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“EFFECTIVE REPETITION”: *BUCHANAN V JENNINGS*, DEFAMATION AND THE LAW OF PARLIAMENTARY PRIVILEGE

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I INTRODUCTION

One of the curiosities of our legal system is that some of its oldest laws are still the most important. Parliamentary privilege is a case in point. Developed to meet the needs of medieval England, it has been modified, codified, fought over and tailored to different conditions, times and places, yet the essence of this ancient idea has become and remained a living part of New Zealand law. In spite of its antique heritage the nature and boundaries of Parliament's privileges are still the subject of dispute.

As recently as 2002 the New Zealand Court of Appeal was called upon to decide a question of privilege. A parliamentarian's claim that he 'did not resile' from certain parliamentary statements formed the basis of an action in defamation. In *Buchanan v Jennings*¹ the Court held that privilege was not breached by allowing admission of a statement made in Parliament to supply a defamatory meaning to statements made outside of Parliament, where the unprotected statements amounted to an 'effective repetition' of the protected statements. The case turned on the scope of article 9 of the Bill of Rights 1689.

The decision of the majority, with Tipping J dissenting, was based on claims that:

- 1) The critical facts of this case distinguished it from other cases and meant that 'wider principles' had no application.
- 2) There is a line of 'effective repetition' authorities from Australia and New Zealand that have caused no parliamentary concern over the last decade.

The decision was a surprise because it seemed to depart from the previous law in this area. The courts have been faced with conflicting interests in this respect, since while it is clear that protection of the privileges is important, it is also clear that the privilege enshrined by the Bill of Rights is open to abuse. I will argue that narrowing the scope of parliamentary privilege in the manner captured by the *Buchanan* judgment will lead to greater uncertainty without

¹ *Buchanan v Jennings* [2002] 3 NZLR 145 (CA) Richardson P, Gault, Keith and Blanchard J, Tipping J (dissenting).

limiting the scope for abuse of privilege. Rather than opening the way for greater judicial control of the privilege, it may be appropriate for Parliament to have more stringent internal procedures for responding to its abuses.

II PARLIAMENTARY PRIVILEGE

A What is Parliamentary Privilege?

Parliamentary privilege is made up of the various rights and immunities of the House of Representatives.² The privileges have their origin in England's constitutional history: some were asserted by Parliament and accepted by the Crown and courts as 'ancient practice', others were fully acknowledged only after constitutional struggle by the House of Commons during the seventeenth century.³ In New Zealand, section 242(1) of the *Legislature Act 1908*, provides that the New Zealand House of Representatives shall hold the same privileges as were held by England's House of Commons on January 1 1865.

At the heart of parliamentary privilege lies freedom of speech. Members of Parliament are immune from any civil or criminal liability for proceedings in Parliament. Linked to this is the notion of the 'exclusive cognisance' of Parliament over its own proceedings. Parliament has sole right to determine what its procedures shall be, and sole right to punish breaches of those procedures.⁴ These privileges exist so that the House of Representatives can carry out its functions effectively. In order to freely debate the laws they create, and to provide an effective check on the workings of the executive, parliamentarians need to be able to speak freely and without fear of reprisal from any quarter.⁵

² The New Zealand Law Commission *The Law of Parliamentary Privilege in New Zealand – A Reference Paper* (NZLC MP 5, Wellington 1996) 6.

³ The Joint Committee on Parliamentary Privilege *Volume 1 Report and Proceedings of the Committee* (HL 43 – 1, HC 214 – 1 The Stationery Office, London, 1999) 8-9.

⁴ Report of the Joint Committee on Parliamentary Privilege *Volume 1 Report and Proceedings of the Committee*, above, 10.

⁵ Report of the Joint Committee on Parliamentary Privilege *Volume 1 Report and Proceedings of the Committee*, above, 8.

The privileges also exist to secure the separation of powers by ensuring Parliament's independence from the executive and the judiciary.⁶ The idea that Parliament should not be subject to the jurisdiction of the courts was originally based partly on a characterisation of Parliament as the highest 'court' in the land – subject to no lower authority. This must be understood in the context of medieval England, where the term 'court' held a range of meanings both political and judicial.⁷ In the twentieth century, Parliament can no longer be described as a 'court' in our modern, judicial sense.⁸ Rather, as lawmaker, its proceedings should not be subject to the jurisdiction of those who interpret those laws.

B Parliamentary Privilege and the Courts

The immunity of parliamentary proceedings from 'impeachment or questioning' in the courts, is regarded as "the only immunity of substance" possessed by Parliament.⁹ As such, it is a powerful exemption from the 'ordinary law,' and in contexts such as defamation, it acts to prevent the availability of common law remedies. A recent case in the European Court of Human Rights examined the interplay between parliamentary privilege and the interest in reputation. In *A v UK*, a woman claimed that parliamentary privilege denied her right of access to a court for damage caused by attacks on her reputation made inside the British Parliament. Article 6 of the European Convention guarantees that "in the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing... by an independent and impartial tribunal established by law". The European Court of Human Rights concluded that parliamentary immunity pursued the legitimate aims of protecting free speech in Parliament and maintaining the separation of the judiciary and legislature:¹⁰

⁶ Harry Evans (ed) *Odger's Australian Senate Practice* (10th ed, Department of the Senate, Canberra, 2001) 5.

⁷ Jeffrey Goldsworthy *The Sovereignty of Parliament - History and Philosophy* (Oxford University Press, Oxford, 2001) 38-9.

⁸ Sir Clarrie Harders "Parliamentary Privilege – Parliament versus the Courts; Cross Examination of Select Committee Witnesses" (1993) 67 ALJ 109, 123.

⁹ Evans, above, 5

¹⁰ *A v The United Kingdom* (2002) European Court of Human Rights, Application No:00035373/97, para 21.

While freedom of speech is important for everybody, it is especially so for an elected representative of the people. He or she represents the electorate, draws attention to their preoccupations and defends their interests. In a democracy, Parliament or such comparable bodies are the essential *fora* for political debate. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein.

The Court concluded that a rule of parliamentary immunity could not be regarded as a disproportionate limit on the right of access to a court under article 6 of the European Convention. While reputation is acknowledged as important, freedom of speech in Parliament is even more so.

C Article 9 of the Bill of Rights 1688

Freedom of Speech in Parliament was given a statutory declaration in the Bill of Rights 1688. Article 9 of the Bill of Rights reads:

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

Despite the apparently plain words of article 9, there is uncertainty as to its scope. There is a conflict between the traditional claim of Parliament to be the exclusive judge of the extent of its own privileges, and the courts' view that it is for them to make that judgement, especially where the rights of third parties are involved.¹¹ As a result, the courts have some measure of control over the privileges of Parliament, but will be wary of how far to extend that control.

1 Wider principles

One of the central controversies surrounding freedom of speech in Parliament has concerned whether or not its scope is to be determined solely by article 9. At the time of its enactment, article 9 of the Bill of Rights was a

¹¹ *Halsbury's Laws of England* (4 ed Butterworths, London, 1980) vol 34, Parliament, para 1003, 553.

statement of existing (though sometimes breached) privileges and not a creation of new law.¹² The Bill of Rights secured that privilege and as recently as 1985 it was written that after the enactment of the Bill of Rights, "the extent of the privilege was to be found by reference to the statute and nothing else".¹³ Three recent cases from the House of Lords and the Privy Council demonstrate the uncertainty surrounding article 9, and the development of judicial thinking concerning it.

In 1993, *Pepper v Hart*¹⁴ was concerned with whether parliamentary materials such as *Hansard* might be consulted as an aid to interpretation of statutes. The House of Lords concluded that the practice would not constitute 'impeaching or questioning' within the terms of article 9.¹⁵ The House of Lords also rejected the suggestion that the Court was bound by anything other than the words of article 9 when considering parliamentary privilege. Lord Browne-Wilkinson said in his judgment:¹⁶

The Attorney-General... said that article 9 was an illustration of the right that the House of Commons had won by 1688 to exclusive cognisance of its own proceedings... In fact, neither the letter from the Clerk of the Commons nor the Attorney-General have identified or specified the nature of any privilege extending beyond that protected by the Bill of Rights.

