

The Impact of Jennings v Buchanan on Freedom of Speech and Defamation: The Erosion of Parliamentary Privilege?

JULIA HARKER^{*}

I INTRODUCTION

Parliamentary privilege was conceived in the wake of the Glorious Revolution of 1688-1689.¹ Article 9 of the Bill of Rights 1688 represents the culmination of the English House of Commons' struggle for parliamentary supremacy and freedom of speech in debate. More than three centuries since the Bill of Rights was enacted, however, there is still uncertainty both as to the necessary ambit of the protection provided by article 9, and as to the boundary between that which is solely within the jurisdiction of Parliament and that which is legitimately within the competence of the courts. Such boundaries have become the subject of heightened scrutiny in areas of the civil law such as defamation, where the article 9 privilege collides with the rights of ordinary citizens to protect their reputation.

These issues have been brought into sharp relief by the recently decided New Zealand case *Jennings v Buchanan*² which has the potential to both materially alter the nature and content of contributions able to be made by Members of Parliament to political debate, and to destabilise the constitutional equilibrium that exists between the Courts and Parliament. The Privy Council found that a Member of Parliament might be held liable for a subsequent unprivileged comment that effectively repeated defamatory statements made during parliamentary proceedings. Past and current Members of Parliament disagreed with the decision. In their opinion it unnecessarily constrained their parliamentary privilege and impinged on their ability to properly fulfil their role as a member.³

^{*} BA/LLB (Hons). I would like to thank Dr Rosemary Tobin, Associate Professor at the University of Auckland for her encouragement, guidance and observations in the preparation of this article.

¹ In English history, the events of 1688-89 that resulted in the deposition of James II and the accession of William III and Mary II to the English throne.

² [2005] 2 NZLR 577 [“*Jennings*”]. The Court of Appeal decision citation is *Buchanan v Jennings* [2002] 3 NZLR 145 [“*Buchanan*”].

³ The author conducted interviews of past and present Members of Parliament during the period November 2004-January 2005. Auckland University Human Participants Ethics Committee Ethics

This article examines *Jennings* to determine whether there has been an erosion of the protection afforded by parliamentary privilege to Members against defamation actions. Part II canvasses the historical development of parliamentary privilege, its relationship with the courts and the ambit of article 9. Part III reflects on the development of the doctrine of effective repetition in both Australian and New Zealand jurisdictions. Part IV analyses *Jennings*' progression through the courts and explores the Court of Appeal and Privy Council decisions' legitimacy. Finally, Part V considers legislative reform options with particular attention on both the positive and negative repercussions of any amendment.

II PARLIAMENTARY PRIVILEGE AND ARTICLE 9 OF THE BILL OF RIGHTS 1688

Parliamentary privilege is a concept that is fundamental to the workings of a modern day parliamentary democracy. This privilege can be defined as a collection of unique rights enjoyed both by the House in its collective capacity and by Members of Parliament individually, which facilitate the discharge of their functions and provide a limited exemption from the general law.⁴

The courts recognise parliamentary privilege as a part of the common law which gives special legal status to the House of Commons, its Members and people taking part in its proceedings.⁵ This difference in status is justified functionally. For Parliament to operate it must have special powers and immunities to carry out its work effectively. This protection is also necessary for the House to address challenges to its authority that might diminish its dignity and lower the esteem in which it is held.⁶ Such privileges, however, are only enjoyed by individual Members as a "means to discharge the collective functions of the House"⁷ and thus must not be seen as merely conferring personal benefits on a privileged group.⁸

Application (The Erosion of Parliamentary Privilege? - Implications of *Jennings v Buchanan* for Freedom of Speech and Defamation - 2004/375).

⁴ May, *Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (21 ed, 2004) 75.

⁵ McGee, *Parliamentary Practice in New Zealand* (2 ed, 1994) 468.

⁶ *Ibid* 468.

⁷ May, *supra* note 4, 75.

⁸ Report of the Standing Orders Committee [1987-90] AJHR I18B [8].

In New Zealand, parliamentary privilege was incorporated into New Zealand Law through the statutory adoption of the same privileges possessed by the House of Commons on 1 January 1865, as represented by section 242 of the Legislature Act 1908 and section 3(1) of the Imperial Laws Application Act 1988.

