

THE PARLIAMENT OF THE
COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON PROCEDURE

A CITIZEN'S RIGHT OF REPLY

Report

June 1991

Australian Government Publishing Service
Canberra

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ISBN 0 644 14595 1

Printed by P. J. GRILLS, Commonwealth Government Printer, Canberra

Terms of reference of the committee

To inquire into and report on the practices and procedures of the House generally with a view to making recommendations for their improvement or change and for the development of new procedures.

Members of the committee

Chairman: Hon. G G D Scholes, MP

Deputy Chairman: Mr P D Shack, MP

Members: Mr R F Edwards, MP
Mr E L Grace, MP
Mr C Hollis, MP
Mr A C Rocher, MP
Mr W E Truss, MP
Hon. F J Walker, QC, MP

Acting Secretary: Mr M Kiermaier



A CITIZEN'S RIGHT OF REPLY

1. The privilege of freedom of speech for Members of Parliament is derived from Article 9 of the Bill of Rights 1688, which declares 'That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'. *House of Representatives Practice* makes the following observation¹:

The privilege has been variously described as a privilege essential to every free council or legislature, as one which has always been regarded as most valuable and most essential, as the only privilege of substance enjoyed by Members of Parliament, and as one of the most cherished of all parliamentary privileges, without which Parliaments probably would degenerate into polite but ineffectual debating societies. Unquestionably, freedom of speech is by far the most important privilege of Members.

Members are absolutely privileged from suit or prosecution only in respect of anything they might say in the course of proceedings in Parliament. Members may state whatever they think fit in debate in the Parliament, however offensive or injurious to the character of individuals and provided it is in accord with the ordinary rules and practices of the House. It is, however, incumbent upon Members not to abuse the privilege. The House itself, by its rules of debate and disciplinary powers, has the duty to prevent abuse. As *May* puts it:

... it becomes the duty of each Member to refrain from any course of action prejudicial to the privilege which he enjoys.

2. The issue of misuse of this privilege is a contentious one. While it can be argued that the Parliament's practice is self-regulatory - that any misuse by a Member will be recognised by the House (and the public) and his or her reputation will be judged accordingly - it does not guarantee that an individual, rightly or wrongly, will not suffer injury during parliamentary proceedings.

3. Significant attention has been given to this matter by the Parliament in recent years. All examinations have concluded that, apart from the application of the standing orders and past practice, there should be no restrictions placed on an elected Member's right to raise points of view. With this accepted, avenues have been explored which would allow a 'right of reply' to individuals who consider themselves to have been aggrieved by words used about them in the House.

¹ A.R. Browning (ed), *House of Representatives Practice*, 2nd ed, AGPS, Canberra, 1989, p.688.

Joint Select Committee on Parliamentary Privilege

4. In 1984, the Joint Select Committee on Parliamentary Privilege, among its deliberations on a number of matters, considered the issue of a right of reply. In its report the committee concluded that 'some means should be sought to meet the legitimate concern of those who, regardless of the reasons, have been subjected to unfair or groundless parliamentary attack on their good names and reputations.'² The committee concluded:

We think the only practical solution consistent with the maintenance in its most untrammelled form of freedom of speech and the rights of members of the public to their good reputation may lie - and we emphasise the word 'may' - in adopting an internal means of placing on record an answer to a Parliamentary attack. If such an answer is to have any efficacy, we think it should become part of the record of parliament so as to carry back to the forum in which the attack was made a refutation or explanation.³

5. The committee suggested a model, the essential elements of which would ensure that:

- (a) complaints be subject to rigorous screening; and
- (b) there be clear limits on what may be put in an answer which is to be incorporated in *Hansard*.

6. The mechanism proposed by the committee envisaged persons applying direct to the Committee of Privileges of the relevant House, and for that committee to have wide discretionary powers to deal with the complaint as it thought fit. The committee rejected a proposal to have complaints referred directly to the Presiding Officer as they felt that this 'would place the Presiding Officer in the invidious position of taking responsibility for the threshold decision.'⁴

Parliamentary Privileges Bill 1987

7. In May 1987, during consideration of the Parliamentary Privileges Bill 1987, the then Attorney-General tabled proposed resolutions relating to parliamentary privileges. One resolution related to the protection of persons referred to in the House and provided for a similar mechanism to the one recommended by the Joint Select Committee on Parliamentary Privilege in 1984, except that specific and limited

² Final report, Joint Select Committee on Parliamentary Privilege, October 1984, PP 219 (1984) p.57.

³ *Ibid*, p.55.

⁴ *Ibid*, p.56.

procedures were envisaged for the Committee of Privileges. Importantly, clause 8 of the proposed resolution stipulated that the Committee of Privileges 'shall not consider or judge the truth of any statements made in the House, of the submission or of any evidence received by the Committee.'⁵ No action was taken by the House on the proposals.

