AUSTRALIAN SENATE

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Senator the Hon P. Cook
Chair
Select Committee on a Certain
Maritime Incident
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Cook

WITNESSES — MINISTERIAL ADVISERS AND PERSONAL STAFF

Thank you for your request, conveyed by letter dated 20 March 2002 from the secretary of the committee, for advice on the power of the committee to call before it current and former ministerial advisers.

This question has a simple answer, but due to past and current discussion of the issue the simple answer requires some exposition. I hope that the following observations will assist the committee.

Advisers and personal staff

The category of public office-holders concerned in this question may be described as ministerial advisers and personal staff. Their defining characteristic is that they are engaged at the discretion of ministers to provide services exclusively to those ministers. Their ostensible function is to provide advice and personal assistance to ministers.

Whether they are employed under the Members of Parliament (Staff) Act is not a defining characteristic. Public servants not engaged under that Act who are seconded to ministerial offices as advisers and personal assistants also fall into the defined category by virtue of their function, even though that function may involve only a temporary change of role. Moreover, the Act contains nothing which bears on the question in issue in any way.

Voluntary and compulsory appearance

The question is whether persons falling into this category of public office-holders are liable to be required to appear, produce documents and give evidence, or should be so required, by a committee of the legislature; that is, whether they may be, or should be, the subject of summonses or subpoenas issued by a committee directing them to appear, produce documents and give evidence.

So far as I am aware no one has suggested that there is any objection to these persons appearing before a committee in response to an invitation and voluntarily with the presumed approval of their ministers. It would in any event be rather difficult to raise such an objection, since there have been several cases of such voluntary appearance before Senate committees. The question is whether they may be, or should be, compelled to appear.

No recognised immunity

As to whether they may be compelled to appear, the simple answer is that the Senate and comparable houses of legislatures have not recognised any immunity attaching to this category of office-holders. There is also no basis for supposing that they possess any legal immunity, that is, an immunity which would be upheld by a court as a matter of law in respect of legislative inquiries as distinct from court proceedings.

The best way to explain what is meant by an immunity recognised by the Senate and comparable houses, and which may have a legal basis, is to refer to the immunities which *have been* recognised.

Two recognised immunities

The Senate has recognised that two categories of office-holders are entitled to be regarded as immune from summons to appear before the Senate and its committees. They are:

(a) current members of the House of Representatives

(b) current members of state legislatures and other state office-holders.

The basis for the immunity of category (a) office-holders is the requirement for comity between the two Houses of the Parliament. The Houses do not seek to summon each other's members; if such a power were exercised, they could hinder and ultimately render each other unable to function. The immunity is recognised in the procedures of the Senate, which require that a message be sent to the House of Representatives if the Senate or its committees seek formal evidence from a member of the House. In past cases the Senate and its committees have accepted advice that they may not summon members of the House, and the Senate has sought to secure the attendance of House members by way of message to the House. The immunity may also have some legal basis in that, if a court were ever called upon to determine the question, the court might hold that the immunity exists as a matter of law arising from the bicameral nature of the legislature under the Constitution. There are, however, no directly relevant cases.

The basis for the immunity of category (b) office-holders is the need for comity between the Commonwealth and state levels of government. Again, there is a practical consideration: the Commonwealth and state legislatures could render each other unable to function by summoning each other's office-holders. There is a stronger basis for supposing that this immunity could have a legal status, in that the High Court has held that the Commonwealth is not able to interfere with the vital functions of the states. Again, Senate committees have accepted advice that they are not able to summon state legislators and office-holders and have not sought to do so.

The bases of these two recognised immunities make it clear that there is no such recognised immunity in respect of ministerial advisers and personal staff. The existence of such an

immunity has not been recognised by the legislature, and there is no ground for concluding that such an immunity might be recognised by the courts in respect of legislative inquiries.

In that connection, it must be emphasised that we are here considering legislative inquiries and not court proceedings. It cannot be assumed that the law relating to compellability of witnesses and the admission of evidence applying to court proceedings can be automatically transferred to legislative inquiries. For example, statements are sometimes made as if the law of legal professional privilege, the law relating to the admission of evidence by legal advisers and about legal advice, is applicable to legislative inquiries. There is no ground for this assumption. On the contrary, the Senate and comparable legislatures have never recognised that legal professional privilege automatically defeats a legislative inquiry. Of course, legislatures may voluntarily refrain from taking evidence about legal advice where it is considered that this would not be appropriate. This does not concede any limitation on the legislative power of inquiry.

Should they be compelled?

This leads to the question whether ministerial advisers and personal staff *should* be compelled by legislative inquiries. In other words, given that the Senate and its duly authorised committees have the undoubted power to summon this category of office-holders, and there is no recognised immunity, should there be a self-denying ordinance whereby the legislature refrains from summoning such persons because of their particular role in the system of government?

