

The right of reply procedure

- 3.1 The privilege of freedom of speech in Parliament has sometimes been described as the most important of parliamentary privileges. Its origins date from the British Bill of Rights of 1689 which declares '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'.
- 3.2 It is vital for the effectiveness of our parliamentary institution that Members be able to freely debate any issues without fear of prosecution. Members may say whatever they think fit during debate in the Parliament provided it is in accord with the ordinary rules and practice of the House. Nevertheless it is incumbent upon Members to use this privilege responsibly. Speaker Sinclair commented on 23 March 1998:

(T)here is much more to the responsible exercise of this privilege than merely complying with the technical requirements of the standing orders and practices of the House. In using the opportunities they enjoy, all members are under an obligation to ensure that, as well as observing the rules of the House, they also apply very careful judgment, especially when making remarks about those who are not members of the House. They should take all reasonable steps to satisfy themselves as to the accuracy of any comments they may wish to make and also express themselves in appropriately temperate terms.

The House has established a procedure allowing those reflected upon adversely to apply to have a response published in the parliamentary record. Members will recognise, however, that whatever its merits such a procedure cannot undo nor negate the harm that may be done by the careless or cavalier use of the

privilege of freedom of speech with all the publicity that may sometimes flow from that.¹

- 3.3 This committee supports these sentiments and urges Members to think carefully about what they may say about individuals in the course of debate. Privilege with responsibility should be the watchword.
- 3.4 Nevertheless, despite all the care that Members may take, there are occasions when it may be judged important to speak frankly or in the heat of impassioned debate a Member may, rightly or wrongly, say something to which someone outside the House may take offence. This was the background to the development of the reply process outlined below.

Historical development

- 3.5 In a report in June 1991, the Procedure Committee recommended that a person be able to make a written submission to the Speaker relating to perceived adverse remarks about themselves, and that the submission may be referred to the Committee of Privileges, which may consider the matter and make a report to the House, either recommending that no further action be taken, or the person's submission be published or incorporated in Hansard.²
- 3.6 In reaching its 1991 recommendations the committee considered the 1984 findings of the Joint Select Committee on Parliamentary Privilege, the *Parliamentary Privileges Act 1987*, and the Senate experience where such a procedure had existed since 1988. The report examined the issue in relation to the freedom of speech extended to Members when speaking in the House. The committee maintained that the issue of privilege is a contentious one, and considered that although it could be argued that Parliament's practice was self-regulatory, 'it [did] not guarantee that an individual, rightly or wrongly, will not suffer injury during parliamentary proceedings'.³
- 3.7 The right of reply procedure was established by resolution of the House on 27 August 1997 and gives people who have been offended by remarks made about them in the House the opportunity to respond to those

1 House of Representatives Debates, 23 March 1998, p. 1255.

2 House of Representatives Standing Committee on Procedure, *A citizen's right of reply*, June 1991.

3 *ibid.*

remarks and to seek to have their responses published in the parliamentary record.

Operation of the procedure

- 3.8 The procedure may be used by a person named in the House or referred to in such a way as to be readily identified. It is intended for use by individuals, not by or on behalf of corporations or other organisations. It has been interpreted as applying only to Australian citizens and residents.
- 3.9 A person who perceives that he or she has been adversely reflected upon may make a written submission to the Speaker:
- claiming that he or she has been adversely affected in reputation or in respect of dealings or associations with others, or injured in occupation, trade, office or financial credit, or that his or her privacy has been unreasonably invaded by that reference; and
 - asking to be able to incorporate an appropriate response in the parliamentary record.
- 3.10 The Speaker must refer a submission to the Committee of Privileges if he or she is satisfied that the subject is not obviously trivial or that the submission is not frivolous, vexatious or offensive, and that it is practicable for the Committee of Privileges to consider it.
- 3.11 In considering a submission, the Committee of Privileges must meet in private, and may confer with the person who has made the submission or the Member who has made the statement in the House. The committee may not consider or judge the truth of the statements in the submission or in the House. The committee may not itself publish either the submission, or its proceedings, but may present minutes, and all or part of the submission, to the House. If it believes the submission is frivolous, vexatious or offensive, or not sufficiently serious, the committee must report to the House accordingly.
- 3.12 The Committee of Privileges can make one of two recommendations: that a response by the person, in terms specified in the report and agreed by the person and the committee, be published in the House or incorporated in Hansard; or that no further action be taken by the House.
- 3.13 Responses must be succinct and strictly relevant to the questions in issue, and must not contain anything offensive in character. They must not contain any matter the publication of which would have the effect of

unreasonably adversely affecting or injuring a person or unreasonably invading a person's privacy, or unreasonably adding to or aggravating such an adverse effect.

- 3.14 The Committee of Privileges has agreed to guidelines and procedures which apply to its consideration of submissions.

Experience so far

- 3.15 Only a handful of applications have been made under this procedure since its introduction in 1997. In light of this the chair of the Committee of Privileges has suggested that no changes be made to the procedure at this time.⁴ The Clerk supported this view.⁵
- 3.16 The Leader of the House, the Hon Peter Reith MP, in his submission comments that:

The procedure enhances the Parliament's standing as, consistent with the rule of natural justice, citizens who feel genuinely aggrieved by adverse mentions in the House will have the ability to seek to reply to the comments which have been made about them. The stringent ground rules in the procedure are effective, I believe, in filtering out vague complaints and guarding against frivolous or vexatious claims.⁶

Senate experience

- 3.17 The Senate has had a procedure in place since 1988 which provides an opportunity for a person who has been adversely referred to in the Senate to have a response incorporated in the parliamentary record. A person aggrieved by a reference to the person in the Senate may make a submission to the President of the Senate requesting that a response be published. The submission is scrutinised by the Senate Privileges Committee, which is not permitted to inquire into the truth or merits of statements in the Senate or of the submission, and provided the suggested response is not in any way offensive and meets certain other criteria, it

4 Hon A M Somlyay MP, Chair, House of Representatives Committee of Privileges, *submission*.

5 Department of the House of Representatives, *submission*.

6 Hon Peter Reith MP, *submission*.

may be incorporated in Hansard or ordered to be published.⁷ The procedure was the model for that adopted by the House.