The privilege of freedom of speech in parliamentary proceedings and debate is perhaps the best known privilege and is encapsulated in article 9 of the Bill of Rights 1688. It states:

[F]reedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament.

This provides immunity for Members of Parliament, witnesses and petitioners from liability for things said or done during parliamentary proceedings. Importantly, the article also places restrictions on the courts' scrutiny of parliamentary proceedings as evidence in relation to legal actions.⁹

There had been a long history of conflict between the House of Commons and the Tudor and Stuart Monarchs. Article 9 was the resolution of this conflict.¹⁰ Successive monarchs had employed criminal and civil procedures to intimidate unsympathetic Members of Parliament, climaxing with the prosecution of Sir John Elliot for seditious words made during parliamentary debate in 1629.¹¹ During the Glorious Revolution of 1688-89 Parliament took the opportunity to protect its status and the freedom of speech of its Members by codifying this immunity in article 9.¹²

Article 9 is therefore a product of the fundamental necessity for both Members and witnesses before Parliament to speak uninhibited by the threat of Court action.¹³ On a constitutional level, it also protects Parliament and its Members from the control of both the Crown and the courts.

Parliamentary Privilege and the Courts

More than three centuries since the Bill of Rights 1688 was enacted, there is still uncertainty as to the boundary between the jurisdiction of

⁹ Campbell, *Parliamentary Privilege* (2003) 11.

¹⁰ Jennings, *supra* note 2, 579.

¹¹ Buchanan, *supra* note 2, 144.

¹² May, *supra* note 4, 82.

¹³ McGee, *supra* note 5, 472.

Parliament and the competence of the courts in regard to parliamentary privilege.¹⁴ This conflict between the courts and the House over relevant jurisdiction and competence in relation to privilege reflects greater constitutional issues concerning the separation of power and parliamentary supremacy. Early disputes between the courts and Parliament over privilege were centred on the relationship between the common law and the *lex parlamenti* (law of Parliament). The House of Commons claimed that it had exclusive jurisdiction under this law to determine both whether a privilege existed and whether such privilege had been breached.¹⁵ By the mid 19th Century, however, Parliament had accepted that the *lex parlamenti* was an integral part of the general law controlled by the courts, and that the limits of parliamentary privilege were to be set through the operation of the common law.¹⁶

Parliament has always maintained exclusive cognisance of its own internal processes, and thus is the sole judge of their lawfulness.¹⁷ This circumscription of the court's jurisdiction is expressed in Sir Edward Coke's view "that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not else—"where".¹⁸

The potential for constitutional conflict over the scope and boundaries of parliamentary privilege was recognised in *British Railway Board v Pickin*.¹⁹ Lord Simon of Glaisdale there cautioned that in the past there had been dangerous conflict between the courts and Parliament:

...[D]angerous because each institution has its own particular role to play in our constitution, and because collision between the two institutions is likely to impair their power to vouchsafe the rights for which citizens depend on them.

It is debatable, however, whether the courts have heeded this warning given the continuing struggle over the extent of their jurisdiction, none more obvious than in the consideration of the scope and limitations of the protection afforded by article 9 of the Bill of Rights 1688.

¹⁴ May, *supra* note 4, 176.

¹⁵ Joseph, *Constitutional and Administrative Law in New Zealand* (2 ed, 2001) 392.

¹⁶ *Stockdale v Hansard* (1839) 112 ER 1112.

¹⁷ May, *supra* note 4, 102.

¹⁸ Blackstone, *Commentaries on the Law of England* (1978) 158-159.

¹⁹ [1974] 1 AC 765.

The Scope of Article 9

The protection afforded by article 9 for free speech in debate has continued in importance since its codification. Lord Browne-Wilkinson addressed some of the modern challenges to the scope of parliamentary privilege in *Prebble v Television New Zealand Ltd.*²⁰ His Lordship acknowledged that there were three important public policy issues at play, but that freedom of speech in debate was of primary concern:

First the need to ensure that the legislature can exercise its powers freely on behalf of its electors...second, the need to protect freedom of speech generally; third, the interests of justice in ensuring that all relevant evidence is available to the Courts. Their Lordships are of the view that the law has long been settled that... the first must prevail.

