Introduction

1.1 During the 41st Parliament, the then President of the Senate, Senator the Hon. Paul Calvert, wrote to the committee on the issue of effective repetition, asking it to consider seeking a reference on the matter, following an approach to him from the Speaker of the Western Australian Legislative Assembly. The committee was unable to consider this matter before the 41st Parliament concluded but has now done so.

1.2 Over several years, the committee has maintained a watching brief on the issue, assisted by expert advice[1] and reports from other jurisdictions[2], and by conducting its own researches. The committee is sufficiently concerned about the threat to freedom of speech in parliament, apparent in a recent tendency in judicial authority to read down the previously accepted scope of parliamentary privilege, to provide this advisory report to the Senate.

Freedom of speech in parliament

1.3 Parliamentary privilege has commonly been described as a set of immunities from the operation of certain laws. The term includes powers to protect the integrity of parliamentary processes. The most significant immunity is freedom of speech in parliament whereby words uttered and acts done in parliament are not actionable in a court of law. For example, a person cannot take action for defamation against a member of parliament on the basis of words spoken in parliament. The member's right to freedom of speech is protected by parliamentary privilege which ensures that houses of parliament, their committees and members may discharge their functions as representatives of their constituents freely and independently, without fear of intimidation or punishment and without improper impediment.

1.4 This protection, which evolved during the sixteenth and seventeenth centuries in Britain, was given statutory expression in 1689 in article 9 of the Bill of Rights:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament.

Article 9 is one manifestation of a wider principle recognising the separate constitutional roles of parliament and the courts. As expressed by Lord Browne-

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1 See advice No. 37 from the Clerk of the Senate on this issue, published on the committee's website at http://www.aph.gov.au/Senate/committee/priv_ctte/clerks_advices/index.htm.

2 New Zealand House of Representatives, Privileges Committee, *Question of privilege referred 21 July 1998 concerning Buchanan v Jennings*, May 2005; Legislative Assembly of Western Australia, Procedure and Privileges Committee, *Effective Repetition: Decision in Buchanan v Jennings*, Report No. 3, 2006.

Wilkinson in the Privy Council's judgment in *Prebble v Television New Zealand Ltd*, a leading case on the scope and purpose of article 9:

> So far as the Courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges.[3]

Lord Browne-Wilkinson then quotes from Blackstone's commentaries the maxim at the heart of the law and custom of parliament:

> …that whatever matter arises concerning either house of parliament, ought to be examined, discussed and adjudged in that house to which it relates, and not elsewhere.

The potential conflict between the rights of members of parliament and the public in relation to freedom of speech, and the ultimate primacy of parliamentary privilege, was analysed in the Privy Council's *Prebble* judgment in the following terms:

> There are three such issues at play in these cases: first, the need to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information; second, the need to protect freedom of speech generally; third, the interests of justice in ensuring that all relevant evidence is available to the Courts. Their Lordships are of the view that the law has been long settled that, of these three public interests, the first must prevail.

1.5 In Australia, at the Commonwealth level, the scope of the protection afforded by article 9 has been declared in section 16 of the *Parliamentary Privileges Act 1987*.[4] In particular, subsection 16 (3) provides:

> In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:
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> (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
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> (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
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> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

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3 1994 3 NZLR 1 at 6-7.

4 See Appendix 1 for the full text of section 16.

1.6 Inconsistencies in Australian case law provided the impetus for the enactment of these provisions. The Act was designed in part to reaffirm the scope of the protection of parliamentary proceedings after decisions in two NSW cases in the 1980s radically read down the protection afforded.[5] In those cases, witnesses were cross-examined on the truthfulness of evidence they had given to parliamentary committees (including, in one case, evidence given *in camera*). The explanatory memorandum for the Parliamentary Privileges Bill makes it clear that section 16 of the Act was aimed at overturning the effect of those cases.