Confronted with different fact situations, the courts have subsequently understood article 9 to have declared but not codified a freedom wider than that captured by its precise words. Only a year after *Pepper v Hart*, Lord Browne-Wilkinson, delivering the judgment of the Privy Council in *Prebble v TVNZ*, said:¹⁷

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

¹² G F Locke "Parliamentary Privilege and the Courts: The Avoidance of Conflict" [1985] PL 64, 73.

¹³ Rt Hon Lord Denning "Annex on the *Strauss* Case" [1985] PL 80, 89.

¹⁴ *Pepper v Hart* [1993] AC 593, 639 (HL).

¹⁵ *Pepper v Hart* [1993] AC 593, 639 (HL) Lord Browne-Wilkinson.

¹⁶ *Pepper v Hart* [1993] AC 593, 645-6, (HL) Lord Browne-Wilkinson.

¹⁷ *Prebble v TVNZ* [1994] 3 NZLR 1, 7 (HL) Lord Browne-Wilkinson.

Prebble was a New Zealand case in which a parliamentarian wished to sue a broadcaster in defamation for comments made about his conduct during his time as Minister for State-Owned Enterprises, including allegations that his implementation of government policy and statements made in Parliament had been part of a conspiracy to further the interests of highly placed business leaders. Part of the defamatory comments concerned Mr Prebble's actions in Parliament. Both the New Zealand Court of Appeal and the Privy Council held that parliamentary privilege prevented the defendant from using evidence of parliamentary events to support the defences of truth or fair comment, since to do so would involve the courts in 'questioning' proceedings in Parliament.¹⁸

Prebble, which differed from the 'paradigm' parliamentary privilege case where a non-member sues a member for defamatory words said in Parliament, forced the courts to consider afresh the role and meaning of article 9. The conclusion appears to have been that the scope of parliamentary privilege is not limited by the words of article 9.

This view was affirmed by the House of Lords in the 2001 case of *Hamilton v Al-Fayed*.¹⁹ Neil Hamilton, MP, wished to sue Mr Al-Fayed in response to the latter's claims that he had bribed Mr Hamilton to ask questions in Parliament. The same allegations had been the subject of an investigation by the Parliamentary Commissioner for Standards. Lord Browne-Wilkinson, (who delivered the leading judgments in both *Pepper v Hart* and *Prebble*) declared that it was "well established that article 9 does not of itself provide a comprehensive definition of parliamentary privilege."²⁰

¹⁸ See *Prebble v Television New Zealand* [1993] 3 NZLR 513, 520, (CA) Cooke P; *Prebble v Television New Zealand* [1994] 3 NZLR 1, 11 (PC) Lord Browne-Wilkinson.

¹⁹ *Hamilton v Al-Fayed* [2001] 1 AC 395, (HL).

²⁰ *Hamilton v Al-Fayed* [2001] 1 AC 395, 402, (HL) Lord Browne-Wilkinson.

2 *The operation of article 9*

The controversy relates not just to the scope of article 9, but also to what have been described as its “conceptual ambiguities”.²¹ Article 9 does not operate simply as a blunt tool for blocking liability for things said in parliament. Rather, in combination with the wider principle, article 9 can be seen in the more recent cases to operate as a rule about what evidence may be admitted and the purposes for which it may be used.²²

The Privy Council in *Prebble* held that while *Hansard* could be used to show what was said and done in Parliament as a “matter of history”,²³ the defendants could not use such evidence to show that “the actions or words were inspired by improper motives or were untrue or misleading.”²⁴ The Privy Council held that the exclusion of material from the Court on the grounds of parliamentary privilege was not so fatal to the defendant’s case as to require a stay of proceedings, although such a stay might be appropriate in other cases.²⁵ Rather than dictating the outcome of the proceedings, article 9 simply affected what could and could not form part of the defendant’s case.

The same analysis of the role of article 9 can be seen in *Hamilton*. The English Court of Appeal held that the Court would only decline to hear proceedings if to do so risked an “assertion by the Court of any power to challenge the exercise of authority by Parliament.”²⁶ The House of Lords rejected this wholesale approach. The question of breach of article 9 was not to be dealt with by asking whether the hearing the proceedings risked a decision that would undermine Parliament’s authority. Lord Browne-Wilkinson said:²⁷

[Where] a party to litigation wishes to challenge the accuracy or veracity of something said in parliamentary proceedings. ... The other party applies to prevent

²¹ Nicholas Bamforth “Parliamentary Privilege and Defamation” (1999) 58 CLJ 471, 471.

²² A W Bradley “Mr Al-Fayed, Mr Hamilton and the Law of Parliamentary Privilege” [2000] PL 556, 557; Geoffrey Marshall “Impugning Parliamentary Impunity” [1994] PL 509, 509.

²³ *Prebble v Television New Zealand* [1994] 3 NZLR 1,11 (PC) Lord Browne-Wilkinson.

²⁴ *Prebble v Television New Zealand* [1994] 3 NZLR 1,10 (PC) Lord Browne-Wilkinson.

²⁵ *Prebble v Television New Zealand* [1994] 3 NZLR 1,12 (PC) Lord Browne-Wilkinson.

²⁶ *Hamilton v Al-Fayed* [1999] 3 All ER 317, 335 (CA) Lord Woolf MR.

²⁷ *Hamilton v Al-Fayed* [2001] 1 AC 395, 403-4 (HL) Lord Browne-Wilkinson.

the giving of that specific evidence or the challenging of a particular witness. If parliamentary privilege is held to exclude such evidence normally the only result (serious though it may be) is that the case is decided in the absence of that evidence.

Hamilton was eventually decided on the basis of a United Kingdom statute allowing individual members to waive their privilege. Nevertheless, the reasoning in the judgements gives an understanding of the current role of article 9 and parliamentary privilege. Following *Hamilton*, it seems clear that, in England at least, the extent of the privilege is not limited to what is secured by article 9. Article 9 must be understood in the context of this idea of 'comity', or 'mutual restraint' between Parliament and the courts. This means that the prohibition against 'questioning' proceedings in Parliament will not operate simply to prevent the courts from hearing proceedings seeking liability for things said in Parliament, but will operate in a more complex way as a rule about what evidence the courts may receive.

D Parliamentary Privilege in the New Zealand Context – Concerns About Abuse

Despite its constitutional importance, parliamentary privilege is clearly open to abuse. Allowing parliamentarians to 'hide' behind privilege while making unwarranted attacks on the reputations of others may lead to substantial injustice. This is particularly the case when non-members are involved, since they have comparatively limited opportunities to defend themselves against public accusations. Over the last decade, there has been increasing concern about the use of parliamentary privilege in New Zealand as a "political weapon".²⁸ The calls for reform were especially acute in the early nineties, when, between 1992 and 1994, members of Parliament made a series of separate allegations involving serious offences by business people, public officials and solicitors.²⁹

²⁸ Sir Geoffrey Palmer "Parliament and Privilege: Whose Justice?" [1994] NZLJ 325, 325

²⁹ Palmer, above, 325.

Allegations such as these formed the basis of *Hyams v Peterson*³⁰ in 1991. In this case, the plaintiff relied on news reports of a memorandum tabled in Parliament to show that people would have understood other statements in the media to refer to him. The document in question, which was written by a Department of Justice official and named the plaintiff as part of a "Gang of 20" was allegedly published to "various reporters, MP's and others"³¹ before it was tabled in Parliament. The memorandum, and later news reports, suggested that the Gang of 20, a group of businesspeople and solicitors, was involved in fraudulent activity. The case was concerned with whether the document could be used to supply identity, rather than a defamatory meaning. Cooke P held that parliamentary privilege was not relevant since the plaintiff sought to rely on reports of parliamentary proceedings, rather than the proceedings themselves.³² Therefore, the document could be used to show that the plaintiff was identified in the relevant news reports.