The scope of article 9 has been a central issue in many modern cases, especially those concerning actions for defamation where either the plaintiff or defendant has sought to rely on statements made in Parliament to either support their action or raise a defence.

In *Church of Scientology of California v Johnson-Smith*²¹ the plaintiff attempted to rebut the defendant Member of Parliament's defences of fair comment by referring to extracts from the Official Report of the Commons. The Court decided, however, that the scope of parliamentary privilege extended to the examination of proceedings in Parliament for supporting an action, even though the cause of action arose from something done outside the House.

*Prebble*²² has been heralded as one of the most authoritative assertions of freedom of speech in Parliament in recent times²³ and emphasises the wider principle behind article 9. The plaintiff, the Hon Richard Prebble MP, sued TVNZ for defamation. In their defence, TVNZ sought to rely on speeches, reports and announcements made by the plaintiff which clearly fell within the umbrella of 'proceedings in Parliament'.

On appeal to the Privy Council one of the main issues concerned whether references to parliamentary material by TVNZ in its defence

²⁰ [1994] 3 NZLR 1, 10.

²¹ [1972] 1 QB 522.

²² Supra note 20.

²³ Harris, "Sharing the Privilege: Parliamentarians, Defamation, and Bills of Rights" (1996) 8 Auckland U L Rev 45, 57.

would breach article 9. Lord Browne-Wilkinson, in defining the article, refused to restrict its ambit and criticised an Australian decision²⁴ which had limited its application to cases in which the maker of the statement would be exposed to legal liability for what they had said in Parliament. His Lordship stated that:²⁵

This view discounts the basic concept underlying art 9, viz the need to ensure so far as possible that a Member of the legislature and witnesses before Committees of the House can speak freely without fear that what they say will later be held against them in the Courts. 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.

The Court also stated that section 16 of the Australian Parliamentary Privileges Act 1987 (Cth) codified “what had previously been regarded as the effect of art 9” and that subsection (3) was “the true principle to be applied”.²⁶

- (3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:
 - (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
 - (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
 - (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

²⁴*R v Murphy* (1986) 5 NSWLR 18. The Australian Parliamentary Privileges Act 1987 (Cth) has since nullified the decision.

²⁵ *Prebble*, supra note 20, 8.

²⁶ *Ibid* 8.

Such an extended definition of freedom of speech in debate and article 9 was reiterated in Lord Browne-Wilkinson's concluding statement that:²⁷

[P]arties to a litigation...cannot bring into question anything said or done in the House by suggesting...that the actions or words were inspired by improper motives or were untrue or misleading. Such matters lie entirely within the jurisdiction of the House...

As well as expanding on the definition of article 9 and incorporating subsection (3) of the Australian Act into New Zealand law, Lord Browne-Wilkinson also stressed the constitutional balance that needs to be maintained between the courts and Parliament and the fact that article 9 did not limit or completely encapsulate the wider principle behind the privilege. He stated that there was:²⁸

[A] long line of authority which supports a wider principle of which art 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.

The Judge cautioned that to allow submissions that a Member or witness was lying to the House could "lead to exactly that conflict between the courts and Parliament which the wider principle of non-intervention is designed to avoid".²⁹

These findings on the wider principles and implications of article 9 were reiterated in *Hamilton v Al Fayed*³⁰ where the House of Lords held that the courts were precluded from examining "...evidence designed to show that a witness in parliamentary proceedings deliberately misled Parliament", and that to do so would be "for the courts to trespass within the area in which Parliament has exclusive jurisdiction".³¹

²⁷ Ibid 10.

²⁸ Ibid 7.

²⁹ Ibid 8.

³⁰ [2001] 1 AC 395.

³¹ Ibid 403.

III EFFECTIVE REPETITION

There is no doubt that while statements made by a Member of Parliament in the House are protected by article 9, if such statements are repeated outside of Parliament they will not be protected and the speaker may be held liable.³² This traditional exception to the protection afforded by article 9 for freedom of speech in debate has, however, been extended in recent cases by the judicial doctrine of effective repetition. Effective repetition occurs where a defamation action is based on an unprivileged statement, with an earlier parliamentary record being called upon to complete the non-privileged statement. The doctrine asserts and relies upon a distinction between establishing that parliamentary events occurred as a matter of history and questioning or impeaching their integrity.³³

The doctrine was first encountered in the Cape of Good Hope case *Meurant v Raubenheimer*³⁴ where the seconding of a defamatory resolution was held to be an adoption and repetition of the defamation, and subsequently in *Spike v Golding*³⁵ which concerned statements referring to a defamatory publication. The publisher there claimed that he could prove the allegations contained in the first article. Notably neither of these cases are concerned with parliamentary privilege or statements made during parliamentary debate.

