Question of privilege referred
21July1998 concerning
Buchanan v Jennings

Report of the Privileges Committee

Forty-seventh Parliament
(Matt Robson, Chairperson)
May 2005

Presented to the House of Representatives
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Question of privilege referred 21 July 1998 concerning Buchanan v Jennings

Recommendation

The Privileges Committee recommends 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.

Referral of the question of privilege

On 21 July 1998 the Speaker ruled that a question of privilege was involved in a defamation action, Buchanan v Jennings, in the High Court (CP No 1C 9/98). The question consequently stood referred to this committee. The ruling is appended to this report (Appendix B).

The defamation action related to statements made by Owen Jennings MP to a newspaper, which, it was argued, effectively adopted and repeated earlier statements he had made in the House. An interim report of this committee was presented to the House in September 1998 in which the committee noted that “the question of whether Mr Jennings made statements outside the House adopting and repeating earlier parliamentary statements does not involve any issue of parliamentary privilege…however [if] it is desired to give those statements in evidence for the purposes of proving the defamation alleged, an issue of parliamentary privilege does arise”.1

At the time of the committee’s report an application to have the action struck out in the High Court was pending and the committee resolved to defer consideration of the matter until the outcome of that application was known.

The action was not struck out; and on the trial of the action, the High Court and subsequently on appeal, a majority of the Court of Appeal concluded that a member may be held liable in defamation if the member makes a defamatory statement in the House and later affirms the statement (without repeating it) on an occasion which is not protected by parliamentary privilege.2

Mr Jennings then appealed to the Privy Council, which unanimously upheld the Court of Appeal decision and dismissed the appeal. The Privy Council judgment was delivered on 14 July 2004.3

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2 [2002] 3 NZLR 145.
3 [2005] 2 All ER 273.
Legal finding

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.

Implications for Parliament

This litigation has occupied some six years. The House, through the Speaker, intervened at the Court of Appeal and Privy Council hearings to put before the court its view of the principles involved. While the committee is obviously disappointed with the outcome of the final appeal, it does not propose to reargue the Privy Council’s reasoning in this report. With one exception relating to Standing Order 396 (see below), no particular purpose would be served by its doing so. The contrary view to that taken by their Lordships has been put in three articles that followed the Court of Appeal’s judgment,4 and is eloquently stated in Justice Tipping’s dissent in that court.5

Rather, this report addresses the implications of the judgment for Parliament and what, if anything, should be done about them. The committee invited three of New Zealand’s leading academics in the fields of constitutional and defamation law to meet with it and discuss these matters. These three academics—Professor John Burrows and Professor Philip Joseph of the University of Canterbury and Mr Andrew Geddis, Senior Lecturer in Law at the University of Otago—met with the committee for a stimulating and productive session on 2 December 2004.

Outlines of the points made to the committee by these experts are set out in Appendices C, D and E.

5 [2002] 3 NZLR 145 at [70] to [168].
Summary of issues

This section outlines some of the potential issues for Parliament, members, select committee witnesses and the news media, arising from the decision.

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.

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.

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.

**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.

Secondly, there is no guarantee that the principle is confined to parliamentary proceedings. The most obvious context with a parallel to freedom of speech in Parliament is court proceedings. They also enjoy absolute privilege in defamation (and similar legal protections against other legal liability). Is a similar principle of “effective repetition” to apply to an imputed adoption or reassertion of statements made in court, thus opening up a potential liability for parties, counsel and witnesses should they speak about the proceedings outside the confines of the court—something that seems increasingly common? This latter concern is beyond the scope of any consideration that the committee can give to the matter. The Government may wish to consider the implications of the principle in the context of court proceedings.

**Possible means of addressing “effective repetition”**

A number of suggestions for dealing with the Jennings decision were made by the legal experts consulted by the committee. They would involve legislation to modify or remove its effect. Four broad approaches were suggested, though no doubt each one could accommodate a number of variations.

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6 Joseph, Appendix D.
1  Straightforward reversal of Jennings in defamation

The first approach would be an amendment to the Defamation Act to reverse Jennings. Such a provision would provide that a parliamentary statement could not be linked with remarks made outside the House for the purposes of establishing defamation. To establish defamation a plaintiff would have to rely entirely on what was said outside the House.

2  Limitation of Jennings

The second suggested approach would also be confined to the defamation effects of Jennings. But here the use of parliamentary statements by the plaintiff would be permitted if the defendant added remarks in his or her statement outside Parliament. If the defendant did add anything to the parliamentary statement, both statements could be used in the action. But if the defendant merely reaffirmed or limited the parliamentary statement (as in Jennings) the earlier parliamentary statement would not be admissible to establish liability. This approach would reverse Jennings but it would leave members subject to liability if they added anything to the sting of their parliamentary statements.