In allowing the document to be used as evidence, the Court of Appeal observed, "There is no reason of common sense or policy why some artificial legal barrier should be placed in the way of the plaintiff in proving what the public would have understood from what was published to the public."³³ This comment must be understood in the context of a case focussed on the media, who formed the majority of the defendants. Accordingly the Court said "If there is to be a change in the law, drawing a line in favour of the media, it should be made by way of extending the defences of qualified privilege or fair comment."³⁴

In *Peters v Cushing*,³⁵ the High Court was required to consider the relationship between statements made inside the House, and allegations made in media interviews. In 1992, Mr Peters, MP, made allegations on the *Holmes* show about a businessman whom he subsequently identified in Parliament as

³⁰ *Hyams v Peterson* [1991] 3 NZLR 648 (CA).

³¹ *Hyams v Peterson*, above, 653 Cooke P.

³² *Hyams v Peterson*, above, 656 Cooke P.

³³ *Hyams v Peterson*, above, 656-7 Cooke P.

³⁴ *Hyams v Peterson*, above, 657 Cooke P.

³⁵ *Peters v Cushing* [1999] NZAR 241 (HC).

Mr Cushing. In an interview on *Frontline* some months later he repeated Mr Cushing's name and said that viewers could believe either him or Mr Cushing. Mr Cushing claimed two causes of action in defamation, the first based on the *Holmes* allegations and the parliamentary identification, and the second based on the *Holmes* allegations and the *Frontline* interview.

The High Court in *Peters* held that a parliamentary statement could not be used to found an action in defamation. The full Court was unanimous that the first cause of action must fail since the parliamentary identification was protected by privilege.³⁶ The second cause of action was complete without reference to the parliamentary words, since the public would be able to draw a connection between the allegations made in the *Holmes* interview, and the identification in the later *Frontline* interview.³⁷

While the case was decided on the basis of the connection between the two media interviews, Ellis J indicated that, "the plaintiff would have succeeded in a claim that the words of 10 October [the *Frontline* interview] adopted and republished what was said in Parliament."³⁸ However, the plaintiff had "expressly refrained" from relying on the parliamentary words in respect of the second cause of action.³⁹ Grieg J limited his decision to the connection between the two unprotected interviews, making no comments on the issue of 'adoption' of protected statements.

By 1999, the law of parliamentary privilege in New Zealand was difficult to state clearly. *Hyams* suggests that article 9 applies only to proceedings in parliament, not to reports of proceedings by media defendants.⁴⁰ However James Allan has pointed out that Cooke P said the case had "nothing to do with the scope of parliamentary privilege".⁴¹ Arguably, the *Hyams* position can no longer be maintained in light of the *Prebble* decision that reports of parliamentary proceedings may be used to show that a given event occurred as a

³⁶ *Peters v Cushing* [1999] NZAR 241, 245 (HC) Ellis J and 255, Grieg J.

³⁷ *Peters v Cushing* [1999] NZAR 241, 251 (HC) Ellis J and 257, Grieg J.

³⁸ *Peters v Cushing*, above, 251 Ellis J.

³⁹ *Peters v Cushing*, above, 251 Ellis J.

⁴⁰ *Peters v Cushing*, above, 246 Ellis J.

⁴¹ Allan James 'Parliamentary Privilege in New Zealand' (1996) 7 *Canta LR* 324, 325

'matter of history' but may not be the subject of certain submissions or inferences.

In addition, where parliamentary words are protected, that protection will not apply to a full repetition of those words outside of Parliament.⁴² Finally, there has been one suggestion that an 'adoption' of parliamentary words may not be protected. Ellis J used the terms 'adoption,' 'repetition' and 'republished' interchangeably in *Peters*, but also grounded his *obiter dicta* in the distinction between an acknowledgement that defamatory words were said and a claim that the defamatory words were true.⁴³ It is not clear whether his understanding of 'adoption' involves a full repetition or something less. Following *Peters*, parliamentary privilege in New Zealand was in a confused state.

What is clear is that article 9 must be interpreted in a way that allows it to operate effectively in a modern context. Gone are the days when it was not permitted to repeat or publish the proceedings of the House.⁴⁴ The New Zealand Court of Appeal has noted, "The reality for well over a century has been that the public has had available to it protected accounts of parliamentary proceedings."⁴⁵ The challenge for the courts and for Parliament now is to develop an understanding of parliamentary privilege that protects reputations from attacks made both inside and outside of Parliament, while preserving the relationship between Parliament and the courts and without inhibiting the freedom of speech so important to a functional legislature.

⁴² *R v Creevey* (1813) 1 Esp 226; 105 ER 102 and *R v Lord Abingdon* (1794) 1 M & S 273; 170 ER 337.

⁴³ *Peters v Cushing*, above, 248 Ellis J.

⁴⁴ Joseph Maingot QC, *Parliamentary Privilege in Canada* (Butterworth & Co (Canada) Ltd, Toronto 1982) 37.

⁴⁵ *Buchanan v Jennings* [2002] 3 NZLR 145, 166 para 57 (CA).

III BUCHANAN v JENNINGS

In December 1997, Mr Jennings, MP, made accusations in Parliament about Mr Buchanan that would have been defamatory if not protected by parliamentary privilege. He accused Mr Buchanan, a senior official of the New Zealand Wool Board, of spending public money to promote a tour to the United Kingdom for the 'Barbarians' rugby team in order to "have a romp in London"⁴⁶ and "continue an indulgence in an illicit relationship".⁴⁷ In an interview with *The Independent* some months later, Mr Jennings stated that he did not 'resile' from those accusations about the relationship - "just the money".⁴⁸ Mr Buchanan claimed that that statement defamed him because it "referred to, adopted, repeated and confirmed as true" the original, protected, accusations.⁴⁹ Mr Buchanan maintained that he was relying on the statement made in Parliament only as a matter of history, and not as forming the basis for Mr Jennings's liability.

After unsuccessful strike out applications by Mr Jennings, Mr Buchanan succeeded in his claim for \$50 000 in damages. On appeal, the Court was asked to consider whether parliamentary privilege prevented liability for a statement made outside Parliament that affirmed, but did not literally repeat, a statement made inside Parliament. The majority concluded that it did not. The statement made in the interview was more than an acknowledgement of the protected speech - it was an "effective repetition" of it, and was therefore not protected by absolute privilege. The Court reasoned that the public would understand the unprotected statement as referring to the widely published accusations made in Parliament. Therefore evidence of the statement could be brought to establish what was said as a matter of historical fact. Since the unprotected statement was made *after* the protected statement, liability for it would not infringe or inhibit freedom of speech in Parliament, so there would be no breach of article 9.

⁴⁶ *Buchanan v Jennings*, above, 149, para 2 Keith J for the majority.

⁴⁷ *Buchanan v Jennings*, above, 148, para 2 Keith J for the majority.

⁴⁸ *Buchanan v Jennings*, above, 149, para 5 Keith J for the majority.

⁴⁹ *Buchanan v Jennings*, above, 149, para 5 Keith J for the majority.

Tipping J dissented. He argued that since the later statements were not defamatory without reference to the earlier ones, Mr Buchanan's claim had to be understood as 'questioning' the words said in Parliament. In Tipping J's view, a repetition of protected statements would be actionable only if the unprotected words were defamatory "in themselves".⁵⁰ To accept the alternative would be to accept a limited view of the role of article 9. Even if liability in this case could not logically inhibit freedom of speech, to allow the Court to consider whether Mr Jennings had misled Parliament by his statements would be to encroach on Parliament's exclusive jurisdiction to an undesirable extent.⁵¹ Tipping J proposed an alternative test that would require any unprotected words to be defamatory on their own before they could form the basis for liability.

IV THE MAJORITY DECISION

The majority identified two facts about the case before them that distinguished it from other cases concerning parliamentary privilege. The correct approach, according to the majority, was not to consider the case in light of those authorities, but rather to consider the 'critical facts' in light of the words and purpose of article 9.

The critical facts identified by the majority were:

- 1) The alleged defamatory statement was made up in part of a statement "in respect of which no claim of parliamentary privilege could be or is made."⁵²
- 2) The unprivileged statement was made after the privileged statements.