The development of the doctrine of effective repetition in relation to parliamentary privilege is illustrated in four cases from Australian and New Zealand jurisdictions. It was first introduced in the Victorian case *Beitzel v Crabb*³⁶ where the plaintiff was able to establish an effective repetition based on the defendant's unprivileged statement that he stood by what he had said in Parliament. The Court held that the Member had made a publication by an "adoption and repetition outside Parliament of [defamatory] words spoken by him in Parliament..."³⁷ and that whether what is said outside amounted to an adoption is a mixed question of fact and law. The Court acknowledged that this conflicted with the respected authority of *Roman Corp v Hudson's Bay Oil & Gas Co*,³⁸ which held

³² *R v Lord Abingdon* (1794) 170 ER 337; *R v Creevey* (1813) 105 ER 102; *Duncombe v Daniell* (1838) 2 Jur 32; *Wason v Walter* (1868) LR 4 QB 73; *Stopforth v Goyer* (1978) 8 DLR (3d) 373.

³³ Joseph, *supra* note 15, 410.

³⁴ (1868) 1 Buch AC 87.

³⁵ (1895) 27 NSR 379.

³⁶ [1992] 2 VR 121.

³⁷ *Ibid* 127.

³⁸ 36 DLR (3d) 413.

that press releases and telegrams made by the defendant Members of Parliament were only an extension of statements made in Parliament and a discharge of their duties in the course of parliamentary proceedings. The Court held that:³⁹

It is undoubtedly arguable on the facts of this case that, despite the fact that the words previously spoken in Parliament were not subsequently repeated, there would be a sufficient temporal and substantive connection made by the listening public [between the privileged and unprivileged comments] for there to have been a defamatory publication by adoption...

This statement of principle was echoed in *Laurance v Katter*⁴⁰ where the defendant Member of Parliament had made a statement in the House implying impropriety on the plaintiff's part and subsequently made an unprivileged statement that he would not apologise for what he had said and that he had evidence to support his assertions. Doyle CJ, in holding the defendant's unprivileged statements to the media were an effective repetition of what he had said in the House, stated that:⁴¹

No impropriety is alleged against the first defendant in respect of what he said in parliament. What is alleged against him... is that what he said outside parliament was false and defamatory of the plaintiff... The privilege of Art 9 applies to the statements in parliament but not to the statements outside parliament even though they are incorporated by reference to the statements made in parliament. This case is distinguishable in this respect from *Prebble v TVNZ Ltd.*... in which the defendant, sued by a parliamentarian for defamation, was attempting to use what the plaintiff said in parliament against him to prove dishonesty and improper motive.

Thus the doctrine of effective repetition or adoption has been firmly established as part of Australian law. In New Zealand, however, there is no direct authority for the doctrine prior to *Jennings*. The following cases illustrate the approaches taken by the New Zealand courts prior to *Jennings* in cases concerning reference being made to parliamentary records during an action for defamation.

³⁹ *Beitzel*, supra note 36, 128.

⁴⁰ (1996) 141 ALR 447.

⁴¹ *Ibid* 490.

Hyams v Peterson,⁴² a Court of Appeal case, did not deal with effective repetition by a Member of Parliament. It did, however, provide the impetus and authority for future cases such as *Jennings*. The plaintiff in this case wished to use documents tabled in Parliament as background or extrinsic information to inform the Court's consideration of the meaning and impact of the materials published outside of the House. The Court held that such documents could be used to establish the link between prior non-actionable publication and the plaintiff, with Cooke P stating that "It is clear that an extrinsic fact known to readers of an article may be proved in order to show that the article refers to a plaintiff or bears a defamatory meaning."⁴³ His Honour also declared that as a matter of principle "[t]here 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 in fact would have understood from what was published to the public."⁴⁴

This case has been cited as authority for the principle that, as a matter of common sense, parliamentary records may be used to establish the meaning of a later non-privileged statement.⁴⁵ It is notable that in *Hyams* parliamentary reports were only referred to as a means to identify the plaintiff rather than to establish the substance of the defamatory statement. Any expansion of Cooke P's "common sense" approach must also be treated with caution as the case did not actually involve a Member of Parliament, either as plaintiff or as defendant, so issues of freedom of speech in debate and constitutional boundaries may not have been at the forefront of the Court's mind.