3  Qualified privilege for interviews

A third approach, also confined to defamation, would avoid reversing Jennings directly but create a new head of qualified privilege for interviews about matters discussed in Parliament. Qualified privilege already exists for a fair and accurate report of proceedings in Parliament. In the Jennings case itself this privilege was not pleaded as a defence, though arguably it could have been and it is briefly alluded to in the Court of Appeal judgments.

If this approach were followed a person “effectively repeating” a parliamentary statement would be protected by qualified privilege (a legal privilege having nothing to do with parliamentary privilege) unless the interviewee was activated by ill-will or improper motive (formerly known as “malice”).7 Thus the Jennings principle of “effective repetition” would be left in place but its potentially chilling effect on public discussion outside Parliament would be tempered.

4  Abolish “effective repetition” generally

The fourth general approach is broader than any of the preceding three. It is to provide that Parliament’s freedom of speech is not subject to abrogation by “effective repetition” at all. Such an amendment, as it is of a general nature relating to parliamentary privilege, would be made to the Legislature Act. Under this approach no liability (whether in defamation or in any other respect) could arise except in respect of words actually spoken outside the House. It would not be possible to impose legal liability by adding a parliamentary statement to a statement made outside the House. In this regard the Jennings principle would be reversed as in option 1 above, but for all potential legal purposes, not just for defamation.

7 Defamation Act 1992, s.19.
Internal controls on abuse of freedom of speech

The committee acknowledges that underlying some of the courts’ reasonings in Jennings is a concern that members can possibly repeat damaging statements with impunity by the device of making veiled references to them in an interview. If this was the mischief that concerned the judges in the Jennings case, while we do not agree that there was any abuse in that case itself we do concede that it is a legitimate concern.

In 1996 the House introduced provisions in its Standing Orders giving persons who are attacked in the House a right to have a response to the attack entered in the parliamentary record. In addition, the Standing Orders contain elaborate provisions allowing persons adversely affected by evidence given to a select committee, or by provisional findings of a committee, to comment on the evidence or provisional findings. The committee considers that these provisions strike an appropriate balance between freedom of speech and protection for the reputational interests of individuals.

Authority to refer to proceedings in Parliament

The committee wishes specifically to record its disagreement with one aspect of the Privy Council’s judgment.

The Privy Council referred to Standing Order 396(1) under which the permission of the House is not required for reference to be made in court to proceedings in Parliament. The Privy Council appears to have regarded this provision (and an equivalent provision in the House of Commons) as support for its finding that using parliamentary materials to establish an “effective repetition” was not contrary to article 9 of the Bill of Rights, and that before the Standing Order was adopted the mere production of a record of what was said in Parliament might have infringed article 9.

This committee does not agree that that is the effect or was the intended effect of Standing Order 396(1).

That Standing Order (adopted in 1996 in New Zealand and in 1980 in an equivalent form by the House of Commons) was not intended to deal with any possible contravention of article 9. Indeed, as the House has taken the strong view that article 9 is not subject to waiver, it is not possible for a Standing Order to authorise the use of parliamentary materials in contravention of article 9. Standing Order 396(1) was intended to abolish a previous practice of applying to the House for leave to refer to its debates so as to overcome a supposed breach of privilege of the House in referring at all to its proceedings without its permission. Litigants applied to the House for permission to refer to its debates to avoid a breach of privilege at the hands of the House, not to overcome the strictures of article 9, which is a rule of law that the courts are obliged to enforce.

That Standing Order 396(1) is not intended to derogate from article 9 is made clear in paragraph (2) of the order—reference to proceedings in Parliament is always subject to

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8 Standing Orders 160–163.
9 [2005] 2 All ER 273 at [16].
article 9. By using Standing Order 396(1) as an indication that the mere use of parliamentary proceedings is not in contravention of article 9 (in itself an innocuous proposition), the Privy Council confused the very question it was charged with determining—whether the proposed use in the Jennings case was a contravention of article 9. It is significant that the Privy Council introduced Standing Order 396(1) into its judgment without the benefit of hearing argument on its intended application.

Quite simply, this House has never taken the view imputed to it by the Privy Council that mere reference to or production of a record of what was said in Parliament infringes article 9. Such a view is entirely at odds with the submissions made to the Privy Council on behalf of this House in Prebble v Television New Zealand Limited and endorsed by their Lordships in that case.11

Conclusions

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 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. Thus it has decided that the fourth option outlined above and elaborated on in one of the summaries presented to the committee12 is the appropriate way of dealing with the matter. This would involve an amendment to the Legislature Act providing that no criminal or civil liability may arise as a result of any person merely affirming, adopting or endorsing words written or spoken in proceedings in Parliament if the liability would not arise but for those proceedings.

Recommendation

The Privileges Committee recommends 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.