3.18 Since the adoption of the procedure in 1988 (to 30 June 1999) the Senate Committee of Privileges had recommended 26 responses for publication with a further five matters not pursued after the committee had made contact with the aggrieved person. This is clear evidence that the procedure is not heavily used. In a recent report to the Senate on developments in parliamentary privilege⁸ the committee speculated that reasons for this may include:

- It is not well known. It is rare for the media to report on the issue.
- Many matters arise during the adjournment debate or matters of public interest when media interest in Senate proceedings is minimal. People seeking a response are likely to be affected within their own community rather than nation-wide and their concern is more to have their response disseminated at the local rather than at the national level.
- Such abuse of parliamentary privilege as may occur tends to be directed primarily at persons within the same arena or alternatively at persons who have other mechanisms for asserting a right of reply.
- The most likely sources of adverse comments against individuals are committee proceedings which have their own detailed procedures to afford a person adversely named or referred to, usually by witnesses in those proceedings, a right of reply.

3.19 Despite the small numbers of people availing themselves of the procedure the Senate committee concludes that the procedure is both desirable and successful. It also comments that it has found in most cases ‘that the persons have been concerned not with vengeance or apology, but rather to ensure that their voice is heard or views are put in the same forum as the original comments were made’⁹. The Senate committee concludes that in its experience misuse of the process has not occurred. It emphasises the simplicity of the process and says it is usually quick, inexpensive and effective and is available to all regardless of either skill or financial capacity.

7 Evans, Harry (ed), *Odgers’ Australian Senate Practice*, 9th edn, Department of the Senate 1999, p. 69.

8 Senate Standing Committee on Privileges, *Parliamentary Privilege: Precedents, Procedures and Practice in the Australian Senate 1966–1999*.

9 *ibid.*

- 3.20 The Senate committee suggests that the fact that the committee makes no judgment as to the truth or otherwise of the assertion made by either the Senator or the responders is vital to the success of the process and avoids the committee getting bogged down in adjudicating endless claims and counter claims.

Conclusion

- 3.21 The evidence available would appear to indicate that the procedure operates satisfactorily and should be retained in its present form.
- 3.22 Similar processes have recently been adopted in several State legislatures. This may indicate a degree of general acceptance of this type of mechanism, at least in Australia. It may also result in the procedure gradually becoming more well known.

Recommendation 5

- 3.23 **The committee recommends that the resolution of the House of 27 August 1997 concerning protection of persons referred to in the House continue in effect without alteration.**
- 3.24 The Australian Computer Society suggested to the committee that the Internet could be used to publicise the availability of this procedure.¹⁰ The Society went further to suggest that a right of reply interface might be developed to allow people to lodge their applications directly via this mechanism. The committee recognises that this may assist some people but considers that the need to prepare a written application may ensure that people think carefully about their submission and the case they wish to put forward. A form which allows instant lodgment of a submission may encourage more frivolous submissions or lead to people not presenting the best possible response that they might with longer consideration.
- 3.25 While not supporting the Society's proposal for a right of reply interface, the committee agrees that there should be information on the Internet site about the procedure. More and more people are likely to access Hansard reports or view live proceedings over the Internet. The committee

10 Australian Computer Society, *submission*.

proposes that brief information about the availability of the right of reply process be placed on the pages from which Hansard and live telecasts are accessed and that links to fuller information be provided.

Recommendation 6

- 3.26 **The committee recommends that information about the availability of the right of reply process be placed on the Parliament’s Internet site on the pages from which Hansard reports and live telecasts of proceedings are accessed, with links to full details on how to apply.**
- 3.27 Some of the State procedures place more responsibility on the Presiding Officer to determine and report on the matter rather than refer all except frivolous or vexatious cases to a Committee of Privileges. This committee felt that, in the Commonwealth context, the Committee of Privileges is the most appropriate body to consider these issues. A multi-member body representing all parties, as the Committee of Privileges is, can ensure that the process is seen as fair and not left to the judgment of a single person.

People referred to in committee proceedings

- 3.28 People referred to adversely in the published evidence of a committee are not covered by the procedure described in this chapter. They are free to respond directly to the committee involved. The committee may decide to publish further evidence or statements from the person if it feels it appropriate. This arrangement allows the rebuttal to be published in the same form as the original reference (published evidence of the committee) and to be presented to the House in that form.
- 3.29 It has been suggested to the committee that the process in regard to people referred to adversely before a committee should be clarified.¹¹ The committee believes that the process is adequate but proposes that information relating to committee processes be added to the explanatory material on the right of reply procedure provided to inquirers. The implementation of formal procedures governing interaction with witnesses recommended in chapter 6 will also help to ensure that people

11 Dr A Brien, Charles Sturt University, *submission*.

are aware of what action they can take if they believe that they have been adversely referred to by another witness or committee member.

Recommendation 7

- 3.30 The committee recommends that information be added to the explanatory material about the protection of persons referred to in the House to specify what course people may take if they believe they have been adversely referred to in the published evidence of a committee.**