Senate procedure

8. In February 1988 the Manager of Government Business in the Senate moved that the resolutions referred to above (with minor modifications to make them applicable in the Senate) be adopted by the Senate. The resolution dealing with protection of persons named in the Senate was amended to provide for a simple, yet specific procedure, and was adopted by the Senate.

9. Essential elements of the procedure are as follows:

- persons may forward submissions (subject to certain rules) to the President; it is only available to persons named or readily identified in debate in the Senate - it does not cover persons referred to by committee witnesses;

- a person must be able to claim that he or she has been 'adversely affected in reputation or in respect of dealings or associations with others or injured in occupation, trade, office or financial credit, or that the person's privacy has been unreasonably invaded, by reason of that reference;

- if satisfied a submission is not trivial, vexatious, frivolous or offensive, and that it is practicable for the Committee of Privileges to consider it, the President must refer it to the Committee of Privileges;

- the committee then has a similar discretion to the President in considering submissions, and may confer with the person and Senator, and may report to the Senate either:

- that no further action be taken, or
- that the person's response in terms agreed by the person and the committee should be published or incorporated in *Hansard*.

10. Additionally, it is the practice in the Senate for such reports, when presented to the Senate, to be ordered to be printed, and therefore become part of the Parliamentary Papers series. A motion also is moved for the Senate to adopt the report.

11. The Senate resolution in relation to the procedure was transmitted to the House of Representatives for notification on 15 March 1988. No action was taken by the House.

⁵ H.R. Deb. (6.5.87) 2674.

Assessment of Senate procedure

12. There have been 11 instances of the right of reply procedure being exercised over the 3 years in which the procedure has been available in the Senate and it would appear that the process has worked well. Significantly, it has not been seen to diminish the ability of Senators to raise matters of importance to them and has been accepted well by Senators.

13. No official assessment has been made of the Senate procedure and it is the only such procedure to have been introduced in any comparable legislature. However, the Deputy Clerk of the Senate reviewed the procedure in a parliamentary journal⁶ and made the following points:

- . the process had been implemented with ease;
- . the process had been used sparingly (although the incidence has increased since the article was written);
- . the relatively stringent ground rules filter out vague complaints and guard against rash and clumsy approaches;
- . the prohibition against any judgment by the Committee of Privileges of the truth or otherwise of the statement complained of, and the response, is of fundamental importance;
- . the committee, in considering submissions, must meet in private; and
- . the committee had not found it necessary to consult with any complainant or Senator in respect of any case, the only contact being with the citizen on the question of the terms of reference.

Considerations

14. Although the Senate right of reply procedure has not been reviewed officially, and no other comparable legislatures have adopted such a procedure, the concept has been examined by other bodies.

15. 1989 reports of the House of Commons Procedure Committee and the Western Australian Parliamentary Standards Committee recommended against the introduction of a right of reply procedure.

⁶ 'Coward's Castle' and the public's right of redress - Senate Privilege resolution No. 5, Lynch, A. *The Parliamentarian*, October 1989, pp.235-8.

16. The UK House of Commons Procedure Committee⁷ recommended against a formalised right of reply. It considered the Senate's procedure (although it had only been used on one occasion at that time). The committee made the following points:

- . the time taken in the first case robbed the rebuttal of any immediacy;
- . by allowing any rebuttal at all 'somebody is passing judgment on the Member';
- . any refusal by an aggrieved person to take advantage of the procedure might be seen as an acceptance of the truth of the allegations; and
- . the actual words objected to by the first complainant were not sufficiently damaging to justify a formal right of reply.

17. A report by the Parliamentary Standards Committee of Western Australia⁸ endorsed the reservations of the House of Commons report and also concluded:

- . the Senate procedures required the drafting of 'cumbersome regulations' which are not easy to interpret in practice; and
- . it 'is difficult to find any evidence to this stage that they have added significantly to the rights available to citizens'.

18. In the Senate itself⁹ arguments put forward against the procedure prior to its introduction included:

- . it would be an admission of failure on the part of the Parliament in that it suggests that the Parliament has not provided methods of redress for persons who feel they have been improperly dealt with;
- . there are other avenues of redress available, such as approaching a Member or Senator with one's grievance to obtain a response;
- . the Privileges Committee should not be able to overturn a decision of the President that a person has a case in requesting a right of reply; and

⁷ Conduct of Members in the Chamber and the alleged abuse of Parliamentary Privilege. *First report from the Select Committee on Procedure*, March 1989, H.C. 290 (1988-89) xviii-xx.

⁸ Report of the Parliamentary Standards Committee of Western Australia, 1989, Vol 1, pp.49-58.

⁹ S.De. (25.2.88) 620-42.

it will encourage the Committee of Privileges to divide along party lines when the issue concerned is of a political nature.