12 Joseph, Appendix D.
Appendix A

Committee procedure
The committee met on a number of occasions during 2003 and 2004 to consider the question of privilege. In 2005 it met on 7 April, 5 May and 12 May.

The committee received advice from Mr D G McGee QC, Clerk of the House. It also invited Professor John Burrows, Professor Philip Joseph, and Mr Andrew Geddis to assist with its consideration of this matter.

Committee members
Hon Matt Robson (Chairperson)
John Carter (Deputy Chairperson)
Hon Mark Burton
Hon Dr Michael Cullen
Hon Peter Dunne
Dr Wayne Mapp
Rt Hon Winston Peters
Hon Richard Prebble
Metiria Turei
Hon Margaret Wilson

Rodney Hide replaced Hon Richard Prebble from 30 June 2004
Russell Fairbrother replaced Hon Margaret Wilson from 9 March 2005

Committee staff
D G McGee, QC, Clerk of the House
Louise Sparrer, Clerk of Committee
Ruling delivered on 21 July 1998

I have received a letter dated 1 July from Hon Richard Prebble raising as a matter of privilege the defamation action Buchanan v Jennings. Mr Prebble asserts that the plaintiff intends to violate the parliamentary privilege of the absolute right of free speech in Parliament enjoyed by Mr Jennings. He invites me to rule that a question of privilege is involved so that the Privileges Committee can be seized of it.

Whether the action would violate the member’s free speech is not for me to say, but I do agree that the issue should be looked at by the Privileges Committee so that that committee can consider whether any steps need to be taken by the House.

Consequently I determine that a question of privilege is involved in respect of the action Buchanan v Jennings in the High Court—CP No IC 9/98. The question therefore stands referred to the Privileges Committee.
PARLIAMENTARY PRIVILEGE AND DEFAMATION

The Basic Principle

Proceedings in the House of Representatives are protected by absolute privilege (Defamation Act 1992 s13(1)). So a speaker cannot be liable in defamation for words spoken in proceedings in Parliament.

This derives from Article 9 of the Bill of Rights 1688:

“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.”

However if the speaker repeats the words outside proceedings in Parliament he or she is not covered by the privilege.

Jennings v Buchanan

The Privy Council decision in Jennings v Buchanan [2004] UKPC36, affirming a majority of the New Zealand Court of Appeal, has unfortunate consequences.

Speaking in Parliament, Mr Owen Jennings MP made remarks about the part played by an official of the Wool Board in procuring Board sponsorships of a rugby tour to the United Kingdom. He said that the Board had spent $3.5million “for what appears to be no other reason than that two of the senior officials involved in the process could continue an indulgence in an illicit relationship.” When later interviewed by a newspaper, Mr Jennings was reported as saying that

“He did not resile from his claim about the official’s relationship, just the money.”

It was held that these words amounted to an effective repetition outside Parliament of the defamatory remarks. Mr Buchanan’s defamation action against Mr Jennings was successful.

The legal difficulties

The case raises the following difficulties:
Firstly, despite the holdings of the court to the contrary, it appears to infringe parliamentary privilege. Mr Jennings’s words outside the House are virtually meaningless on their own. To give them meaning, and to understand their defamatory sting, it is necessary to read them together with what Mr Jennings said in the House. That is surely to say that reference to the parliamentary debates is a necessary part of the cause of action. The debates are being used against the interests of the speaker (Mr Jennings) and are thus being “questioned.”

Secondly, the case stands oddly with *Peters v Cushing* [1999] NZAR 241. Mr Peters had spoken words outside Parliament about an unnamed person. Mr Peters later named the person in Parliament as Mr Cushing. Mr Cushing’s defamation action on those words failed. As Ellis J put it:

“In my view the plaintiff could not succeed in his first cause of action without basing his claim on the words said by Mr Peters in Parliament, and that is an end of it.”

The Privy Council agreed with that decision. Yet the only difference between the two cases is which of the in-House and out-of-House statements came first in time.

This is the sort of distinction which makes the law a mystery to ordinary people.

Thirdly, *Jennings v Buchanan* holds that the words “I do not resile” amounted to an effective repetition, or reassertion, outside the House of words spoken inside it. Yet it would have been safe for Mr Jennings to have merely confirmed that he spoke the words in the House, without reasserting them. That can be a very fine distinction indeed. It is harmless to say “Yes, I did say that” but not, apparently, to say “Yes I did say that and I still believe it.” Given that meaning depends on context, very similar words may bear different meanings depending on the attitude of the speaker, the inflexion used, and so on. It may be very difficult to decide whether words spoken outside Parliament amount to a mere confirmation or an effective repetition. Such distinctions are too fine in the hurly-burly of political and media life.