Statements to that effect have been made from time to time, usually by ministers. Such statements, however, do not amount to establishing a general rule, and certainly not a convention.

In the one instance in which the Senate directed a member of a minister's personal staff to appear before a committee, the case of the Director of the National Media Liaison Service in 1995, there were statements that ministerial advisers and personal staff should not normally be summoned. The preamble to the Senate's order noted that the National Media Liaison Service was publicly funded and not subject to audit, and this may be taken to be a justification for summoning a person who was a member of a minister's personal staff. It was also stated in debate that the order did not set a precedent. The circumstances of the order, however, fall far short of establishing a general rule that ministerial advisers and personal staff will not be summoned, or a convention to that effect.

The circumstance that, in this case, the person concerned, although a member of ministerial staff, directed a publicly funded government agency, draws attention to the principal weakness in the case for such a general rule or convention.

The cases for and against their appearance

The case that such persons should not (normally) be summoned rests on the presumption that their role is to provide advice and personal support to their ministers. Those ministers are responsible for their own decisions and actions, whether or not made or performed on advice, and whether or not facilitated by staff who are only their agents. If the staff were to be compulsorily examined on the advice and personal support they provide, this would tend to destroy the trust and confidentiality which is essential to the effective performance of their tasks. It would discourage frank advice. It would also be unnecessary for legislative and

public purposes, because ministers accept full responsibility for their own decisions and actions, which are the appropriate subjects of legislative and public scrutiny.

The case that ministerial advisers and personal staff should be subject to compulsion in relevant legislative inquiries often begins with a concession that persons who are purely advisers and personal assistants to ministers should not normally be compelled for the reasons stated. This concession may be unwarranted. If the legislature is inquiring into serious malfeasance or malfunction in government administration, and the advice and personal assistance of ministerial staff played an essential role in that malfeasance or malfunction, the legislature would be perfectly justified in calling such staff even if their role was strictly confined to advice and personal assistance, and even if relevant ministers accept full responsibility for their actions. The legislature may well want to uncover problems with the way in which ministers are advised and assisted.

Even if this concession is made, however, there is a strong case for subjecting ministerial personal staff to compulsion in legislative inquiries, on the basis that their role is manifestly now not confined to advice and personal assistance. There is ample evidence that ministerial staff perform other functions. They are said to, and seen to:

- control access to ministers, and determine who has that access
- determine the information which reaches ministers, particularly information flowing from departments and agencies
- control and regulate contact between ministers and other ministers, other members of the Parliament and departments and agencies
- make decisions on behalf of ministers
- give directions about government activities and actions, including directions to departments and agencies
- manage media perceptions and reporting.

In short, they act as de facto assistant ministers and participate in government activities as such.

Moreover, ministers no longer necessarily accept full responsibility for the actions of their staff, as has been demonstrated on several occasions.

In these circumstances, it may be argued that it is appropriate that legislative inquiries into the actions of government be able to summon these staff and to require them to explain their part in those actions.

Public interest immunity

The term public interest immunity is now used as a generic term to describe grounds on which governments may make a claim to withhold information on the basis that the disclosure of the information would be injurious to the public interest. The terms executive privilege or Crown privilege were used in the past. The change of terminology reflects changes in the perception and treatment of the matter. The former terminology suggested that

there was a right possessed by the executive government to withhold information. The current terminology reflects the view that there are grounds on which government may claim to withhold information, but the claims do not become applications of recognised immunity until sustained by the tribunal in question. In legal proceedings, the courts have arrived at a position of not accepting executive claims that information should not be disclosed in those proceedings, but of examining the information in question and determining whether disclosure would be sufficiently injurious to the public interest to outweigh the importance to justice of the admission of the information. If a court decides that a claim of public interest immunity is not sustained, the information must be produced, by hearing relevant evidence or otherwise. Legislatures, particularly in Australia, have adopted the changed terminology because they have maintained a position that it is for the legislature to determine whether a claim that disclosure of information would be injurious to the public interest is sustained. This is the view which has been taken by the Senate in several past cases. Governments have not conceded that position, and have refused to produce information in response to legislative demands. Legislatures have applied various means to compel governments to disclose disputed information. The Senate has obtained such information by directing committee examinations of public officers and has imposed procedural and political penalties on recalcitrant ministers. The New South Wales Legislative Council compelled a minister to produce information by removing him from the Council, and its right to do so was upheld by the Supreme Court, even though the Council does not possess the same constitutional powers as the Senate and most other Australian Houses. No comparable legislature has accepted that government claims of public interest immunity are automatically effective, and they could not make such a concession without seriously weakening their legislative power.

Public interest immunity relates to categories of information, not to categories of office-holders. A postulated application to ministerial staff would rest on the premise that they could give evidence only about advice and personal assistance to ministers, and that that kind of evidence should not be received. That premise is undermined if it is believed that their role goes beyond advice and personal assistance.