1.7 According to the explanatory memorandum, the courts had previously held that article 9 "prevents parliamentary proceedings from being examined or questioned in a wide sense or used to support a cause of action".[6] The clear intention of the Parliament in enacting these provisions was to "avoid the consequences of the interpretation of article 9"[7] in the NSW judgments by declaring "that article 9 applies in respect of the Australian Parliament and that it has the effect indicated by the provisions of the clause".[8]

1.8 In its *125th Report* the committee noted that "The passage of the Act was designed to confirm what had always been assumed to be the scope of freedom of speech in Parliament".[9] The section as enacted begins "For the avoidance of doubt…". Parliament was not seeking to expand the scope of the article 9 immunity. To do so may have undermined the broad interpretation of article 9 applicable in other jurisdictions. A number of cases have since established the constitutional validity of the approach taken in the Act, and that the provisions in fact codify the earlier understanding of article 9.[10]

What is effective repetition?

1.9 There is no question that a member of parliament who walks outside the chamber or committee room and repeats an utterance made inside is no longer immune from the ordinary laws of defamation. But what is the situation where that member acknowledges or affirms, but does not repeat, words uttered under the protection of

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5 *R v Murphy* (1985, unreported) and (1986) 64 ALR 498. For an account of the background to and effect of the *Parliamentary Privileges Act 1987* see *Odgers' Australian Senate Practice*, 11th edition, 2004, ed. Harry Evans, pp. 34-41.

6 Senate Committee of Privileges, *125th Report, Parliamentary privilege: Precedents, procedures and practice in the Australian Senate 1966-2005*, p. 91. The explanatory memorandum is reproduced in full at pp.88-94.

7 *ibid*. p.88.

8 *ibid*. p.92.

9 *ibid*. p.11.

10 *Amman Aviation v Commonwealth* 1988 19 FCR 223; *Rann v Olsen* 2000 172 ALR 395; *Prebble v Television NZ Limited* 1994 3 NZLR 1. Also see Report of the Joint Committee on Parliamentary Privilege (UK), (1998-1999) HL 43-I/ HC 214-I.

parliamentary privilege? Courts in recent years have had cause to consider the following cases:

- A member of parliament made certain remarks in parliament about a person and his remarks were reported in the press. Some time later, asked about his remarks in a radio interview and press conference, and whether he would apologise to the person concerned, the member said that he would not apologise and that he stood by what he said in parliament.[11]

- A member of parliament made statements in parliament imputing impropriety to a person. Interviewed on radio and television about the remarks, the member said he was not going to allege anything except for the statements he had made in parliament and that he had evidence to support the statements.[12]

- A member of parliament made observations about the conduct of an official of a government entity. The observation attracted publicity at the time. Some time later the member issued a press release renewing his attack on the entity in less specific and in impersonal terms. Interviewed by a reporter about the detail of his parliamentary statement the member was reported as saying that he did not resile from his claim about the official's conduct.[13]

1.10 In each of these cases, decisions of the courts opened the way for defamation actions to proceed on the basis that the statements made outside parliament were actionable because they incorporated by reference the statements made in parliament. The concept of incorporation or adoption by reference in this context has become known as effective repetition. In essence, by referring to or adopting statements made in parliament, the members had effectively repeated those statements outside parliament, thereby opening themselves to defamation actions *because of what they said in parliament*.

1.11 In the first two cases described above, defamation action did not proceed to trial. The court's decision in the first case (*Beitzel v Crabb*) was to dismiss an application by the member to strike out the statement of claim for not disclosing a cause of action (because of its reliance on words spoken in parliament). Following the ruling against the member, however, the case was settled. In the second case (*Laurance v Katter*), the decision was given in the context of a challenge by the plaintiff in a defamation action to subsection 16(3) of the *Parliamentary Privileges Act 1987*. A majority of the court held that subsection 16(3) did not prevent the plaintiff relying on remarks made in parliament by the member in an action for defamation based on statements made later outside the parliament. An application for special leave

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11 *Beitzel v Crabb* 1992 2 VR 121.

12 *Laurance v Katter* 1996 141 ALR 447.

