PROCEDURE AND PRIVILEGES COMMITTEE

EFFECTIVE REPETITION:

DECISION IN

BUCHANAN v. JENNINGS

Report No. 3

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Procedure and Privileges Committee

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10 William Street
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BUCHANAN v. JENNINGS

Report No. 3

Presented by:
Mrs Dianne Guise, Deputy Speaker of the Legislative Assembly
Laid on the Table of the Legislative Assembly
On 13 April 2006

COMMITTEE MEMBERS

Chairman	Hon. Fred Riebeling, MLA Speaker of the Legislative Assembly
Members	Dianne Guise, MLA Paul Andrews, MLA Robert Johnson, MLA Max Trenorden, MLA

COMMITTEE STAFF

Clerk to the Committee	John Mandy Deputy Clerk of the Legislative Assembly
Adviser	Peter McHugh Clerk of the Legislative Assembly

COMMITTEE ADDRESS

Procedure and Privileges Committee
Legislative Assembly
Parliament House
Harvest Terrace
PERTH WA 6000

Tel: (08) 9222 7222
Fax: (08) 9222 7818
Email: ppc@parliament.wa.gov.au
Website: www.parliament.wa.gov.au

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COMMITTEE'S FUNCTIONS, POWERS AND TERMS OF REFERENCE

Legislative Assembly Standing Order No. 282 provides the following functions, powers and terms of reference to the Procedure and Privileges Committee -

Procedure and Privileges Committee

282. (1) A Procedure and Privileges Committee will be appointed at the beginning of each session to —

(a) examine and report on the procedures of the Assembly; and

(b) examine and report on issues of privilege; and

(c) wherever necessary, confer with a similar committee of the Council.

(2) The Procedure and Privileges Committee will have the powers of a select committee.

(3) Membership of the committee will consist of the Speaker and four other members as the Assembly appoints.

(4) Standing Order 278 will apply except that where possible any report of the committee will be presented by the Deputy Speaker.

(5) When consideration of a report from the committee is set down as an order of the day it will be considered using the consideration in detail procedure.

Problems relating to defamation and parliamentary privilege were first brought to the attention of the prevous Procedure and Privileges Committee by the Clerk of the House in 2003. While this was primarily in relation to recent developments in the House of Commons (UK), the question of privilege concerning effective repetiition and *Buchanan v. Jennings* (1998) was also raised at that time. It was agreed that the issue would need to be revisited once the Privy Council's judgement on the matter had been released. The Privy Council's judgement was delivered in July 2004 and the New Zealand House of Representatives' Privileges Committee released its report on the issue in May 2005.

The committee was immediately briefed by the Clerk of the House after the release of the 2005 report and, accordingly, your committee agreed to review the matter and report to the House.

RECOMMENDATIONS

Recommendations 1 and 2

1. That the *Parliamentary Privileges Act 1891*, be amended to include a provision which ensures that parliamentary proceedings cannot be used to establish what was 'effectively' but not actually said outside Parliament.

2. That the Attorney General raise the form of wording for this proposal at the next Standing Committee of Attorneys General meeting to ensure as far as possible a uniform approach on the matter across Australia.

MINISTERIAL RESPONSE

In accordance with Standing Order 277, the Committee directs that the Attorney General to report to the Legislative Assembly as to the action, if any, proposed to be taken by the Government with respect to the recommendations of the Committee.

PART 1 - BACKGROUND:

Doctrine of Effective Repetition

1.1 Decision in *Buchanan v. Jennings*

In Western Australia, it is now the case that a court may find that a member of Parliament is liable in defamation if he or she affirms outside the House or a Committee, a statement made under Parliamentary privilege in the House or Committee. This results from the Privy Council's affirmation of the decision of lower courts in *Buchanan v. Jennings* [2005] 2 all ER 273, a New Zealand case.

On 31 May 2005, the New Zealand Privileges Committee reported on the matter as a whole, drawing attention to the issues and proposing a solution for their situation. That succinct report has been highly beneficial in the consideration of this issue by the Western Australian Legislative Assembly Procedure and Privileges Committee and we are in agreement with its approach and findings. For that reason, the New Zealand report is extensively quoted here.

A summary of the case was recorded as follows -

> *Owen Jennings MP, during the course of a debate in the House, made a statement critical of the actions of an employee of the Wool Board. Some time later, Mr Jennings told a journalist, outside the House, that he "did not resile from his claim about the official's relationship".*
>
> *The principal issue in the proceeding concerned the extent to which what was said by a member inside Parliament could be used in a defamation claim against the member on the basis of an effective (as opposed to actual) repetition of the parliamentary statement outside the House.*
>
> *The Privy Council considered that the established principle—that is, that republication outside Parliament of a statement previously made in Parliament is not protected by absolute privilege—applied also to later statements outside the House that relate to, but do not repeat in full, what was said in the House. Using the parliamentary record in these circumstances to prove what was effectively said outside the House did not infringe Article 9 of the Bill of Rights 1688, which prevents proceedings in Parliament being impeached or questioned in any court.*[1]

