



PARLIAMENT of AUSTRALIA
HOUSE of REPRESENTATIVES

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DAVID ELDER

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Ms Catherine Cornish
Secretary
Standing Committee on Procedure
Parliament House
CANBERRA ACT 2600

Dear Ms Cornish

Thank you for your letter of 1 July inviting me to provide further information to the Committee.

As discussed, I am happy to provide further information to assist the Committee.

As I mentioned when I spoke to the Committee on 19 June, matters to do with parliamentary privilege can be fairly complex. In response to the questions the Committee has asked I have prepared some notes on the matters raised. I apologise for the length of the notes, but I thought I should give the Committee the background it needs in relation to these matters.

I will be happy to expand on the material covered in the notes when I meet the Committee on 17 July.

Yours sincerely

DAVID ELDER
Clerk of the House

Notes – Freedom of speech privilege and Members

Background

The privilege of freedom of speech is captured in Article 9 of the Bill of Rights 1688 which states:

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 now more fully spelled out in section 16 of the *Parliamentary Privileges Act 1987*, the key provisions of which are:

16 Parliamentary privilege in court proceedings

- (1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.
- (2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, ***proceedings in Parliament*** means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:
 - (a) the giving of evidence before a House or a committee, and evidence so given;
 - (b) the presentation or submission of a document to a House or a committee;
 - (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
 - (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.
- (3) 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:
 - (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
 - (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
 - (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

As can be seen, section 16 provides a detailed definition of ‘proceedings in Parliament’ (section 16(2)) and then provides the restriction on the use that may be made of such proceedings (section 16(3)).

The protection provided by ‘proceedings in Parliament’ is an absolute privilege so that no legal action, whether for defamation or other matters, could be taken against the person making protected comments.

There is also potentially protection of qualified privilege if certain conditions are met, such as that the statements are not made with malicious intent.

Also section 10 of the Parliamentary Privileges Act provides protection against defamation action for reports of proceedings under circumstances where:

- the defendant publishes the defamatory matter without any adoption by the defendant of the substance of the matter; and
- the defamatory matter is contained in a fair and accurate report of proceedings.

Communication by Members about proceedings in Parliament

The Committee has asked about communication by Members to the public about matters that they may have raised in the House. This issue is well covered in its generality in House of Representatives Practice:

Hansard reports of the proceedings are absolutely privileged. However, it is considered that parliamentary privilege does not protect individual Members publishing their own speeches apart from the rest of a debate. If a Member publishes his or her speech, this printed statement becomes a separate publication, a step removed from actual proceedings in Parliament and this is also the case in respect of the publication of Hansard extracts, or pamphlet reprints, of a Member's parliamentary speeches. In respect of an action for defamation, regard would also be had to the particular law applying in the State or Territory in which the action is taken or contemplated. Even qualified privilege may not be available unless the publication is for the information of the Member's constituents. In any case arising in the future, reference would need to be had to the provisions of the Parliamentary Privileges Act.

Under section 10 of the Parliamentary Privileges Act it is a defence to an action for defamation that the defamatory matter was published by the defendant without any adoption by the defendant of the substance of the matter, and that the defamatory matter was contained in a fair and accurate report of proceedings at a meeting of a House or a committee. This defence does not apply in respect of a matter published in contravention of section 13 of the Act, and it does not deprive a person of any defence that would have been available to that person if the section had not been enacted.

To perhaps provide a bit more clarity, in terms of actions Members can take:

- if a Member, for example, had links from their website to the official Hansard record of their speeches and this also included the full Hansard of proceedings, it would seem unlikely that the Member would not enjoy protection, and perhaps would have the full protection of absolute privilege;
- alternatively, if a Member routinely reproduced the verbatim texts of their speeches on line or in printed form, the protection is likely to be less and would rely on

qualified privilege ie. you would need to demonstrate there was not malice in the publication;

- further, if a Member specifically reproduced, either on his or her website or in print, a specific speech which may have contained defamatory material and particular attention was drawn to that speech, then again the Member would be relying on qualified privilege, but it may be more difficult to establish that there has not been an adoption of the defamatory remarks or that there is no malice.

The Committee also asks whether there are any words that Members may use to lessen the possibility of a claim or defamation or the denial of a claim of immunity. This is a difficult area on which to provide any clear guidance.

Of relevance here is the New Zealand case of *Buchanan v Jennings*, which involves what is referred to as ‘effective repetition’.

A New Zealand Member, Owens Jennings, MP, during the course of a debate in the New Zealand House, made a statement critical of the actions of an employee (Mr Buchanan) of the Wool Board. Sometime later, Mr Jennings told a journalist, outside the House, that he “did not resile from his claim about the official’s relationship”.

The principle issue in the case 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, on appeal of the matter, 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, which prevents proceedings in Parliament being impeached or questioned in any court.

Following the decision in *Buchanan v Jennings* it is of concern that the ‘effective repetition’ of statements made in a House by comments made outside which ‘adopt’ the statements made in the House, may give rise to a case for defamation. It is worth noting that section 10 of the Privileges Act specifically states that ‘adoption’ of a report of ‘proceedings of Parliament’ will defeat a defence of qualified privilege.