13 *Buchanan v Jennings* 2002 3 NZLR 145; upheld by the Privy Council on appeal.

to appeal to the High Court was withdrawn when the case was settled. Only in the third case, the New Zealand case of *Buchanan v Jennings*, did the action proceed to trial. The member lost the case, and lost on appeal first to the Court of Appeal and then to the Privy Council.

1.12 The potential impact of these decisions, in the committee's view, is to redraw the boundary between privileged and unprotected speech to the detriment of the institution of parliament. The concept of incorporation or adoption by reference, applied to privileged speech, undermines the basis of the privilege as it has been previously understood to apply. It allows an unprotected statement which, on its face, contains nothing actionable to become a cause of action through reliance on a privileged statement. In the words of Tipping J of the New Zealand Court of Appeal in his widely acclaimed dissenting judgment in *Buchanan v Jennings*:

> … the plaintiff should not be able to make reference to parliamentary words in order to establish a cause of action against an MP. The purpose and policy behind parliamentary privilege viewed as a whole[14] persuades me that the use of parliamentary words as a necessary step in establishing a cause of action should be regarded as inconsistent with parliamentary privilege and therefore impermissible.[15]

Later in the judgment, Tipping J gave a very clear explanation of the issues:

> … I do not consider there can properly be any doctrine of effective repetition, as discussed in some of the authorities and in particular by the Full Court in the present case. A plaintiff should not be able to rely on parliamentary words to establish a defamatory meaning for words spoken or written by an MP outside the House. To do so necessarily involves questioning the veracity of the parliamentary words. If the words spoken or written outside the House are defamatory without reference to any parliamentary words, the cause of action can be established independently of those words which are then only incidentally questioned. That seems to me to be the only principled and clear line which can be drawn in this context.[16]

The committee endorses these views.

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14 Tipping J considered that the purpose and policy behind parliamentary privilege as a whole was correctly enunciated by the Privy Council in *Prebble.*

15 2002 3 NZLR 145 at [117].

16 *ibid.* at [150].

Effective repetition and subsection 16(3)

1.13 On a proper reading, in the committee's view, subsection 16(3) of the *Parliamentary Privileges Act 1987* precludes a *Buchanan v Jennings* conclusion in relation to Commonwealth parliamentary proceedings. That case was decided on the basis of article 9 of the Bill of Rights its original form. As noted in paragraphs 1.5 to 1.8, section 16 of the Parliamentary Privileges Act is a very careful codification of article 9, elucidating its key phrases. Subsection 16(3) expounds on the meaning of "impeached or questioned" in article 9. In particular, paragraph 16(3)(c) makes it unlawful in proceedings before a court or tribunal for proceedings in parliament to be used for the purpose of drawing inferences or conclusions from anything forming part of those proceedings in parliament. If an unprotected statement can become actionable only because of inferences and conclusions drawn from words spoken or acts done in the course of proceedings in parliament and it is unlawful to draw those inferences and conclusions, then there can be no cause of action.

1.14 This was not the conclusion reached by the majority in *Laurance v Katter*, who thought that section 16 needed either to be read down or found invalid in order to allow a statement in the House of Representatives to be used to support an action for defamation. Laurance v Katter, the only relevant case in the federal sphere, provides limited guidance on the application of subsection 16(3) in cases of this nature. Each of the judgments approached the issues from a different angle, leaving no clear rationale (or ratio decidendi) linking the majority judgments or providing a firm basis for future decisions. The matter was settled before an appeal could be heard.

Is amendment of the Act required?

1.15 In the committee's view, the record of judicial authority on matters relating to parliamentary privilege has been somewhat uneven, a matter upon which the committee has commented in a number of its reports.[17] The committee has given undertakings in the past to seek a reference from the Senate on any possible change to the law of parliamentary privilege, but only after the courts have brought down judgments in individual cases and only after the committee has evaluated the judgments to determine whether an inquiry is warranted.[18]

1.16 Although these specific preconditions are absent from the present circumstances, the committee is nonetheless of the view that a useful purpose can be served by setting out its thinking on this issue – in isolation of the distractions of a specific case – for the benefit of future consideration, including by the national Standing Committee of Attorneys-General (SCAG) at which forum the issue was