1.2 Potential Issues for Parliament

The New Zealand report recorded some of the potential issues for Parliament, its members and others as follows -

[1] Question of privilege referred 21 July 1998 concerning Buchanan v Jennings, Report of the Privileges Committee, New Zealand House of Representatives, 31 May 2005, p.4

1.2.1 *Involves courts assessing and adjudging parliamentary proceedings*

One of the principal aims of Parliament's freedom of speech, acknowledged by the courts as much as by Parliament itself, is to avoid the courts being drawn into examining and making judgments on parliamentary proceedings. There is a longstanding principle of mutual restraint between the courts and the legislature whereby one does not interfere in the work of the other. There is a grave danger of this principle breaking down in a case of "effective repetition". In defamation a plaintiff is alleging that false statements have been published with an intent to defame. Certainly if a member repeats a parliamentary statement outside the House it is no protection against the liability that a finding of defamation is tantamount to a finding that the member on the earlier occasion spoke falsely in the House. That may be an inevitable, though unexpressed, conclusion. But in an "effective repetition" case the parliamentary statements are being put directly to the court because they are the only or the main evidence of the defamation. In these circumstances the principle of mutual restraint breaks down completely, as the court directly judges the quality of the parliamentary proceedings. This has major implications for the relationship between the legislature and the courts.

1.2.2 *Effect on free speech itself*

Arising from the fact that a court may now find itself directly judging the quality of parliamentary proceedings is the effect that this may have on persons (particularly members, but also select committee witnesses) participating in those proceedings. If, via a doctrine of "effective repetition", participants may find themselves answerable before a court for their parliamentary contributions, this may affect those contributions in the first place. Indeed, it may eliminate them. It may be said (indeed it was said in the Court of Appeal in the present case) that a member wishing to avoid such consequences has only to remain silent outside the House. But how realistic is this? The media's and the public's expectations are that members who say something controversial in Parliament will respond, at least minimally, in an interview. If the danger of even a minimal response is civil liability, the result may be less willingness to contribute to parliamentary debate in the first place.

1.2.3 *Chilling effect on public debate*

This leads directly to the danger, which has been appropriately described as a potentially "chilling" effect on public debate, whereby members and witnesses are reluctant to submit themselves to subsequent interview for fear of losing their parliamentary immunity. This would be so even if they were prepared to modify, clarify or restrict their parliamentary statement (indeed Mr Jennings actually did so in his "effective repetition"). It is hard to see how this promotes the public interest in facilitating discussion of public affairs.

It has been pointed out that the news media are also subject to the principle of "effective repetition" so a television or radio broadcast or a newspaper report carrying an "effective repetition" would open up the possibility of an action against the media too, even though this was not pursued in the Jennings case. In itself this may make the media more cautious about following up and challenging parliamentary statements.

1.2.4 *Effect beyond defamation in a parliamentary context*

Principles of law have an inherent capacity for development. "Effective repetition" has arisen in the context of defamation arising out of a statement made in Parliament. But there is no reason why it should remain confined to that context. First, even in a parliamentary context, it may be that "effective repetition" will extend beyond defamation and be used to establish liability for every crime or civil wrong that may be perpetrated by the use of words. Suggested instances where "effective repetition" might be used thus are statutory breaches of law involving the imposition of penalties, civil liability for breach of confidentiality, and criminal liability for (amongst other crimes) sedition, incitement to racial disharmony or breach of the obscenity laws, as well as contempt of court. In any of these instances a statement in the House, followed by an adoption or reassertion of that statement under the "effective repetition" principle, could establish liability. There is thus no guarantee that the new area of potential liability revealed by the Jennings case is confined to defamation.[2]

1.3 Four Alternatives to Address Effective Repetition

The New Zealand committee considered four alternatives to address effective repetition. In summary, those were -

(i) a straightforward legislative reversal, providing that a parliamentary statement could not be linked with remarks made outside the House for the purpose of establishing defamation;

(ii) limiting the effect of *Buchanan v Jennings*, allowing the use of parliamentary statements only if the member added remarks in the statement made outside the House;

(iii) creating a new head of qualified privilege for interviews about matters discussed in Parliament; and

(iv) provide that freedom of speech in Parliament is not abrogated by "effective repetition" at all. This would have effect for all potential legal purposes, not just for defamation.[3]

1.4 Conclusions of the New Zealand Committee

The conclusions of the New Zealand committee were -

The committee does not believe that taking no action at all in response to the decision is practicable. Members are being challenged in media interviews in terms directly derived from the "effective repetition" principle. Unless public debate is to be stymied, this must be addressed. On the other hand, the committee does not wish to impinge on the long—established rule that if a member republishes his or her speech or otherwise actually repeats it outside the House, the member is liable for any defamatory content in it. This has been the understood position for 200 years and

[2] ,Ibid. p.5.
[3] Ibid. p 7.