Effective repetition was also addressed in *Peters v Cushing*⁴⁶ which concerned defamatory comments made by the Rt Hon Winston Peters outside of Parliament and later statements made by him in Parliament that identified the plaintiff. At the District Court⁴⁷ Dalmer DCJ held that article 9 was not infringed where a statement made in the House is relied upon only as evidence to identify a plaintiff defamed outside of Parliament. This was, however, overturned at the High Court,⁴⁸ where it was held that the identification of the plaintiff was an essential element of Defamation and that reference to the defendant's statements in Parliament was not merely to prove what had occurred in

⁴² [1991] 3 NZLR 648.

⁴³ *Ibid* 656.

⁴⁴ *Ibid* 656.

⁴⁵ *Buchanan*, *supra* note 2.

⁴⁶ [1999] NZAR 241.

⁴⁷ *Cushing v Peters* (3 July 1996) DC WN WP 1340/92 Dalmer DCJ.

⁴⁸ *Supra* note 46.

the House as a matter of history, but to found the cause of action. However, Ellis J made the obiter statement that:⁴⁹

[W]ords said outside Parliament can be an adoption and repetition of what was said there and so be the subject of a claim before the Courts. It is the basis of the traditional challenge to a Member to repeat what he has said outside the Debating Chamber.

This comment has been cited in favour of applying the doctrine of effective repetition in circumstances involving parliamentary privilege and speech in debate.

The doctrine of effective repetition has the potential to dramatically affect the protection afforded by Article 9 to Members of Parliament and other witnesses. This will become more evident in the next section, which considers the implications of *Jennings v Buchanan* on parliamentary privilege.

IV JENNINGS v BUCHANAN - THE CONTEMPORARY DEBATE

While the scope of parliamentary privilege and the protection afforded by article 9 have always been in a state of flux and a subject of controversy, these issues have been brought into sharp relief by the New Zealand Court of Appeal's decision in *Buchanan v Jennings*, subsequently affirmed by the Privy Council in *Jennings v Buchanan*. The decision has the potential to materially alter the nature and content of political debate and the constitutional equilibrium between the courts and Parliament.

1 Facts

In *Jennings v Buchanan* the Courts were asked to consider the current scope of parliamentary privilege and article 9, as well as the implications of the controversial doctrine of effective repetition. Jennings, an Act MP, made defamatory comments in debate about Buchanan, a senior official of the New Zealand Wool Board. Buchanan had been involved in organising a promotional tour for the Barbarians rugby team to the United Kingdom. Jennings alleged that:⁵⁰

⁴⁹ Ibid 249.

⁵⁰ *Buchanan*, supra note 2, 148.

This year one of the boards spent \$3.5 million promoting the Barbarians rugby team in Great Britain, 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.

Subsequently, on 18 February 1998, Jennings made a statement to *The Independent* newspaper under the headline “Jennings’ Woolly Smear Turns to Flannel” that “He did not resile from his claim about the officials’ relationship”...⁵¹

In establishing that comments made by Jennings to *The Independent* were defamatory, Buchanan sought to refer to and rely on the Member’s statements in the House as a historical fact. The central issue of concern therefore was whether a Member of Parliament might be held liable in defamation if he or she makes a defamatory statement in the House and later affirms this statement on an unprivileged occasion.⁵²

The Court of Appeal Decision

1 *The Majority Judgment*

The majority of the Court of Appeal⁵³ concluded that a Member might be held liable in defamation if they make a defamatory statement in Parliament and then later affirm that statement without repeating it on an occasion not protected by parliamentary privilege, thereby confirming the doctrine of effective repetition in New Zealand.⁵⁴ This was largely based on the Court’s interpretation of article 9 and their finding that freedom of speech in debate was not itself being questioned and that Members would not be inhibited from speaking frankly prior to making an unprivileged statement.⁵⁵

Keith J began his judgment for the majority by considering article 9 in its historical setting and in relation to its ‘corporate purpose’. He sought to establish the scope of article 9 by first considering Coke’s well known statement that matters concerning the House should only be adjudged by the House, and, with reference to the Joint Committee on Parliamentary Privilege of the United Kingdom Parliament, suggested

⁵¹ *Ibid* 149.