19. The Procedure Committee has considered the arguments put forward against a right of reply procedure and agrees that they have varying degrees of validity. However, the perceived imperfections in the procedure are outweighed by the need to protect individuals from inaccurate or malicious abuse under the protection of parliamentary privilege. The Committee, therefore, believes that a right of reply procedure should be implemented in the House of Representatives.

20. In determining what sort of procedure should be used, the Committee envisaged the following broad guidelines:

That the procedure only be available to 'natural persons', ie, to individuals and not corporate bodies.

That the procedures relate only to statements made in the House, and be available only in cases where the statements can reasonably be considered actionable in a court of law.

That the parliamentary body administering the procedure should not be called upon to be a judge and jury on the matter.

That the rules covering the content of replies be similar to those for a Member making a personal explanation, ie, that they be succinct and strictly relevant to the issue.

21. The standing orders prohibit citizens from referring to debates in Parliament in a petition.¹⁰ An option canvassed by the Clerk of the House in a discussion paper presented to the Committee was to delete that standing order, which would then allow for petitions to be lodged complaining of matters raised in debates. However, as the Clerk is only required to certify whether a petition is, or is not, in order (ie, complies with the standing orders), other procedures would need to be implemented in order to meet the filtering requirements felt necessary by the Committee.

22. It is considered essential that judgements on whether replies comply with particular requirements should be performed by Members, rather than an officer of the House, and therefore should be undertaken by a properly constituted panel, preferably a parliamentary committee.

23. The Committee has concluded that the procedure employed by the Senate is a simple yet effective means for citizens to present their grievances when they consider they have been the subject of an unfair attack in Parliament. In reaching this conclusion the Committee noted that the Senate Committee on Privileges, in a letter published in the

¹⁰ S.O. 124.

West Australian in May 1990¹¹, stated:

When the procedures were first proposed, there was some trepidation about whether they could work. After more than two years' experience, all members of the committee and, we believe, the Senate, are satisfied that the processes give a worthwhile opportunity to people to redress a perceived grievance.

24. The Committee believes that the procedure in operation in the Senate is suitable for the House, and that Parliament's standing would be enhanced if citizens have access to the same procedure in either House. It is recognised that the procedure would require the Committee of Privileges to undertake a new role, and that that committee, while noting the sentiments of the Procedure Committee contained in paragraph 20, would have to develop supplementary guidelines and procedures. However, it is considered that it is the most appropriate body to administer the mechanism.

25. Accordingly, it is recommended that the House adopt the following resolution:

Protection of persons referred to in the House

- (1) Where a person who has been referred to by name, or in such a way as to be readily identified, in the House, makes a submission in writing to the Speaker:
 - (a) claiming that the person has been adversely affected in reputation or in respect of dealings or associations with others, or injured in occupation, trade, office or financial credit, or that the person's privacy has been unreasonably invaded, by reason of that reference to the person; and
 - (b) requesting that the person be able to incorporate an appropriate response in the parliamentary record,if the Speaker is satisfied:
 - (c) that the subject of the submission is not so obviously trivial or the submission so frivolous, vexatious or offensive in character as to make it inappropriate that it be considered by the Committee of Privileges; and
 - (d) that it is practicable for the Committee of Privileges to consider the submission under this resolution,the Speaker shall refer the submission to that Committee.
- (2) The Committee may decide not to consider a submission referred to it under this resolution if the Committee considers that the subject of the submission is not sufficiently serious or the submission is frivolous, vexatious or offensive in character, and such a decision shall be reported to the House.
- (3) If the Committee decides to consider a submission under this resolution, the Committee may confer with the person who made the submission and any Member who referred in the House to that person.
- (4) In considering a submission under this resolution, the Committee shall meet in private session.

¹¹ 'WA on right track in right of reply', Letter published in the *West Australian*, 24 May 1990.

- (5) The Committee shall not publish a submission referred to it under this resolution or its proceedings in relation to such a submission, but may present minutes of its proceedings and all or part of such submission to the House.
- (6) In considering a submission under this resolution and reporting to the House the Committee shall not consider or judge the truth of any statements made in the House or of the submission.
- (7) In its report to the House on a submission under this resolution, the Committee may make either of the following recommendations:
 - (a) that no further action be taken by the House or by the Committee in relation to the submission; or
 - (b) that a response by the person who made the submission, in terms specified in the report and agreed to by the person and the Committee, be published by the House or incorporated in *Hansard*, and shall not make any other recommendations.
- (8) A document presented to the House under paragraph (5) or (7):
 - (a) in the case of a response by a person who made a submission, shall be succinct and strictly relevant to the questions in issue and shall not contain anything offensive in character; and
 - (b) shall not contain any matter the publication of which would have the effect of:
 - (i) unreasonably adversely affecting or injuring a person, or unreasonably invading a person's privacy, in the manner referred to in paragraph (1); or
 - (ii) unreasonably adding to or aggravating any such adverse effect, injury or invasion of privacy suffered by a person.

GORDON SCHOLES, MP

Chairman

4 June 1991