nothing should be done to extend parliamentary protection in this area (though the member may have a qualified legal privilege). It is only at the fiction of "effective repetition" that any reform should be aimed. As the "effective repetition" principle has the potential to operate in areas of the law other than defamation, the committee favours dealing with that principle on a broad basis.[4]

In its single recommendation the New Zealand committee proposed that the course outlined in option (iv) above be taken, and proposed -

... that the Legislature Act be amended to provide that no person may incur criminal or civil liability for making any oral or written statement that affirms, adopts or endorses words written or spoken in proceedings in Parliament where the oral or written statement would not, but for the proceedings in Parliament, give rise to criminal or civil liability.[5]

In its work, the New Zealand committee was assisted by submissions from three academics n New Zealand in the fields of constitutional and defamation law. One of those, Professor Phillip Joseph, Professor of Law, at the University of Canterbury, provided a draft provision for insertion in the NZ Legislature Act 1908. His proposed wording is as follows -

No person may incur criminal or civil liability for making any oral or written statement that affirms, adopts or endorses words written or spoken in proceedings in Parliament where the oral or written statement would not, but for the proceeding in Parliament, give rise to criminal or civil liability.[6]

[4] Ibid. p. 9.
[5] Ibid. p. 9.
[6] Ibid, appendix D, p 19.

PART 2 – APPROACH TO EFFECTIVE REPETITION

2.1 Alternative Approaches

Your committee has had the benefit of discussions with the Solicitor General Mr Robert Meadows, regarding the draft proposed by the New Zealand committee. Mr Meadows agreed, subject to seeing the provision in context in the *Parliamentary Privileges Act 1891*, that the draft provided by Professor Joseph could work in Western Australia but needed further assessment. He also cautioned that it was not necessary to go further in attempting to codify parliamentary privilege in Western Australia.

There is a good deal to be said in favour of using similar language to deal with similar problems in various jurisdictions. Your committee is aware that Parliamentary Counsel from around Australia and New Zealand met on this matter at the end of November 2005 and at the request of this Committee, the matter of the form of such a provision was raised at that meeting. Some concern was expressed that the aim of the provision was not clear and that the law as it stood was not unacceptable.

Parliamentary Counsel expressed doubt about the meaning of words in the New Zealand proposal "would not, but for the proceedings in Parliament, give rise to criminal or civil liability".

Since then, following discussions with the Attorney General, the Hon Jim McGinty MLA, a different draft provision has been made available for comment by this Committee.

That wording which was proposed to be inserted in section 1 of the Parliamentary Privileges Act 1891 is as follows -

> "(2) If a member of either House makes an oral or written statement that affirms, adopts or endorses words that were spoken or written by the member in the course of the proceedings of the House or a committee of the House, the member cannot incur criminal or civil liability by reason only of the affirmation, adoption or endorsement of those words.
>
> (3) If a person who has been a witness before a committee of either House makes an oral or written statement that affirms, adopts or endorses words that were spoken or written by the person while -
>
> (a) giving evidence before the committee; or
>
> (b) presenting or submitting a document to the committee,
>
> the person cannot incur criminal or civil liability by reason only of the affirmation, adoption or endorsement of those words."

It is arguable that use of the words 'proceedings in Parliament' in the New Zealand proposal, which are used because they appear in Article IX of the Bill of Rights, may have advantages in relation to interpretation of any correcting provision in the Parliamentary Privileges Act. It has been suggested for example that presentation of a petition which includes the words of

others may not necessarily be covered by the proposed words. In addition, the use of the term 'document' in the proposed subsection (3) (b) may be limiting depending on how broadly that is interpreted.

It is also conceivable that there might be a claim by Royal Commissioners or other Statutory Inquirers that the proposed provisions do not cover them as they refer only to incurring civil or criminal liability, and as a result it is open to them to use the *Buchanan v Jennings* decision as authority for them to draw inferences and conclusions from proceedings in Parliament.

Your Committee is very conscious of the need for great care in any alteration to the law of privilege, but subject to these considerations being dealt with endorses the statutory amendment approach. It is highly likely that other Australian jurisdiction will have similar concerns and interests and consequently it seems prudent for the Attorney General to discuss the wording with his colleagues in other Australian jurisdictions at the next Standing Committee of Attorneys General (SCAG) meeting, so that to the extent possible, agreement is reached on a common form of words. We understand that the next SCAG meeting is due to occur within the next 3 months (by July 2006) and that it is possible for the Attorney General to have this matter placed on their agenda.

2.2 Recommendations

Subject to discussions at SCAG to achieve agreement if possible on a precise form of wording, your committee believes that the *Parliamentary Privileges Act 1891*, should be amended to include a provision which ensures that parliamentary proceedings cannot be used to establish what was 'effectively' but not actually said outside Parliament.

Recommendations 1 and 2

1. That the *Parliamentary Privileges Act 1891*, be amended to include a provision which ensures that parliamentary proceedings cannot be used to establish what was 'effectively' but not actually said outside Parliament.

2. That the Attorney General raise the form of wording for this proposal at the next Standing Committee of Attorneys General meeting to ensure as far as possible a uniform approach on the matter across Australia.