⁵² *Ibid* 148.

⁵³ Richardson P, Gault, Keith and Blanchard JJ (delivered by Keith J).

⁵⁴ *Buchanan*, supra note 2, 148.

⁵⁵ *Ibid*.

that the protection afforded by article 9 should be confined to a limited number of core activities.⁵⁶ In considering the corporate purpose of the article, the Court of Appeal emphasised that the privilege was given to the House collectively rather than to individual Members and argued that while the underlying purpose of such protection was clear, the meaning of its terms was still uncertain.⁵⁷

The majority went on to consider the nature of the phrase ‘proceedings in Parliament’. Their Honours held that as the law currently stood, proceedings in Parliament could be referred to without impinging on the article 9 protection to establish what was said or done in Parliament as a historical fact and to assist in finding the meaning of legislation.⁵⁸ Keith J stressed, however, that beyond these exceptions to article 9 there was still uncertainty about the scope and limitations of the protection. After consideration of leading authorities on parliamentary privilege,⁵⁹ the Court concluded that, while it must follow Privy Council cases on appeal from New Zealand and that other such cases were highly persuasive, they did not establish a consistent principle and could only be applied in a situation of factual congruity that was not present in the case at hand.⁶⁰

The majority then analysed the factual situation in light of the doctrine of effective repetition.⁶¹ Two facts were critical to its decision and, in the Court’s opinion, distinguished the current case from previous authorities. The first was the fact that the defamatory statement consisted of an unprivileged statement. Secondly, that the non-privileged statement was made after the privilege statement.⁶²

The majority accepted the analysis of the cases put forward by the plaintiff and found that those reading the public statement would be likely to understand it by reference to the defamatory statement made in Parliament and available in Parliament’s published, absolutely privileged, proceedings.⁶³

On this basis the Court decided that the proceedings would not breach the underlying principle of article 9 as it would not have inhibited Jennings “*at the time he spoke in the House*”⁶⁴ (original emphasis). This

⁵⁶ Ibid 153.

⁵⁷ *Buchanan*, supra note 2, 154.

⁵⁸ Ibid 158-159 (as well as other more specific exceptions).

⁵⁹ *Pepper v Hart* [1993] AC 593; *Hamilton*, supra note 30.

⁶⁰ *Buchanan*, supra note 2, 163.

⁶¹ See *Hyams*, supra note 42, *Beitzel*, supra note 36, *Laurance*, supra note 40.

⁶² *Jennings*, supra note 2.

⁶³ Ibid 164.

⁶⁴ Ibid.

decision relied on a literal reading of Lord Browne-Wilkinson's statement of principle in *Prebble*: in the current case the plaintiff was not relying on subsequent statements in parliament to establish content or to identify an earlier non-privileged statement. It was merely considered to provide insight into the meaning the public would have given to Jennings' subsequent comments. Such reference therefore would only be extending the existing right to refer to parliamentary proceedings to establish an historical fact.⁶⁵ In effect, the majority claimed that more general statements about wider principle, mutual self-restraint and non-intervention were of limited assistance and did not think that limits to article 9 protection should conform with Coke's statement of the law.⁶⁶

In holding that the doctrine of effective repetition was part of New Zealand law, the majority considered that the opposite finding would mean that members could, without censure, repeat that they stood by defamatory statements made in the House under the protective cloak of absolute privilege.⁶⁷

2 *Justice Tipping's Dissent*

Justice Tipping, in dissent, challenged the legitimacy of the doctrine of effective repetition and the reference that it allowed to parliamentary debate on two bases: first, his Honour considered whether reference could be properly made to establish defamatory meaning and second, whether it could be used to establish the identity of the plaintiff without necessarily impeaching or questioning 'proceedings in Parliament'.