The practical consequences

The case has serious practical consequences.
Firstly, it is not only MPs who are affected by the decision. So are others who take part in parliamentary proceedings: people giving evidence before a Select Committee, for example. Some of those people will be far less acquainted with the legal niceties than will MPs, and may be dangerously ready to be interviewed about submissions they have made which may be critical of some person.

Secondly, the media are also affected. They have a qualified privilege to report proceedings in Parliament, but not when they are reporting words spoken out of Parliament. So in the Jennings case not only was Mr Jennings liable, so would the newspaper have been had it been sued. Thus journalists need also to make calls about whether the speaker is repeating what was said in the House. They are as much affected by these fine distinctions as are MPs.

Thirdly, the likely result of this case is that freedom of speech will be constrained; if so the public will be the losers. Politicians will be understandably reluctant to speak to the media about issues which have been discussed in the House. The media are likely to act on the side of caution also.

Assume that a MP has raised an issue in the House accusing someone of wrong doing, and that the matter is one of some public concern.

- If others have denied the accusations a journalist will be unable safely to ask the MP whether he or she is persuaded by the denials.

- Journalists will be afraid to ask the MP on what evidence he or she based the accusations.

- Journalists will be afraid to ask the MP to explain or clarify some aspect of the accusations.

- The MP will be unable safely to qualify or modify out of Parliament some of what he or she has said inside if that could amount to saying that he or she still stands by some of the original statements.

Thus, ongoing debate will be stifled, and to what end? The statements safely made in the House are likely to have received wide publicity in the media (radio television and
newspapers) anyway, and it is hard to see that “repetitions” of the kind Mr Jennings made add anything whatsoever to the damage done to the plaintiff.

Reform

If the law is to be changed, how should it be done? It will require legislation, and that always carries the risk that critics will see it as “MPs looking after themselves.” But here it can correctly be asserted that there are much wider interests of freedom of expression at stake, and that that is a matter of public concern.

There is a range of possible solutions. I shall start with the narrowest first.

Firstly, one might enact a provision in the Defamation Act 1992 that no defamation action will succeed if, to give meaning to an out-of-parliament statement, or to identify the person referred to in it, it is necessary for the plaintiff to refer to a report of a statement made in a proceeding in Parliament.

Secondly, it might be enacted that no defamation action will succeed in respect of a statement made out of Parliament if it does not add to the sting of a statement already made in the course of Parliamentary proceedings. This would mean, in effect, that mere repetitions would be safe, but that statements making new and additional defamatory allegations would not be. However, this would mean reversing a long line of authority, and fundamentally changing the rule that every repetition of a defamatory statement is a republication of it. It would probably not be acceptable.

Thirdly, there may be a case for creating a new qualified privilege, which would protect both the speaker of the words and the media, in respect of interviews given to discuss statements made in Parliament. (The Privy Council in Jennings adverted to the possibility of such a privilege existing even at common law, but did not pursue it. The Defamation Act 1992 s16 already gives protection to the media in respect of a report of a press conference given on behalf of a body or person in respect of whose proceedings reports are privileged. This applies to bodies such as local authorities or statutory bodies, but not to Parliament.)

Any such privilege for “interviews” or “press conferences” would be very difficult to draft, the question being how far the interviewee would be permitted to go beyond what was said in the House. It would also be defeated by malice. There might also be dangers if such a
provision were seen to limit the (somewhat uncertain) privilege for political discussion created in *Lange v Atkinson* [2000] 3 NZLR 385.

**Fourthly**, one may wish to consider whether any amendment should extend beyond defamation, and cover other areas of law. A possible example would be a statement in the House which amounted to a contempt of court. It is possible that a reference outside the House to that speech might also be subject to the Jennings principle. If one wished to extend an amendment this far it would need to be done in an act other than the Defamation Act. Since contempts of court are likely to be contrary to Standing Orders it is questionable whether one should be seen to give them this extra protection.

**Conclusion**

The first, narrowest, solution may be the best. It will be the easiest to draft and, probably, to pass. It makes the least inroads into established principle. It would need to be clear it protected not just the original speaker but also the media, which have a qualified reporting privilege.

However careful consideration will need to be given as to whether it is desired to go beyond defamation and cover other legal wrongs as well.

J F Burrows  
15 November 2004
PARLIAMENTARY PRIVILEGE
AND THE EFFECTIVE REPETITION PRINCIPLE

Presentation to the Privileges Committee
2 December 2004

Justification of the principle

The Privy Council decision in Jennings v Buchanan [2004] UKPC 36 (affirming a majority of the New Zealand Court of Appeal) raises troubling implications. It may also be wrongly decided (see PA Joseph, “Parliamentary Privilege and Effective Repetition: Constitutional Review” [2003] New Zealand Law Review 428-432). Arguably, the effective repetition principle represents a departure from the absolute privilege of parliamentary free speech, codified under Article 9 of the Bill of Rights 1688 (Eng). To show that innocuous words spoken outside the House were defamatory by reference to what was said in the House must involve “questioning” proceedings in Parliament. The plaintiff must establish defamatory intent; he or she must establish that the parliamentary words were spoken falsely in order to be actionable. The plaintiff is forced to question the truth or propriety of the words uttered (truth is a defence to a defamation action). Tipping J adopted this reasoning in his dissenting judgment in the Court of Appeal.