A Critical Facts

Mr Buchanan's claim rested partly on Mr Jennings' unprotected statement in *The Independent* that he did not resile from the parliamentary accusations, and partly on the parliamentary accusations themselves. As Tipping J remarked

⁵⁰ *Buchanan v Jennings*, above, 186, para 130 Tipping J dissenting.

⁵¹ *Buchanan v Jennings*, above, 188-9, paras 138 – 145 Tipping J dissenting.

⁵² *Buchanan v Jennings*, above, 163, para 51 Keith J for the majority.

in his dissent, "It is ... difficult to disentangle the words spoken in and out of the House."⁵³ The majority noted that this combination of privileged and unprivileged statements was a feature not found in the previous cases, especially *Prebble*, which the majority held was binding only on its facts.⁵⁴

The second 'critical' fact is more equivocal. The majority used the timing of the statements to distinguish this case from the earlier case of *Peters v Cushing*. In *Peters* the protected statement was made after the unprotected statement, in *Buchanan* it was made before the unprotected statement. The decision in *Peters* was not based explicitly on the timing of the statements, but on the fact that the plaintiff could not complete his first cause of action without reference to the protected statements, whereas he could do so for the second cause of action. In order to determine whether the apparently minor fact difference of timing provides a sound basis for distinguishing one case from another, it is necessary to examine how it might make a difference to the operation of parliamentary privilege, in light of "the particular words of article 9, its purpose and related principle."⁵⁵

B *The Critical Facts and Article 9*

1 Inhibiting freedom of speech

Rather than focussing on the words of article 9, the majority based its decision on what it saw as the 'basic concept' of article 9 identified by Lord Browne-Wilkinson in *Prebble* – preventing people in Parliament from being inhibited from speaking freely. This was why the order of events was so crucial. While allowing a later statement to complete an earlier statement clearly inhibits freedom of speech, the majority claimed that because the unprivileged statement was made after the privileged statement, "the prospect of the present proceedings would not have inhibited the appellant *at the time he*

⁵³ *Buchanan v Jennings*, above, 191, para 154 Keith J for the majority.

⁵⁴ *Buchanan v Jennings*, above, 163, para 50 Keith J for the majority.

⁵⁵ *Buchanan v Jennings*, above, 163, para 50 Keith J for the majority.

spoke in the house."⁵⁶ Thus, freedom of speech would not be inhibited. While this argument has a certain logic, the majority considered only what the consequences of their decision would have been on the facts before it, had the decision been anticipated. What it failed to consider was the consequence this decision will have on future speakers in Parliament.

Tipping J noted that the decision of the majority effectively establishes a case-by-case approach to parliamentary privilege, based on a distinction between acknowledgement (not actionable) and affirmation (actionable). Of this distinction he said:⁵⁷

The line ... is liable to be so fine that to make everything turn on the distinction between the two would be unsatisfactory and productive of uncertainty. An acknowledgement may implicitly amount to an affirmation, depending on subtle issues of context and inflection.

The decision gives rise to a number of possible outcomes. One is that members will confine themselves to making statements inside the House. They will refuse to make any comments to the media about what was said inside the House. However, it is naive to require members not to be able to refer in interviews to things said inside the House. Given the openness of parliamentary proceedings (recognised in the majority's decision), politicians are expected to talk to the media about what goes on inside the House. It is not politically viable for them not to. Rather, to make no comment may suggest that they did not make the comments in good faith – that they are hiding behind parliamentary privilege and do not stand by their comments. This will discredit them politically.

Given this, a (more likely) alternative is that members will be circumspect in what they say in the House. They will limit themselves to the uncontroversial and non-defamatory, ensuring that they may safely refer to any aspect of their parliamentary performance without fear of reprisal. This could have some

⁵⁶ *Buchanan v Jennings*, above, 164, para 53 Keith J for the majority.

⁵⁷ *Buchanan v Jennings*, above, 193, para 162, Tipping J dissenting.

positive outcomes for people such as Mr Buchanan. Their reputations will not suffer. But, on this account, freedom of speech in Parliament *will* suffer, and the purpose of article 9 will be frustrated.

This was recognised by Lord Browne-Wilkinson in *Prebble*. When discussing the purpose of article 9, he noted:⁵⁸

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.

The *Buchanan* decision establishes precisely the sort of exception warned against by Lord Browne-Wilkinson. The order in which statements are made makes it no more easy or difficult for a member to know when his or her words outside Parliament will constitute an affirmation rather than an acknowledgement.

Of course, in the High Court, Heron J had noted that Mr Jennings had gone “looking for” media attention, saying that this was not a case “where the remarks in Parliament may be unintentionally repeated in a media scrum outside Parliament or inadvisably referred to in an oblique way without any intention to give up the privilege”.⁵⁹ However, the line between acknowledgement and affirmation cannot be drawn on the basis on the defendant’s aim in speaking. Allowing a doctrine of ‘effective repetition’ to develop on the basis of case-by-case assessment establishes uncertainty as to whether, in the next case, someone might be held liable for comments made in just such ‘media scrum’ situations.

2 *Reading Article 9*

Aside from whether the claim about freedom of speech is justified, the approach taken by the majority appears to be an unduly narrow approach to

⁵⁸ *Prebble v TVNZ* [1994] 3 NZLR 1, 8 (PC) Lord Browne-Wilkinson.

⁵⁹ *Buchanan v Jennings* [2001] 3 NZLR 71, 85 (HC) Heron J.

article 9 which gives the courts a far more powerful role by allowing them to judge members' speeches. According to Tipping J, the principle of mutual restraint is as much part of the 'basic concept' of article 9 as preventing inhibition:⁶⁰

I regard the purpose and policy of art 9, in combination with the wider principle, as being additionally to avoid the courts becoming involved in any inquiry concerning, inter alia, the truth of what MP's say in the House, and their motives for speaking.

Tipping's approach is supported by an examination of the words of article 9. The first limb is concerned with preventing inhibition of freedom of speech in Parliament, while the second limb states that debates or proceedings in Parliament ought not to be impeached or questioned in any other court or place.⁶¹ That is, article 9 does not simply state that freedom of speech should not be inhibited – it states *how* this is to be done: proceedings in Parliament are not to be subject to the jurisdiction of the courts.

The majority adopts the following analysis of the case; Mr Jennings made a privileged statement, then an unprivileged statement. The public reading the unprivileged statement would have understood it to refer to the privileged statement (which had been made public under qualified privilege). The majority declared that "the defamation proceeding does not question 'freedom of speech' 'in Parliament' itself." Rather, it is Mr Jennings's "unprivileged statement, properly understood, that is being questioned."⁶²

Without reference to the parliamentary words, Mr Jennings's statement in the *Independent* cannot bear a defamatory meaning⁶³ (indeed, it can bear little meaning at all.) Counsel for Mr Buchanan submitted that the privileged words

⁶⁰ *Buchanan v Jennings* [2002] 3 NZLR 145, 187 - 8, para 138 (CA) Tipping J dissenting.

⁶¹ The Joint Committee on Parliamentary Privilege "Memorandum by Francis Bennion" *Volume 3 – Written Evidence* (HL 43 – 1, HC 214 – 1 The Stationery Office, London, 1999) P 12-3.

⁶² *Buchanan v Jennings*, above, 164 para 52 Keith J for the majority.

⁶³ James Allan "Parliamentary Privilege: Will the Empire Strike Back?" (2002) 20 NZULR 205, 207.

were being relied on only as “a matter of history”.⁶⁴ If this were so, they should be proved as neutral facts, with no objections raised to their having been said. However, the privileged words in this case were more than neutral. They were vital to whether the unprivileged statement could be ‘properly understood.’ Tipping J noted, “It is in substance their truth or falsity that is at the heart of the case.”⁶⁵ By bringing a defamation case based on the unprivileged words, Mr Buchanan was clearly ‘questioning’ the unprivileged words in the sense of objecting to their having been said, and calling into question the truth of what was said⁶⁶ (since a defamatory statement must be untrue.)⁶⁷ The statement “I do not resile from my claim” does not easily admit of truth or falsity, and cannot be defamatory on its own. If the meaning of the statement complained of relies entirely on an earlier, privileged, statement, (as is the case here) then Mr Buchanan must also be ‘questioning’ that earlier statement. He must be objecting to its having been said, and claiming that it is false.

