqualified power to send for persons except to the extent that it conflicts with the privileges of the Crown and of Members of the House of Lords, or with the rights of Members of the House of Commons. At pages 648-649 of the twenty-second edition a passage occurs which corresponds with page 677 of the twenty-first edition, that is that attendance before a committee of the other House is at the Member's discretion if the Member or Lord thinks fit.

16. Other references to the corresponding Australian works are collected in GJ Lindell "Parliamentary Inquiries and Government Witnesses" (1995) 20 *Melbourne University Law Review* 383 notes 51-52. See also Harris (ed) *House of Representatives: Practice* (4th ed, 2001) at 34-35, 639-642, 729 and Evans (ed) *Odgers' Senate Practice* (10th ed, 2001) at 56, 440-443. I am also referred to a Senate resolution in 2001 which 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.*" Plainly, this resolution reflects the same immunity.
17. The scope of the immunity is not, in my opinion, limited to the conduct of the Member as a Member of that House or to that which forms part of the proceedings of that House if those concepts are intended to exclude matters for which a Member who is a Minister is or has been officially responsible. Such a line of distinction would be both impractical in operation and flawed in principle. The immunity must extend, in my view, to the acts of the Member for which the Member could be held to account in that House. In the case of a Minister, those acts would include matters of policy and administration for which the Minister is

responsible, using that word as conveying the principles of responsible government.

18. I answer Question (a): “The immunity has a legal basis and does not rest merely in comity.”

Question (b)

19. For the reasons I have given in answer to Question (a), because the immunity is not merely an immunity based on the day to day functioning of the House, it should extend to a former Member whereby he or she has a legal immunity from being compelled to attend before the House of which they were not a Member, or one of its committees, and to give evidence in relation to that former Member’s acts as a Member. This extension is, however, a matter of less certainty than the immunity of a present Member. The authorities appear to make no express reference to such an extension. Thus it would rest in principle and by analogy to the survival of similar privileges and immunities such as the privilege which attaches to parliamentary proceedings or the protection of witnesses. In each case the purpose of the privilege would be substantially impaired if it had a period of operation temporally coincident with the original occasion for the privilege.

Question (c)

20. Page 231 of the 10th edition of *Odgers’ Senate Practice* concerns standing order 193(3) which is directed to the rules of debate. That standing order provides, relevantly, that a senator shall not use offensive words against either House of Parliament or any member of such House and all imputations of improper motives and all personal reflections on those Houses or members shall be considered highly disorderly.

21. Page 231 states that it would be anomalous if the protection provided by the standing order were to cease simply because a house has been dissolved for an election. There would also be an anomalous distinction between a lower house which has been dissolved and an upper house which has not and the members of which would continue to attract the protection. Therefore members of a house which has been dissolved continue to attract the protection of the standing orders until such time as the successor house meets. Members who retire or are defeated at the election then cease to attract the protection when their successors are in office. New members returned in an election are not protected until they take their seats.
22. In my opinion this discussion suggests that, in the case of the protection provided by standing order 193(3), its purpose lasts no longer than a person is a member. The basis for this conclusion is that, whether the immunity is based on the proper functioning of a member or on a broader but not unrelated notion of the dignity of the Houses and their members, those matters would be unaffected once it is clear that the member in question has ceased to be a member.
23. I would not see the material at page 231 as providing a basis for concluding that any immunity extends to Members of a dissolved House, and to former Senators and Members in general. Indeed, I would regard that material as, if anything, inconsistent with the conclusion that there is an immunity of a former member of the House of Representatives to attend and give evidence before a Senate committee. But it is the purpose of the immunity which should be determinative. In my opinion, the immunity with which standing order 193(3) is concerned does not depend on any fundamental matter such as the mutual independence of the Houses but is concerned rather with matters of decorum.

Question (d)

24. For these reasons, while I agree with Bret Walker SC that a person who is a former Member of the House of Representatives may be obliged to give evidence before the Senate in relation to matters that concern that former Member only in a private capacity (which is here not in issue), I do not agree that a former Member may be obliged to give evidence before the Senate in relation to that former Member's acts while a Member and in that former Member's capacity as a Member. This conclusion derives from the Member's immunity while a Member and continues after membership has ceased in order better to effectuate that immunity.

25. The scope of the immunity is not, in my opinion, limited to the conduct of the Member as a Member of that House or to that which forms part of the proceedings of that House but extends to the acts of the Member for which the Member could be held to account in that House. Thus I disagree with the limitation in paragraph 29 of the opinion of Bret Walker SC that: "So long as no intention appears, or better still all intention is disavowed, of questioning the now private citizen about his or her ... conduct in the House of Representatives (being the other House), there is no right in a former Minister who is no longer a Member of the other House to resist an order given under the undoubted power of the Senate." While I agree that the immunity extends beyond the period the person is a Member, I do not agree that the immunity is limited to the Member's conduct in the House if that is intended to exclude what I have referred to as the acts of the Member for which the Member could be held to account in that House.

Conclusion

26. While the matter is, so far as I am aware, free from judicial authority, in my opinion the better view is that a current Member of a House has a legal immunity

from being compelled to attend before the House of which they are not a Member, or one of its committees, and to give evidence in relation to that Member's acts as a Member and that, less certainly, this immunity extends to a former Member.

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