On Tipping J’s reasoning (which it is submitted is correct), the effective repetition principle infringes the Article 9 prohibition. The decision of the Full Court in Buchanan v Jennings [200] NZAR 71 (HC) virtually conceded this objection (albeit the court declined to strike out the cause of action). Neazor and Randerson JJ stated (at 118): “[A]n attack may be made on the truth of allegedly defamatory remarks made outside the House even if that would amount to an indirect attack on the truth of the same or similar remarks made inside the House.” Laurance v Katter (1996) 141 ALR 447 was a further case upholding the effective repetition principle. There, the Australian court conceded that proving what the defendant had said outside the House was false, would prove also that what was said inside the House was false. The court reconciled this outcome as “merely incidental”; although one may take strong exception to the erosion of the Article 9 protection.
Scope of the principle

The effective repetition principle has potentially broader scope than the law of defamation. It might conceivably be used to establish contempt of court, statutory breaches involving imposition of penalties, civil liability for breach of confidentiality, and criminal liability for (inter alia) sedition, incitement to racial disharmony or breach of our obscenity laws. Any proposal for legislative reform should consider whether it should have broader application than defamation law to cover all criminal and civil liability. A general amendment to the Legislature Act 1908 may be preferable than simply amending the Defamation Act 1992.

The public interest

The effective repetition principle undermines the public interest in two ways: it has a chilling effect on political free speech, and it has a potentially chilling effect on parliamentary free speech (contrary to Article 9). First, members will want to avoid media comment if they suspect they have made potentially defamatory statements under cover of parliamentary privilege. The courts have not been slow to construe words uttered outside the House as amounting to an effective repetition of words spoken inside the House (cf Jennings’ words: “I do not resile from my claim about the official’s relationship”). Refusals by politicians to be accessible to media neither promote open debate nor enhance representative democracy.

Secondly, is it true, as the Privy Council and the majority of the Court of Appeal claimed, that the effective repetition principle does not potentially inhibit parliamentary free speech? If a member or a minister agrees to a television, radio or other media interview after the House rises on a matter of pressing public interest, he or she may be dissuaded from making potentially defamatory statements in debates for fear of triggering the effective repetition principle. The principle has a more corrosive effect than either the Privy Council or the Court of Appeal was prepared to acknowledge. The House may wish to consider legislation to negate the effect of the Privy Council decision.

Reform

It is easier to make the case for legislative intervention than to spell out the form in which it should take. The difficulty is in devising a suitable form of words that will cull the effective
repetition principle but without obliterating the important distinction drawn by the Privy Council in Prebble v TVNZ Ltd [1994] 3 NZLR 1. This decision affirmed that it is permissible to lead evidence in court of parliamentary proceedings to establish, as a matter of historical record, that particular words were spoken in the House on a particular day. Article 9 only precludes leading evidence of parliamentary proceedings where the purpose is to question or impeach proceedings in Parliament. There may be various reasons why litigants may want to adduce Hansard as evidence in court (eg to support a particular statutory construction, to identify the person at whom extra-parliamentary statements are directed, or simply to prove that a member was present in the House on a particular day). The object would be to prevent Hansard being used to support the effective repetition principle without also excluding its use for those other purposes.

Addendum

The draft provision that follows might provide a suitable legislative override to negate the principle upheld in Jennings v Buchanan. This provision would bar criminal or civil liability based on the effective repetition principle but without prohibiting the legitimate use of Hansard in judicial proceedings. The appropriate place for the override would be by inclusion in the Legislature Act 1908:

“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.”

Philip Joseph
Professor of Law
University of Canterbury

1 December 2004
Appendix E

Andrew Geddes, Senior Lecturer, Faculty of Law, University of Otago.
Notes for Parliament's Privileges Committee.