The majority claimed that according to their analysis of the case it is not one where “the exercise of freedom of speech in the House itself [is] being questioned”.⁶⁸ This is true, since no one was objecting to the existence of freedom of speech in Parliament. Despite this, closer examination of the words of article 9 shows that the second limb of article 9 was breached – debates or proceedings in Parliament were being questioned.

3 *Wider principles*

The majority in *Buchanan* stated that wider principles are not “helpful”.⁶⁹ The courts can, must and often do, determine the limits of parliamentary privilege.⁷⁰ Since *Prebble*, the leading case in this area, affirms the wider principle of mutual restraint between the courts and Parliament,⁷¹ any ground

⁶⁴ *Buchanan v Jennings*, above, 186, para 131 Tipping J dissenting.

⁶⁵ *Buchanan v Jennings*, above, 186, para 133 Tipping J dissenting.

⁶⁶ See James Allan ‘Parliamentary Privilege in New Zealand’ (1996) 7 *Canta LR* 324, 325-6 for a discussion of the meaning of the word ‘questioned’ in Article 9.

⁶⁷ *Buchanan v Jennings*, above, 185, para 128 Tipping J dissenting.

⁶⁸ *Buchanan v Jennings*, above, 165, para 57 Keith J for the majority.

⁶⁹ *Buchanan v Jennings*, above, 164, para 54 Keith J for the majority.

⁷⁰ *Buchanan v Jennings*, above, 164-5, para 54 Keith J for the majority.

⁷¹ *Prebble v TVNZ* [1994] 3 NZLR 1, 7-8 (PC) Lord Browne-Wilkinson.

for saying that the principle does not apply should bear some relationship with the ground used to distinguish one case from the other – here, the critical fact that the alleged defamatory statement was made up of privileged and unprivileged statements.⁷² I have argued that where an objection to the parliamentary statement is the substance of the complaint, there is necessarily an inquiry into the propriety of that parliamentary conduct. The fact that the court might *also* inquire into non-parliamentary conduct makes no difference to the application of the wider principle that the court should not enquire into parliamentary proceedings.

This is made if clearer analysed in terms of the ‘evidential’ approach used in *Prebble* and *Hamilton*. In *Prebble*, the defendant’s case was able to proceed fairly without the evidence relating to parliamentary proceedings. In contrast, Mr Buchanan’s claim could have no substance at all without reference to the parliamentary proceedings. Rather than suggesting that wider principles are unhelpful, this suggests that where the words complained of are made up of both privileged and unprivileged statements the wider principle should apply more than ever.

V THE ‘EFFECTIVE REPETITION’ AUTHORITIES

In light of the allegedly critical facts, the majority claimed a line of overseas authority allowing an earlier parliamentary statement to ‘complete’ a later statement. These case were known under the headings of ‘effective repetition’, ‘adoption’ or reaffirmation’.⁷³ A closer examination of them shows that the position was not as clear-cut as the Court perhaps claimed.

The first case relied on is *Beitzel v Crabb*.⁷⁴ Here, an Australian Member of Parliament described the plaintiff as a “blood-sucking parasite” while on the floor of the House. At an interview he said he stood by what he said, and at a later press conference where his words were repeated to him, he said he did not

⁷² See Part IV A Critical Facts

⁷³ *Buchanan v Jennings*, above, 164, para 55 Keith J for the majority.

⁷⁴ *Beitzel v Crabb* (1996) 141 ALR 447 (SC (Vic)), Hampel J.

regret them, and made other comments about the plaintiff and what was said in Parliament including "if it turned out that...everything I'd been told and everything I'd read had all been something I had imagined, yes, I would apologise, but that's not the case" and "I think he still hasn't got what he deserves".⁷⁵ Hampel J, on a strike out application, considered that there might be sufficient adoption, and that this was a question of mixed fact and law to be decided at trial.

This case does appear to be an authority for a doctrine allowing a link to be afforded between protected and unprotected statements. Certainly the facts demonstrate the potential harm caused by malicious and irresponsible use of parliamentary privilege. While in this case the extent of the unprotected statements exceeded that of *Buchanan*, the comments still rely on parliamentary words for most of their meaning. While it is not clear that these facts would meet the alternative test presented by Tipping J, which requires unprotected words to be defamatory in their own right, Tipping J argued that Hampel J in *Beitzel v Crabb* failed to adequately consider the policy concerns surrounding article 9.⁷⁶

The final case cited by the majority is the Australian case of *Laurance v Katter*.⁷⁷ *Laurance* concerned a situation where a member made statements in Parliament about the plaintiff. In a later interview, the defendant said that he had evidence to support the parliamentary allegations. The case was based on the Australian Parliamentary Privileges Act 1987, rather than the actual words of article 9. This legislation was enacted following dissatisfaction with the decision in *R v Murphy*, which allowed the Court to review Select Committee evidence.⁷⁸ Section 16 of the Act deals with article 9 and freedom of speech, and declares the effect of article 9 in more detailed terms.⁷⁹ It was also

⁷⁵ *Beitzel v Crabb* (1996) 141 ALR 447, 450 (SC (Vic)), Hampel J.

⁷⁶ *Buchanan v Jennings*, above, 183, para 118 Tipping J dissenting.

⁷⁷ *Laurance v Katter* (1996) 141 ALR 447 (SC (Qld)) Fitzgerald P, Davies and Pincus JJA.

⁷⁸ Harry Evans (ed) *Odger's Australian Senate Practice* (10th ed, Department of the Senate, Canberra, 2001) 6-7.

⁷⁹ Evans, above, 9.

mentioned in *Prebble*, where the Privy Council commented that section 16 declared the original effect of article 9.⁸⁰

In the Supreme Court of Queensland, Pincus JA held that Section 16(3) was invalid with respect to defamation cases.⁸¹ Davies JA read the section down to allow him to approach its application on a case-by-case basis allowing the Court to determine whether the admittance of the 'proceedings in Parliament' forbidden by the section would lead to its 'impeachment or questioning' before deciding whether the section applied in the circumstances of the case.⁸² Davies JA then took the view that the section did not apply in that case because "the defendant was free to say what he did in Parliament".⁸³

The majority in *Buchanan* used *Laurance* as support for its case-by-case approach, noting "The Courts in such cases are saying that there is no difference in principle ... between the complete repetition of the parliamentary statement and its effective repetition."⁸⁴ The majority also noted that Pincus and Davies JJA highlighted some of the difficulties involved with equating section 16 with article 9.⁸⁵ However, the decision in *Laurance* was widely criticised. *Odger's Australian Senate Practise* has written of *Laurance v Katter*, "settlement of this case in 1998 prevented a pending review by the High Court. It is to be hoped that this incoherent judgement will not be followed in any jurisdiction."⁸⁶

Davies JA's approach was also criticised in the later case of *Rann v Olsen*,⁸⁷ a case where a Member of the Opposition in the South Australian State Parliament was suing the Premier. The plaintiff claimed that the defendant had accused him of lying to a Commonwealth Parliamentary Committee. The Court held that parliamentary privilege would prevent the defendant from presenting

⁸⁰ *Prebble v TVNZ* [1994] 3 NZLR 1, 8, Lord Browne-Wilkinson.

⁸¹ *Laurance v Katter* (1996) 141 ALR 447, 486, (SC (Qld) Pincus JA).

⁸² *Laurance v Katter*, above, 489-90, Davies JA.

⁸³ *Laurance v Katter*, above, 490, Davies JA.

⁸⁴ *Buchanan v Jennings* [2002] 3 NZLR 145, 168, para 61 (CA) Keith J for the majority.

⁸⁵ *Buchanan v Jennings*, above, 167, para 60 Keith J for the majority.

⁸⁶ Harry Evans (ed) *Odger's Australian Senate Practise* (10th ed, Department of the Senate, Canberra, 2001) 46.