17 For a summary, see *125th Report*, "Relationship with the courts", pp. 74-75.

18 *125th Report*, p. 74.

raised by the Western Australian Attorney-General on the recommendation of the Western Australian Legislative Assembly Procedure and Privileges Committee.[19]

1.17 It is not possible to predict the future impact of *Buchanan v Jennings*. Even in New Zealand, its impact may be limited by the abolition of appeals to the Privy Council from the end of 2003.[20] The new Supreme Court of New Zealand is free to reinterpret or reject the doctrine of effective repetition in any future case. This may account, in some part, for the legislative remedy recommended by the New Zealand Privileges Committee not having been advanced.[21]

1.18 In Australian jurisdictions, reference to a remedy could be seen as premature as there have been no similar cases finalised with a result comparable to *Buchanan v Jennings*,[22] but it is a very well established practice for Australian courts to consult the jurisprudence of comparable common law countries like New Zealand.[23] Should there be such an outcome for which a legislative remedy is sought or, alternatively, should a legislative solution be considered desirable to pre-empt such an outcome, the committee is of the view that the principles outlined in the following paragraphs should operate as drafting instructions to frame any proposed amendment of the Act.

- First, as it should be clear that subsection 16(3) would not permit a *Buchanan v Jennings* outcome without significant reading down, any amendment should be expressed in the form, "for the avoidance of doubt …".

- Equally importantly, the amendment should not expand the currently accepted scope of the protection of proceedings in parliament but should provide clarification only.

- The clarification should be in generalised terms so that it covers actions done in the course of parliamentary proceedings, not just words spoken or written

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19 Report cited in note 2 above. Recommendation 2 of the report was that the Attorney-General raise at SCAG the form of wording to preclude use of parliamentary proceedings to establish what may effectively have been said (but not actually said) outside Parliament "to ensure as far as possible a uniform approach on the matter across Australia."

20 The *Supreme Court Act 2003* (NZ) established the Supreme Court of New Zealand from 1 January 2004 as New Zealand's court of last resort. Section 42 ended appeals to the Privy Council, subject to certain transitional provisions.

21 Report cited in note 2 above.

22 The Australian cases referred to in paragraph 1.9 were settled out of court.

23 See, for example, Chief Justice Murray Gleeson AC, "The influence of the Privy Council on Australia", (2007) 29 *Australian Bar Review*, 123-135.

(in other words, it should cover the full scope of "proceedings in parliament" as defined in subsection 16(2) of the Act).[24]

- The amendment should enable the courts to distinguish between simple reference to or adoption of words written or spoken in parliament, or acts done (which could not found an action), and any extended use involving elaboration of the protected statements or actions. This will inhibit possible misuse of the clarification to expand the protection of proceedings in parliament to matters not appropriately protected. It will also allow the clear line envisaged by Tipping J in his dissenting judgment in *Buchanan v Jennings* to be drawn ("the cause of action can be established independently of those words which are then only incidentally questioned").

- The purpose of the amendment would be to declare (for the avoidance of doubt) that subsection 16(3) applies to any reference outside parliament by a person to (or affirmation or adoption of) words spoken or written, or actions taken, in the course of proceedings in parliament by that person, provided that the reference, affirmation or adoption is made without elaboration.

- The amendment should be inserted after subsection 16(3).

Conclusion

1.19 The committee:

- seeks the Senate's endorsement of the principles outlined in paragraph 1.18 to guide any amendment of the *Parliamentary Privileges Act 1987* to address the issue of effective repetition; and
- requests the President of the Senate to write to the Attorney-General and to the Speaker of the House of Representatives, drawing their attention to this report, and seeking from the Attorney-General information on the progress of consideration by SCAG of the issue.

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[24] For example, without the clarification applying to the full scope of "proceedings in parliament", a person who later said "I was quite right in submitting that document [not composed by the person for the purpose] to the committee about the conduct of Mr X" could, on the *Buchanan v Jennings* doctrine, be indirectly liable for damages payable to Mr X for the act of providing the document to a committee.