PARLIAMENTARY PRIVILEGE POST JENNINGS V BUCHANAN

1: The Basis for Privilege

- Parliamentary privilege has a long history as a field of law, the extent of which need not be recounted here. The background reason for the ongoing judicial recognition of parliamentary privilege has been summarised usefully by David McGee:

  "Privilege is part of the way in which the separation of powers is delineated in our political system and is a principal means of effecting a modus vivendi between the legislature and the other two branches of government. ... Parliamentary privilege, so far as the legislature is concerned, helps to preserve Parliament’s freedom from outside control and to give it and its members the legal tools and confidence they will need to perform their constitutional functions."\(^1\)

- Parliamentary privilege consists of two linked sets of legal rights particular to Parliament as an institution:
  - Immunities: The suspension of the application of certain general laws to those involved in parliamentary proceedings, so as to allow members to carry out their duties as representatives of their constituents without fear of intimidation or punishment, and without improper impediment.
    - Immunity of parliamentary proceedings from impeachment and question in the courts.
    - Immunity from arrest in civil cases.
    - Exemption from service as a juror.
    - Exemption from compulsory attendance in a court or tribunal.
  - Powers: The ability of the House of Representatives to protect the integrity of its processes.
    - Power to determine own rules of conduct/standing orders.

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- Power to conduct inquiries.
- Power to require attendance of persons.
- Power to require production of documents.
- Power to punish for contempt.
- Power to interpret and apply legislative provisions that relate to proceedings of the House (exclusive cognisance).
- Power to determine questions of membership of the House (?)

- The central issue in the Jennings v Buchanan litigation was the boundaries to the first immunity listed above (immunity of parliamentary proceedings from impeachment and question in the courts). We may refer to this aspect of privilege as Parliament’s “free speech privilege”.

2: The basis for the free speech privilege.

- The legal basis for Parliament’s free speech privilege traces back to article 9 of the Bill of Rights 1688:

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

- There are three preliminary points to note about the legal immunity this provision bestows:
  - It attaches not to the members of Parliament per se, but rather to the proceedings of Parliament as an institution. Thus, any person who speaks during “a proceeding of Parliament” is covered by the privilege.
  - It provides a guarantee (“absolute privilege”) that no legal consequences will follow from speaking during “a proceeding of Parliament”. However, non-legal consequences (such as media

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2 But see Queen v Speaker, House of Representatives [2004] NZAR 585 at [28]-[30].
3 Art 9 is in force in New Zealand by virtue of the Legislature Act 1908, s 242, and the Imperial Laws Application Act 1986, s 3(1).
coverage and criticism)⁴ may — indeed, should — flow from parliamentary speech. Equally, the House itself has the power to regulate speech made during parliamentary proceedings, and to punish any speech which amounts to a contempt of Parliament.

- This “absolute privilege” immunity from legal consequences for speaking during a “proceeding of Parliament” only covers speech made in such a situation (as well as any later reporting of that speech). Therefore, if these words subsequently are repeated outside of “a proceeding of Parliament” — even if in exactly the same form as spoken in Parliament — then the immunity bestowed by the free speech privilege will not apply to that repetition.

- The first “public purpose” rationale for the free speech privilege (as well as the limit to this privilege) lies in avoiding the “chilling effect” that potential legal sanction may have on the speech of those taking part in parliamentary proceedings. Speaking in the Prebble v TVNZ case, Lord Browne-Wilkinson of the Privy Council summarized this rationale as follows:

  "The important public interest protected by such privilege is to ensure that the member or witness at the time he speaks is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore he would not have the confidence the privilege is designed to protect."⁵

In brief, the general societal benefit of having a representative institution where all who participate in its activities may speak their minds without the threat of subsequent legal liability is deemed to outweigh any potential harm — whether to an individual or otherwise — caused by a given act of speech. No such institutional benefit,

⁵ Prebble v TVNZ [1994] 3 NZLR 1, 8 (PC).
however, is gained by the subsequent repetition of the speech outside of Parliament's proceedings.

- A second rationale for the free speech privilege lies in the role it plays in ensuring the separation of the branches of government. As Lord Browne-Wilkinson puts it:

  "In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz, that the courts and Parliament are both astute to recognise their respective constitutional roles. 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."5

By carving out a zone wherein Parliament may regulate and control its own activities, article 9 recognises the sovereignty of Parliament as an institution, and limits the potential for the courts and the legislature to clash over how Parliament's business ought to be conducted. But once again, where the words are spoken in a forum outside of Parliament's proceedings, then the courts' holding the speaker legally accountable for those words will not risk interfering with Parliament's business (as, ipso facto, the speech involved is no longer a part of Parliament's business).

3: The boundary to this free speech privilege following Jennings v Buchanan.

- The Privy Council decision in Jennings v Buchanan continues to acknowledge that an absolute privilege accrues to any speech made during a proceeding of Parliament [at para. 8]:

  "In other situations the value of free and open communication is held to require an even stronger measure of protection, the giving to the publisher of a false and defamatory statement a privilege which is absolute, indefeasible even if the publisher was improperly motivated (or malicious). ... Parliamentary proceedings are the other main situation in which absolute privilege attaches to statements made...."