Other jurisdictions

The situation in comparable jurisdictions is virtually the same as in Australia. Executive governments have claimed a right to withhold information from legislatures, and legislatures have not conceded any such right. Executive governments have from time to time maintained that their advisers and personal assistants should not be compelled to appear in legislative inquiries, and legislatures have not conceded that there is any general immunity attaching to such persons.

In the United Kingdom, the role of persons described as ministerial advisers has been a matter of great controversy in recent times, and there have been demands for such persons to be made accountable to the Parliament. In part, those demands have arisen from a perception that the "advisers" are not merely advisers but have executive roles, particularly in "spin-doctoring", or media management, and in taking decisions and directing public service departments. The demand for accountability, however, has been made even where the persons concerned appear to be only advisers. In its 4th report for 2001-2002, the Transport, Local Government and the Regions Committee of the House of Commons vigorously expressed its disagreement with a government decision to prevent a special adviser giving evidence. The committee stated that it would have summoned the adviser if he had not been a member of the House of Lords, and therefore protected by the rule that members of one

House may not be summoned by the other. The committee's report is a ringing declaration of the right of committees to summon advisers.

In the United States, the Congress has similarly not conceded that the executive government may withhold information or that advisers are immune from legislative compulsion. In recent days, the Government Affairs Committee of the Senate has rejected claims by the administration that the Director of Homeland Security should not give evidence before the committee because he is a presidential adviser rather than an executive government office-holder. While this person's larger role has been referred to as a reason for his appearance, it has been pointed out that presidential advisers have testified in past cases.

The courts in the United States have avoided becoming directly involved in such disputes between the Congress and the administration. General constitutional limitations to the legislative inquiry power have been identified, principally relating to the extent of the power to legislate, but these do not bear on the question. It has been indicated that, for the purpose of court proceedings, the doctrine of executive privilege may have some constitutional basis and that the executive may be able to claim immunity for presidential advice. There is nothing to suggest, however, that the Congress does not have the power to compel advisers and personal staff if it chooses to do so and to use its own powers to enforce compliance.

An issue for legislative judgment

In summary, there is no law which prevents a legislative committee summoning ministerial advisers and personal staff. There is also no parliamentary rule which prevents such a course. There is no convention that the legislature should always refrain from summoning such persons.

It follows that former holders of the offices in question possess no such immunity.

Whether such persons should be summoned, and what weight should be given to relevant factors in determining whether they should be summoned, are issues for the judgment of the committee in the first instance and ultimately the Senate in the context of the inquiry concerned.

Remedies

The question arises of the remedies which may be applied in the event of non-compliance with a committee summons.

A committee cannot apply any remedy, but can only report a recalcitrant witness to the Senate, which may impose penalties on such a witness.

In 1994 the Senate had before it a bill which would have sought to involve the courts in determining public interest immunity claims by government. The preamble of a resolution referring the bill to the Privileges Committee noted that "it would be unjust for the Senate to impose a penalty on a public servant who, in declining to provide information or documents, acts on the directions of a minister".

The same conclusion might be drawn in respect of ministerial staff who act on the directions of their ministers.

In recommending that the bill not proceed, the Privileges Committee concluded that the determination of such issues between the legislature and the executive government should remain in the legislature's sphere. It may be concluded that the only appropriate remedy is to hold the ministers concerned politically responsible.

This restraint in punishing staff for the actions of their ministerial masters, however, does not establish that ministerial staff have some special immunity not available to other witnesses.

Restricting the legislature a serious matter

A point which should be obvious needs to be stated.

Much of the discussion on this subject seems to be based on an assumption that it is the right of the executive government to keep information secret and the legislature has to establish a case for overcoming the secrecy. At least, it seems to be assumed that there are many grounds for maintaining secrecy and many categories of persons who may assert their right to do so. New grounds and new categories of persons are discovered or invented as new cases arise.

It needs to be stated that to withhold any information about public affairs from the representatives of the public assembled in the constitutionally-empowered legislature is an extremely serious step. It is a step which should be taken only on the most compelling grounds. If withholding information from the legislature becomes routine, constitutional government and the right of the public to control the government through their chosen representatives is fatally undermined. A legislature which cannot discover the truth about executive activities is crippled. The public elect their representatives to determine, through the legislature, where the public interest lies, and if that right is lightly infringed malfeasance and misrule also become routine.

The report of the House of Commons select committee to which I have referred, and press items relating to the dispute between the United States Senate committee and the administration, have been supplied to the committee. *Odgers' Australian Senate Practice,* 10th edition, refers to the past cases in the Senate.

Please let me know if the committee would like to have any elaboration or elucidation of these points.

Yours sincerely

(Harry Evans)