⁸⁷ *Rann v Olsen* (2000) 172 ALR 395 (SC(SA)) Doyle CJ, Prior, Perry, Mullighan and Lander JJ.

the defence of truth, since this would entail claims that the statements made to the Committee were untrue.⁸⁸

The majority in *Buchanan* noted that Davies JA's reading of section 16 had been questioned in *Rann*, but claimed that those comments were of "no consequence in the present case".⁸⁹ Part of the criticism in *Rann* surrounded whether section 16 should be read as expanding the scope of article 9 – something undoubtedly of no consequence in New Zealand. However, part of the disapproval of Davies JA's reading concerned the soundness of the case-by-case approach. Citing the wider principle identified in *Prebble*, Doyle JA claimed:⁹⁰

I consider that proper attention is not paid to the principle of non-intervention if one takes the approach, for example, that the section will apply only when the court concludes that its application is not required to protect freedom of speech in Parliament for the benefit of a particular person.

And:⁹¹

I consider that there are powerful arguments against conditioning the operation of such a law upon a judicial assessment, case by case, of the impact of the application of the law upon freedom of speech.

Given that the main reason provided by the majority for their decision is that because of the order of events, freedom of speech will not be inhibited in this case, the comments from *Rann* apply to Davies JA's judgement, and to cases such as *Buchanan*, whether or not the court is concerned with the specifics of section 16 or the broad terms of article 9. As discussed above, the Court in *Buchanan* has done precisely what was criticised about the *Laurance* judgement in *Rann v Olsen*, that is, created a case-by-case exception based on the difference between affirmation and acknowledgement as "a matter of fact to be determined in the circumstances of the case".⁹²

⁸⁸ *Rann v Olsen*, above, 465, Doyle CJ and Mullighan J (Perry and Lander JJ concurring).

⁸⁹ *Buchanan v Jennings* [2002] 3 NZLR 145, 167, para 60 Keith J for the majority.

⁹⁰ *Rann v Olsen* 2000 172 ALR 395, 419, (SC (SA)) Doyle CJ.

⁹¹ *Rann v Olsen* 2000 172 ALR 395, 427, Supreme Court of South Australia, Doyle CJ.

⁹² *Buchanan v Jennings* [2002] 3 NZLR 145, 168, para 62 Keith J for the majority.

An examination of the cases reveals that rather than a clear line of authority, what emerges is a case with an approach almost identical to the *Buchanan* majority's, which was criticised in a later judgement and described by *Odger's Australian Senate Practise* as 'incoherent' and one final case which deals only briefly with the complex issues arising in this area.

VI ALTERNATIVE REMEDIES

Those rightly concerned about the preservation of reputation might well ask what the alternative is to the majority decision. Tipping J presented a test that requires the words outside Parliament to be defamatory in their own right.⁹³ While such a test may entail the conclusion that certain previous cases, such as *Hyams*, were wrongly decided, it would provide certainty, and also reflect the facts of cases involving repetition. Where the non-privileged statements are defamatory on their own, it can accurately and easily be said that it was those words that damaged the plaintiff's reputation. In contrast, in 'effective repetition' cases it is the parliamentary words that cause the damage to reputation. The later words, at worst, enhance the damage, and at best, make no difference, so should be privileged.

It might be said that on this approach a problem still remains. Parliamentary privilege continues to be open to abuse. MP's such as Mr Crabb are still free to describe people as 'blood sucking parasites' with impunity. Again, we might note Heron J's comments to the effect that Mr Jennings went looking for publicity.⁹⁴ Had he not done so, the original allegations might have been ignored and Mr Buchanan's reputation remained safe. It has been said that "without freedom of speech.... public and private wrongs, great and small, will remain unrighted".⁹⁵ However, as the law stood before *Buchanan* it could be argued that it was wrongs to reputations that were being left unrighted.

⁹³ *Buchanan v Jennings* [2002] 3 NZLR 145, 186, para 130 Tipping J dissenting.

⁹⁴ *Buchanan v Jennings* [2001] 3 NZLR 71, 85 (HC) Heron J.

⁹⁵ District Law Society Public Issues Committee 'Speaking Out' Members of Parliament and the Judicial Process' [1988] NZLJ 300-4.

Yet it should be noted that this problem is as much about abuse inside Parliament as outside it. *Buchanan* has increased uncertainty for MP's without limiting the scope for abuse of privilege *inside* the House. It is more in line with the policy behind article 9 to develop a stronger remedy within Parliament than for the courts to engage in inquiries into parliamentary conduct. A strong remedy within Parliament would protect reputations in all cases where they are subject to unwarranted attack inside Parliament, not just those where the debate spills into the televisions and newspapers. It would also prevent uncertainty while preserving the separation of powers that is so important to our constitution. Of course, the courts are not in a position to develop such a remedy – this must be a job for Parliament itself, since it has the exclusive right to regulate its own proceedings. It may be time for parliamentarians to use that right to prevent the abuse of another.

A *Waiver of Privilege*

1 *Waiver of privilege to allow liability*

In a slightly different context, section 13 of the Defamation Act 1996 in the UK allows individual members to waive their privilege. The section allows a Member of Parliament to use this power only in order to enable them to sue rather than be sued:⁹⁶ the *Prebble* situation, as opposed to the *Buchanan* position. However, *Hamilton v Al-Fayed* demonstrated the difficulties associated with the provision. In that case, since the Parliamentary Commissioner for Standards had already prepared a report about the relevant allegations, the Court was faced with the problem of conflicting decisions on the same issue. This was unavoidable because of the terms of the Defamation Act, yet it undermined one of the purposes of the privilege.⁹⁷ In the United Kingdom, the Report of the Joint Committee on Parliamentary Privilege has noted that in any case section 13 undermines the whole basis of parliamentary

⁹⁶ The Defamation Act 1996 (UK) s 13(4) reads "Nothing in this section affects any enactment or rule of law so far as it protects a person (including a person who has waived the protection referred to above) from legal liability for words spoken or things done in the course of, or for the purposes of or incidental to, any proceedings in Parliament."

⁹⁷ *Hamilton v Al-Fayed* [2001] 1 AC 395, 407-8 (HL) Lord Browne-Wilkinson.

privilege since it is the privilege of the whole House, rather than of individual members.⁹⁸ The Committee proposed as an alternative that the whole House, rather than individual members, be permitted to waive the privilege, though only in cases where there is no question of legal liability arising for the parliamentary statements.⁹⁹ In other words, as is the case under the current section 13, the House would be permitted to waive privilege only in *Prebble* situations, never in *Buchanan* ones.

This might be compared with the power of the Singaporean Parliament to waive the privilege to allow continuous abusers to be liable in court.¹⁰⁰ An alternative option for a 'stronger remedy' is mentioned in the New Zealand Law Commission Reference Paper: allowing the Ombudsman to investigate complaints and waive absolute privilege for persistent abusers of its protection. However, the Law Commission has noted that during the calls for reform in the mid 1990's, the option appeared to be "either not considered, or rejected as potentially too uncertain or strict".¹⁰¹

2 *Waiver of privilege and Special Commissions of Inquiry*

A similar approach to the Ombudsman proposal was adopted in New South Wales in 1997. A Member of the Legislative Council, Franca Arena, made allegations in Parliament that the Premier and a Royal Commissioner investigating the New South Wales Police Service had agreed to suppress the names of certain people "in high political, judicial and social positions in the community"¹⁰² who had been accused of involvement in paedophilia and criminal conduct.¹⁰³ The Parliament of New South Wales responded to these

⁹⁸ The Joint Committee on Parliamentary Privilege *Volume 1 Report and Proceedings of the Committee* (HL 43 – 1, HC 214 – 1 The Stationery Office, London, 1999) 24, para 68.

⁹⁹ The Joint Committee on Parliamentary Privilege *Volume 1 Report and Proceedings of the Committee*, above, 25-6, para 73.

¹⁰⁰ Parliament (Privileges, Immunities and Powers) Act Chapter 217 (Singapore) s 20(3)

¹⁰¹ The New Zealand Law Commission *The Law of Parliamentary Privilege in New Zealand – A Reference Paper* (NZLC MP 5, Wellington 1996) 30.