5 Ibid., at 6-7.
item: the Court recognised the well-established position that this absolute privilege does not extend to cover the repetition of words previously spoken during a proceeding of Parliament at para. 13:

"It is common ground in this appeal that statements made outside Parliament are not protected by absolute privilege even if they simply repeat what was said therein. ... In such a case there will inevitably be an inquiry at the trial into the honesty of what the defendant had said, and if the defendant's extra-parliamentary statement is found to have been untrue or dishonest the same conclusion would ordinarily, although not always, apply to the parliamentary statement also. But such an inquiry and such a conclusion are not precluded by article 9, because the plaintiff is founding his claim on the extra-parliamentary publication and not the parliamentary publication."

item: The contentious question in this case was, of course, whether or not article 9 barred the courts from looking to words spoken during a parliamentary proceeding (in this case, accusing the plaintiff of serious, probably illegal, financial activities) in order to ascribe a defamatory meaning to a later, extra-parliamentary republication through an "affirmation"/"effective repetition"/"adoption by reference" of those words. (In the immediate case, the complained of republication was through the claim "I do not resile from my earlier statement...".) Because the words used in this "affirmation"/"effective repetition"/"adoption by reference" itself were not defamatory per se, it was necessary for the plaintiff to be able to bring the earlier parliamentary statement before the court to be demonstrate that it did in fact have a defamatory meaning.

item: Their Lordships noted that this question raised a tension between "the need to afford a measure of protection to the reputation and credit of individuals," and the "value of free and open communication" protected by the absolute privilege given to parliamentary statements, as guaranteed by article 9. The claim that this latter guarantee

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7 Jennings v Buchanan, at para 6.
precluded the courts from taking any judicial notice of what has been said in Parliament was then rejected for the following reasons:

- Such statements already are referred to as an aid in interpreting statutes, and as evidence of the lawfulness or otherwise of ministerial actions.
- Parliament itself, as demonstrated by the Report of the Joint Committee on Parliamentary Privilege, appears to have acquiesced in this state of affairs.

- The Privy Council therefore unanimously upheld the earlier majority decision of the Court of Appeal, and held that article 9 did not preclude the judiciary from looking to see as a matter of fact what had been said during a parliamentary proceeding (at paragraph 16):

  "...it cannot now be said, as it once perhaps could, that mere reference to or production of a record of what was said in Parliament infringes article 9."

The parliamentary statement may then be used to provide (or impart) a meaning to any later, extra-parliamentary “affirmation”/“effective repetition”/“adoption by reference” of that statement. And it this later republication — if untrue — that then founds a defamation action against the speaker.

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9 Pepper v Hart [1993] AC 593.
11 HL 43-I / HC 214-I, 9 April, 1999, paras 42 & 49. Although this report was by a Committee of the UK Parliament, the Privy Council felt it relevant as “there is no distinction to be drawn between the law of New Zealand and that of the United Kingdom so far as concerns the issue in this appeal.” Jennings v Buchanan, at para 16.
4: Rationale for the Jennings v Buchanan decision.

- While the Privy Council in Jennings v Buchanan acknowledged the democratically valuable nature of the right of elected representatives (and other participants) to speak freely during parliamentary proceedings, their Lordships did not wish this immunity from civil liability to entitle an MP (or other participant in a parliamentary proceeding) to persist in publicly maligning an individual citizen's character. The risk of a false accusation being levelled during the course of Parliament's business might be a necessary price for guaranteeing robust debate in that arena, but an MP (or other participant) who continues to raise false accusations outside that forum — even if he or she only does so obliquely — should have to account at law for the harm done to the citizen concerned. Their Lordships thus reduced the scope of article 9 to a policy that participants only need remain free to speak in an uninhibited fashion while directly involved in the proceedings of Parliament.\(^\text{12}\)

- Having freely spoken in this forum, participants should be expected to exercise "a degree of circumspection" before "affirming"/"effectively repeating"/"adopting by reference" any false and character-impugning statement outside of Parliament,\(^\text{13}\) for there is no benefit — but potentially considerable individual reputational harm — attached to drawing ongoing public attention to an untrue accusation made against an individual citizen.

- I would suggest, therefore, that the Privy Council's decision as to where the boundary of the free speech privilege lies relies upon a form of "cost-benefit" reasoning with regard to parliamentary speech.

\(^{12}\) Hence the Privy Council's affirmation of the High Court's decision in Peters v Cushing [1999] NZAR 241, that later parliamentary statements may not be used to ascribe a defamatory meaning to words spoken previously outside of parliamentary proceedings.

\(^{13}\) Jennings v Buchanan, at para 20.
The bench saw their decision as posing little potential harm to the ability of participants to speak freely whilst in Parliament (although it may make participants more careful when commenting subsequently about their parliamentary statements).

Against this minor potential harm, the right to sue for any subsequent "affirmation"/"effective repetition"/"adoption by reference" of a false and character-impugning parliamentary statement carries the benefit of protecting private individuals from suffering the harm of an ongoing defamation (or, at least, enabling them to claim compensation for that harm if they are in fact made subject to such treatment).