A significant issue in the Australian context is that, the basis for any case for defamation involving ‘effective repetition’ must involve the production into a court, and the questioning of, matter that would be ‘proceedings in Parliament’.

At issue in the case of the Commonwealth Parliament is whether the very specific provisions of section 16(3) would prevent an ‘effective repetition’ case being able to proceed as any use of ‘proceedings in Parliament’ in a court for the purpose of establishing an action for defamation would seem contrary to section 16(3).

Notwithstanding the provisions of section 16(3) of the Privileges Act, Members would need to exercise caution in this area and I am very reluctant to suggest words that may be used that

may remove the possibility of an action being taken. As the recent Joint Committee on Parliamentary Privilege in the UK noted in relation to these matters:

Every case will be unique, and cases where Members simply refer neutrally to speeches made in Parliament may shade into others where they have “nothing to add”, “do not resile from” or “re-affirm” those speeches.

As each case will be unique and there is no statutory interpretation in this area, I could not provide with any authority advice as to language that may avoid any legal issues.

Concept of ‘proceedings in Parliament’

The Committee has asked about the concept of ‘proceedings in Parliament’ and what might be incidental to the House or a parliamentary committee transacting its business.

Some guidance on this point is given in section 16(2) of the Parliamentary Privileges Act where there is reference at paragraphs 16(2) (c) and (d) to some incidental matters that would be protected:

- the preparation of a document for purposes of or incidental to the transacting of the business of the House or a committee; and
- the formalisation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document as formulated, made or published.

Recognising that the determination of what matters may be protected would be subject to statutory interpretation by the courts, the following are some examples of what might be expected to be considered ‘incidental’ to the transacting of the business of the House or a committee:

- the documentation, including any drafts, of material prepared by the Table Office for use in the House or Federation Chamber; and
- briefing papers and other such material, including any drafts, prepared for use by parliamentary committees at meetings of the committees.

Communications by Members

The Committee asks about communication by Members. A case relevant to this discussion is *O’Chee v Rowley*.

In *O’Chee v Rowley* the appellant, then Senator O’Chee, bought an appeal from an order of the Supreme Court, that he produce for inspection, particular documents that he alleged were used by him in the course of parliamentary business. The respondent, Mr Rowley, was a professional fisherman and a member of the East Coast Tuna Management Advisory Committee of the Australian Fish Management Authority.

On two occasions in June 1995 Senator O’Chee, during Senate question time, raised issues concerning longline fishing and possibly conflicts of interest of the respondent. Later during a

radio interview on the topic, Senator O'Chee made remarks to which Mr Rowley took offence and it was upon these remarks that Mr Rowley instituted defamation proceedings. Pursuant to these proceedings Mr Rowley sought production of all relevant documents in the possession or under the control of the appellant.

Senator O'Chee claimed parliamentary privilege pursuant to s 16 of the Privileges Act in respect of the documents in his possession or under his control.

A majority of the Court of Appeal held that if documents came into the possession of a senator who retained them with a view to using them, or the information they contained, for the purpose of Senate questions or debate on a particular topic, then it can fairly be said that the procuring, obtaining or retaining possession of them were acts done for purposes of or incidental to the transacting of business of that House pursuant to s 16(2) of the Act.

The case gives some indication of the interpretation of 'incidental' to the transacting of the business of a House or a committee. If documents are brought into existence, collected or assembled for the purpose of being used in the House or a committee, they may be capable for amounting to 'proceedings in Parliament'.

Extension of the protection of parliamentary privilege

The Committee asks about how the protection of parliamentary privilege might be extended to cover communications by Members from the Chamber, Federation Chamber or committees (external public conversations), and whether such an extension would be consistent with the current Act and the interests of the House.

As was stated in my submission to the Committee, such communication generally is not protected by parliamentary privilege. It would only be protected if it could be established that it was 'incidental' to the transacting of the business of the House or a committee.

It would seem that the only effective way of extending the protection of parliamentary privilege to such communications would be by amendment to the Parliamentary Privileges Act to ensure that such communication fell within the definition of 'proceedings in Parliament'.

Any proposal to extend the coverage of parliamentary privilege to actions and words currently not protected would need to be approached cautiously. When the Committee of Privileges was examining whether parliamentary privilege should be extended generally to cover the correspondence of Members with their constituents, the Committee noted:

The protection afforded by privilege clearly is very powerful and, as we have seen from assessing the definition of 'proceedings in Parliament', very wide. Any extension would need to reflect an overwhelming and pressing concern about the adequacy of the current position.

As to whether an extension would be consistent with the objectives of the Privileges Act and the interests of the House, my understanding is that the purpose of the enactment of section 16 of the Privileges Act was to re-assert, and clarify, the provisions of Article 9 of the Bill of Rights, not to extend any existing coverage of parliamentary privilege. Thus any extension would not seem to be consistent with the original purpose of the Act.

You also ask whether it would be in the interests of the House to extend such protection. As noted above by the Committee of Privileges, the protection of parliamentary privilege already is very powerful and wide and any extension would need to reflect an overwhelming and pressing concern. I am not aware that there is such a concern in this area, or that the lack of protection is unduly inhibiting Members or preventing the House from properly performing its work.

I trust that this note is of use to Members and responds to the queries that have been raised.

David Elder
Clerk of the House

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