¹⁰² Parliament of New South Wales Legislative Council Standing Committee on Parliamentary Privilege and Ethics *Report on Inquiry into the Conduct of the Honourable Franca Arena MLC* (1998) Report No 6. Vol 1 of 3, ix.

¹⁰³ Enid Campbell "Investigating the Truth of Statements made in Parliament" [1998] PL 125,127.

allegations by passing the Special Commissions of Inquiry Amendment Act 1997, which allowed a two-thirds majority in Parliament to authorise the establishment of a Special Commission of Inquiry into Mrs Arena's allegations. Since the body was extra-parliamentary, article 9 would otherwise apply to it, so the Act also allowed for parliamentary privilege to be waived. However, the waiver was effective only to allow Mrs Arena to give evidence of parliamentary proceedings if she wished to do so. The Commission could receive evidence of what was said in Parliament in order to establish the truth of the allegations but the waiver did not operate to allow liability to be imposed for things said or done in Parliament.¹⁰⁴ These new provisions had a built in expiry period of six months, so that the power could only be used to respond to Mrs Arena's allegations.¹⁰⁵

The Commission proceeded to investigate, albeit without evidence from Mrs Arena, as allowed by the provisions of the Amendment Act. It found her allegations to be "false in all respects" and made with no evidential foundation.¹⁰⁶ In response to the Report, the Attorney General moved that Mrs Arena be expelled, and the issue was sent to the Privileges and Ethics Committee for consideration.¹⁰⁷ The Committee found that Mrs Arena's conduct "fell below the standard the House is entitled to expect of a Member, and brought the House into disrepute".¹⁰⁸ The Committee recommended that Mrs Arena be called upon to present a written apology and withdrawal of her statements, and that if she failed to do so within five working days, she be suspended from the service of the House until the apology and withdrawal were submitted.¹⁰⁹

3 *Discussion*

¹⁰⁴ Enid Campbell, above, 128.

¹⁰⁵ Enid Campbell, above, 135.

¹⁰⁶ Enid Campbell, above, 133.

¹⁰⁷ Enid Campbell, above, 133.

¹⁰⁸ Parliament of New South Wales Legislative Council Standing Committee on Parliamentary Privilege and Ethics *Report on Inquiry into the Conduct of the Honourable Franca Arena MLC* (1998) Report No 6. Vol 1 of 3, x.

¹⁰⁹ Parliament of New South Wales Legislative Council Standing Committee on Parliamentary Privilege and Ethics *Report on Inquiry into the Conduct of the Honourable Franca Arena MLC*, above, xi.

Limiting any power of waiver to Parliament, rather than an ombudsman or other outside agency, is to be preferred. The advantage of removing the capacity to judge allegations or decide whether to waive the privilege from the House is that it eliminates the risk associated with majorities in Parliament using such procedures to discipline Opposition members only or using the power as a means of preventing debate on unfavourable topics.¹¹⁰ However, whether the waiver is an individual or a committee, control over the privilege has been taken out of Parliament's hands, where it rightly belongs. The New South Wales approach provides an example of a process whereby control over the privilege and sanctions for its abuse is retained by Parliament, but the actual investigation of the truth of allegations is removed into a neutral, quasi-judicial forum. In addition, because the establishment of a Special Commission required a two-thirds majority, there could be no question of a majority government acting to protect its own interests.

The Joint Committee's recommendation in favour of limiting the power of waiver to cases where there is no question of liability has the disadvantage of remedying the harm caused by article 9 to members while leaving non-members open to all its detriments. The New South Wales Investigation is open to a similar criticism – those falsely accused of the cover up by Mrs Arena were still unable to pursue a claim in the courts. The Joint Committee has argued that this 'basic imbalance' is caused by article 9, not by limiting any power of waiver.¹¹¹ It believed that allowing the House to determine when to waive means that parliamentary matters may be considered in court when to do so will not undermine the interests of the House, for example, where there is no risk of conflicting decisions. Implicit in this argument is the suggestion that it will never be in the interests of the House to allow liability for parliamentary statements since to do so would necessarily inhibit freedom of speech.¹¹²

¹¹⁰ Harry Evans (ed) *Odger's Australian Senate Practice* (10th ed, Department of the Senate, Canberra, 2001) 72.

¹¹¹ The Joint Committee on Parliamentary Privilege *Volume 1 Report and Proceedings of the Committee* (HL 43 – 1, HC 214 – 1 The Stationery Office, London, 1999) 26, para 76.

¹¹² The Joint Committee on Parliamentary Privilege *Volume 1 Report and Proceedings of the Committee*, above, 26, para 74.

While the New South Wales process did not allow liability, it did result in sanctions for Mrs Arena, including the demanded apology and threatened suspension. Mrs Arena challenged the constitutionality of the Amendment Act on the basis that it derogated from the requirement of freedom of speech in parliament. The High Court of Australia rejected this argument, noting that Mrs Arena would always remain free from legal consequences for her conduct,¹¹³ and that the Parliament had a legitimate interest in investigating the truth of the allegations.¹¹⁴ The prospect of political consequences, however dramatic, cannot be regarded as a barrier to free speech. Furthermore, it is uncontroversial that Parliament has the right to regulate its own proceedings. This includes the right to discipline members for breaches of those proceedings. Article 9 is directed at inhibitions of free speech from outside Parliament, not within it.

A general power of waiver would solve a number of article 9's drawbacks, not simply those relating to defamation. However, it seems that abuse within the House by members is a more pressing drawback than member's being unable to sue. Even more critically, allowing Parliament to waive immunity to allow liability would create the same risks and uncertainty associated with case-by-case exceptions as are raised by the decision in *Buchanan*. In contrast, the New South Wales approach allows the truth to be established without the prospect of liability. However, it is an example of an "extraordinary measure ... enacted to deal with extraordinary circumstances".¹¹⁵ Such a response, if adopted in New Zealand, would only be suitable for the most serious allegations, where matters of public importance were at stake as well as private reputations.

Finally, there is a risk that the act of waiver itself would create the impression that the member was in the wrong, even before the full case was heard. While the courts would not be so easily influenced, there is a real risk

¹¹³ Enid Campbell 'Investigating the Truth of Statements made in Parliament' [1998] PL 125,130.

¹¹⁴ *Arena v Nader* (1997) 71 ALJR 1604, 1605 (HC (Aust)) Brennan CJ, Gummow and Hayne JJ.

¹¹⁵ Enid Campbell, above, 135.

that the public might. Accordingly, a power of waiver to allow liability is not considered an appropriate remedy for New Zealand. A power of waiver to establish or assist an investigating committee may be appropriate only in the most extreme situations, but should be limited to an investigation of the truth of statements, not imposition of legal liability.

B Right of Reply

The main remedy currently available in New Zealand is the 'right of reply.' Under Standing Orders 161 – 164 an aggrieved person may apply to the Speaker to have their response to any allegations incorporated into the parliamentary record. This measure was adopted as an alternative to the Parliamentary Privileges Bill 1994. The Bill attempted to prevent abuse of privilege by including a requirement that MP's give notice to the Speaker, in advance, of any assertions likely to adversely affect a person's reputation and satisfy the Speaker that such assertions were well grounded.¹¹⁶ Such a process was apparently rejected "in principle"¹¹⁷ by the Select Committee since it would "transfer the moral and political responsibility for making an attack from the member who made it, to the Speaker who authorised it."¹¹⁸

The English Joint Committee on Parliamentary Privilege has identified some of the problems associated with a right of reply. It believed there is a lack of immediacy, which reduces the effectiveness of the replies in restoring any harm done. However, like the New Zealand Parliament, the Australian Senate provides the right to have a reply incorporated into the written record. This process can be speedy. For example, in 2001 a submission was received, reported on, and published all in the same day.¹¹⁹ The Australian experience

¹¹⁶ The New Zealand Law Commission *The Law of Parliamentary Privilege in New Zealand – A Reference Paper* (NZLC MP 5, Wellington 1996) 27

¹¹⁷ The New Zealand Law Commission *The Law of Parliamentary Privilege in New Zealand – A Reference Paper* (NZLC MP 5, Wellington 1996) 30.