5: Potential problems with the Jennings v Buchanan decision.

- The Privy Council’s decision is open to criticism on two fronts:
  - It is built upon something of a fiction — that the defamation action "really" targets the later extra-parliamentary "affirmation"/"effective repetition"/"adoption by reference", and not the earlier parliamentary statement.
  - It gets the cost-benefit balance wrong — that the potential harm to free parliamentary speech posed by the threat of a later defamation action actually is greater than as assessed by the Court.

- The first point — the "fictional" nature of the court’s holding — is not in itself a fatal criticism of a judicial decision. Much of the law is based upon "legal fictions" (i.e. that a company is a "person"). However, the effect of the present fiction is to disguise the fact that the court is involved in directly judging the veracity of a statement made during a parliamentary proceeding. All the later "affirmation"/"effective repetition"/"adoption by reference" of that parliamentary statement
provides a hook upon which the court can hang the statement for scrutiny. Thus, the court is stepping into a realm which previously has been closed to it — holding members of Parliament (and other parliamentary participants) directly to account for their words and behaviour whilst engaged in parliamentary business.

- The second criticism flows from the first. It may be argued that all a participant in parliamentary proceedings needs to do in order to avoid having their statements scrutinised before the courts is avoid making any later, public "affirmation"/"effective repetition"/"adoption by reference" outside of Parliament of such statements. If the participant does engage in such an action, then he or she effectively forfeits the right to protection by his or her behaviour. However, this approach has two flaws:
  - It is not clear exactly what sort of words or conduct will amount to an "affirmation"/"effective repetition"/"adoption by reference" of an earlier parliamentary statement. There is no apparent "bright line" test here. Therefore, a parliamentary participant cannot know with any certainty what he or she safely may say publicly in regard to any statement he or she has made in Parliament. (This issue may become clearer with time, but it will require further cases to set precedents as to what counts, and what does not count, as an "affirmation"/"effective repetition"/"adoption by reference".)
  - The reality of our media society is that parliamentary participants (and members of Parliament in particular) often are the subject of intense pressure to comment on, and defend, their parliamentary statements. It is debatable whether complete silence on the matter is a realistic option in this climate. Equally, whether complete silence would be a desirable option is also questionable. It could reduce the ability of the public to hold accountable a member of Parliament for their statements, in that
a member may well use the threat of potential lawsuits to duck all questions relating to the words he or she has spoken in Parliament.

- Therefore, the uncertainty as to just what sorts of subsequent extra-parliamentary statements might open up a member or other parliamentary participant to legal liability might have the kind of chilling effect that article 9 is supposed to avoid. A member, or other parliamentary participant, may decide that rather than run the risk of making a later, accidental "affirmation"/"effective repetition"/"adoption by reference" of some parliamentary statement which may or may not be defamatory of an individual, they simply will not speak up in the first place. Or, alternatively, they will "hedge and trim" their parliamentary language so as to be sure of avoiding any future liability.

6: Ought the Privy Council’s decision be overridden by Parliament?

- Both the Privy Council in Jennings v Buchanan, 14 and the Court of Appeal in Awatere-Huata v Prebble, 15 recently have reasserted the judiciary’s role in determining the limits of parliamentary privilege. However, this judicial role is always subject to Parliament’s overarching power to legislate. Indeed, the current basis of privilege lies in statute — the Legislature Act 1908 — and so there is no constitutional reason why Parliament should not exercise its own judgment about where the appropriate boundaries of this privilege should lie.

- If precedents are required, the Australian Parliament acted in just such a way when it passed the Parliamentary Privileges Act 1987 in response to a court decision it felt wrongly limited the reach of article 9 with regard to evidence presented before a parliamentary committee.

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14 At para 18.
Therefore, if Parliament was of the opinion that the Privy Council has made an error when considering the potential impact of its decision upon free speech within Parliament’s procedures, it legitimately may respond by enacting legislation to restore matters to what it believes to be an appropriate

One note of caution should be struck, however. Parliament’s privileges are just that — *privileges*. They only exist so that it *as an institution* can better play its role as sovereign lawmaker for society. Therefore, these privileges should be used responsibly, and not used as a shield which allows members or other parliamentary participants to engage in the ongoing defamation of individual citizens. Where a member, or other participant in parliamentary procedures, wrongly makes use of the legal immunity that parliamentary privilege confers in a way that visits harm upon some individual or individuals, some thought should be given as to how that individual will be called to account (given that the courts will be prevented from acting to protect the harmed citizen). To this end, the committee may wish to:

- Examine Parliament’s internal processes for overseeing the use of privilege;
- Give thought to allowing the House the power to waive privilege in an individual case so as to allow a gross misuse to be compensated for by the courts.