¹¹⁸ Standing Orders Committee "Report on the Parliamentary Privilege Bill" [1994] AHJR I 18C 6.

¹¹⁹ Harry Evans (ed) *Odger's Australian Senate Practice* (10th ed, Department of the Senate, Canberra, 2001) 71.

indicates that the fears of the Joint Committee in this respect may be somewhat overstated.

The Joint Committee also voiced concerns about overuse of the right of reply. The system relies on the responses being publicised for it to be effective, since an unpublicised response will not repair a damaged reputation. However, that same publicity may lead to the overuse of the remedy. The Report of the Joint Committee mentioned concerns that a situation might arise where not responding to any allegations might be seen as “tantamount to acceptance of truth of the allegations”.¹²⁰

In the thirteen years between November 1988 and June 2001, a total of thirty-four responses were incorporated into the reports of the Australian.¹²¹ This suggests that the procedure is seen as effective but not overused. Furthermore, any ‘overuse’ may not in fact present any real problem. If the process can be as speedy and efficient as the Australian experience suggests, then its popularity need not present any administrative problems. The responses will simply promote public debate and accountability, which is an outcome that cannot be seen as undesirable.

The Joint Committee also raised the possibility that the replies may get less publicity than the original allegations, since they would not get the media coverage associated with the heated debates in which harmful allegations are likely to arise.¹²² A right of reply might be made more powerful and effective if it granted the right to be heard in person. The effect would be more immediate – parliamentarians would be sure to hear the reply, and the chances of it receiving appropriate publicity would be significantly increased. However, it would be a more cumbersome process than the incorporation of a reply into the written record. The parliamentary agenda would have to be altered (though replies could be kept short) and any delay would carry a risk of Parliament

¹²⁰ The Joint Committee on Parliamentary Privilege *Volume 1 Report and Proceedings of the Committee* (HL 43 – 1, HC 214 – 1 The Stationery Office, London, 1999) 59

¹²¹ Harry Evans, above, 587-614

¹²² The Joint Committee on Parliamentary Privilege *Volume 1 Report and Proceedings of the Committee*, above, 59.

becoming 'bogged down' with responses to allegations made some time previously. However, the increased magnitude of the response might prevent its overuse. The delay and greater publicity would mean that people would be reluctant to use it unless certain that it was necessary since the alternative would involve reviving the public memory of forgotten allegations. Of course, such a system would favour the confident and articulate. Perhaps, then, the 'response in person' could be one option in a range of alternatives, including the incorporation of a written response, or having the response read by the Speaker.

A final problem is that the reply may not restore the hurt reputation. A right of reply leaves no scope for determining the truth of any allegations. Rather, it is simply a matter of claim and counter-claim. In addition, even where a reputation is effectively restored, a right of reply provides no financial recovery, and damage to reputation can have important financial implications.

VII CONCLUSIONS

Ultimately, the risk to reputation inherent in the protection accorded by article 9 is a justified and necessary price to pay for the advantages of freedom of speech in Parliament. For article 9 to achieve its aims effectively, its protection must apply with some measure of certainty. Parliamentary privilege is not one of those areas where the case-by-case approach based on factual assessments, as used in *Buchanan*, is the most appropriate. It is the job of Parliament, both as a collection of responsible individuals and also as a House capable of self-regulation, to recognise and act on the scope for abuse of its privileges. The Special Commission established in New South Wales provides a compelling model for response to extraordinary abuses, but it is, of course, to be hoped that such a drastic measure will not be required in New Zealand. If it proves necessary, it may be appropriate to provide a 'stronger' right of reply as a remedy for maligned reputations and possible method of prevention of abuse of privilege.

BIBLIOGRAPHY**PRIMARY MATERIALS****Legislation**

Defamation Act 1996 (UK).

Legislature Act 1908.

Parliament (Privileges, Immunities and Powers) Act Chapter 217 (Singapore).

Cases

A v The United Kingdom (2002) European Court of Human Rights, Application No:00035373/97.

Arena v Nader (1997) 71 ALJR 1604 (HC (Aust)).

Beitzel v Crabb (1996) 141 ALR 447 (SC (Vic)).

Buchanan v Jennings [2002] 3 NZLR 145 (CA).

Hamilton v Al-Fayed [1999] 3 All ER 317 (CA).

Hamilton v Al-Fayed [2001] 1 AC 395 (HL).

Hyams v Peterson [1991] 3 NZLR 648 (CA).

Laurance v Katter (1996) 141 ALR 447 (SC (Qld)).

Pepper v Hart [1993] AC 593 (HL).

Peters v Cushing [1999] NZAR 241 (HC).

Prebble v Television New Zealand [1993] 3 NZLR 513 (CA).

Prebble v TVNZ [1994] 3 NZLR 1 (HL).

R v Creevey (1813) 1 Esp 226; 105 ER 102.

R v Lord Abingdon (1794) 1 M & S 273; 170 ER 337.

Rann v Olsen (2000) 172 ALR 395 (SC(SA)).

SECONDARY MATERIALS

Books

Evans, Harry (ed) *Odger's Australian Senate Practice*, 10th ed, Department of the Senate, Canberra, 2001.

Goldsworthy, Jeffrey *The Sovereignty of Parliament - History and Philosophy*, Oxford University Press, Oxford, 2001.

Maingot, Joseph, QC, *Parliamentary Privilege in Canada*, Butterworth & Co (Canada) Ltd, Toronto 1982.

Periodicals

Allan, James, 'Parliamentary Privilege in New Zealand' (1996) 7 *Canterbury Law Review* 324-330.

Allan, James, "Parliamentary Privilege: Will the Empire Strike Back?" (2002) 20 *New Zealand Universities Law Review* 205-219.

Bamforth, Nicholas "Parliamentary Privilege and Defamation" (1999) 58 *Cambridge Law Journal* 471-3.

Bradley, A W "Mr Al-Fayed, Mr Hamilton and the Law of Parliamentary Privilege" [2000] *Public Law* 556-9.

Campbell, Enid, "Investigating the Truth of Statements made in Parliament" [1998] *Public Law* 125-136.

Campbell, Enid, "Parliamentary Privilege and Admissibility of Evidence" (1999) 27 (3) *Federal Law Review* 367-90.

Denning, Rt Hon Lord, "Annex on the *Strauss* Case" [1985] *Public Law* 80-92.

Griffiths, Clive, "In Defence of Parliamentary Privilege" (1994) 24 *University of Western Australia Law Review* 247-52.

Harders, Sir Clarrie "Parliamentary Privilege – Parliament versus the Courts; Cross Examination of Select Committee Witnesses" (1993) 67 *Australian Law Journal* 109-125.

Locke, G F, "Parliamentary Privilege and the Courts: The Avoidance of Conflict" [1985] *Public Law* 64-92.

Loveland, Ian, "Political Libels – Whose Right is it Anyway?" (2000) 53 *Current legal Problems* 333-61.

Marshall, Geoffrey, "Impugning Parliamentary Impunity" [1994] *Public Law* 509-512.

Palmer, Sir Geoffrey, "Parliament and Privilege: Whose Justice?" [1994] *New Zealand Law Journal* 325-330.

District Law Society Public Issues Committee 'Speaking Out' Members of Parliament and the Judicial Process' [1988] NZLJ 300-4.

Other

Lord Hailsham of St Marylebone (ed), *Halsbury's Laws of England* (4 ed) Butterworths, London, 1980. Vol 34.

Parliament of New South Wales Legislative Council Standing Committee on Parliamentary Privilege and Ethics *Report on Inquiry into the Conduct of the Honourable Franca Arena MLC* (1998) Report No 6. Vol 1 of 3.

Standing Orders Committee "Report on the Parliamentary Privilege Bill" [1994] AHJR I 18C 6.

The Joint Committee on Parliamentary Privilege *Volume 1 Report and Proceedings of the Committee* and *Volume 3 – Written Evidence* (HL 43 – 1, HC 214 – 1) The Stationery Office, London, 1999.

The New Zealand Law Commission *The Law of Parliamentary Privilege in New Zealand – A Reference Paper* (NZLC MP 5) Wellington 1996.

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