Buchanan, in establishing an action in defamation, had to prove that the statements made outside Parliament had defamatory meaning. This was only possible if reference was made to Jennings' statements in debate. Justice Tipping considered that in doing so Buchanan was attempting to show that such comments would be understood as having a defamatory meaning outside the House and therefore he must be contending that Jennings had misled Parliament.⁶⁸ As a consequence, any defence Jennings attempted to raise, such as honest opinion or truth would involve an examination of those statements made in Parliament for their veracity, an outcome which could not possibly be reconciled with the article 9 privilege against questioning or impeachment.⁶⁹

⁶⁵ *Prebble v TVNZ*, supra note 20.

⁶⁶ *Buchanan*, supra note 2, 164-165.

⁶⁷ *Ibid* 163.

⁶⁸ *Ibid* 185.

⁶⁹ *Ibid* 186.

Justice Tipping found that repetition by a Member could only be actionable if the unprivileged statement was capable of establishing a defamatory meaning on a stand alone basis, with no requirement that reference be made to parliamentary proceedings.⁷⁰ His Honour also stressed that questioning words spoken in the House by referring to them to establish defamatory meaning was not legitimate.⁷¹ Justice Tipping found that this line of reasoning should not be open to the majority considering the statement in *Prebble* that section 16(3) of the Australian Parliamentary Privileges Act 1987 (Cth) was the true statement of the law.⁷² Section 16(3)(c) clearly states that it is unlawful to tender evidence of proceedings in Parliament for the purpose of “drawing, or inviting the drawing of, inference or conclusions wholly or partly from anything forming part of those proceedings in Parliament”.

Justice Tipping also disagreed with Buchanan’s assertion that such a reference to parliamentary proceedings could not logically inhibit the Member at the time he spoke in the House. His Honour viewed this claim as overly constraining the underlying rationale for the protection afforded by article 9 and cited *Prebble* as authority for the proposition that article 9 is but one manifestation of the wider principle.⁷³ As important as the policy not to inhibit the free speech of Members, his Honour stressed, was the concern to avoid the courts involving themselves in inquiries as to the truth and motives behind statements made by Members in debate.⁷⁴ Lying to and misleading the House are clearly matters which are subject to Parliament’s exclusive jurisdiction. In seeking to refer to statements made in Parliament to establish defamatory meaning, the plaintiff was contravening this fundamental principle. Such recourse to matters essentially within the jurisdiction of the House, Tipping J cautioned, could lead to conflict between the courts and Parliament.⁷⁵ Justice Tipping asserted, however, that even if a textual analysis of Article 9 were undertaken that Buchanan would still be necessarily ‘questioning’ what Jennings had said in the House.

Justice Tipping therefore concluded that there could not be a doctrine of effective repetition which allows a plaintiff to rely on parliamentary words to establish defamatory meaning as “[t]o do so

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.* 188.

⁷³ *Ibid.* 187-188.

⁷⁴ *Ibid.* 190.

⁷⁵ As warned against in *Prebble*, *supra* note 20 and *Pickin*, *supra* note 19.

necessarily involves questioning the veracity of the parliamentary words”.⁷⁶

As to whether it is legitimate to refer to parliamentary proceedings to establish the identity of the plaintiff, Tipping J also held that this would be in violation of article 9:⁷⁷

The idea that a plaintiff, in referring to identifying words in Parliament, is simply proving what was said there as a matter of history suffers from the problem that “questioning” and “proving as a matter of history” are not mutually exclusive concepts. In some circumstances to prove that words were said in Parliament necessarily involves questioning them. It will depend on what the plaintiff’s purpose is in proving that the words were spoken. If the purpose is to demonstrate that non-parliamentary words spoken by an MP have now become actionable by dint of what the MP has said in Parliament, the plaintiff is in substance questioning the fact that the MP has chosen to name him and thus create what, but for privilege, would be an actionable wrong. The plaintiff is not relying on the words spoken in Parliament purely as a matter of history, as the Privy Council put it in *Prebble*. The MP’s conduct in the House is in a real sense being questioned and in my view it would be inconsistent with the purpose and policy of parliamentary privilege to allow evidence to be given of the parliamentary words.

In coming to these conclusions Tipping J challenged the reasoning of the Australian cases that establish the doctrine of effective repetition in relation to parliamentary proceedings. His Honour criticised judgements such as *Beitzel v Crabb* for not giving enough weight to the “policy and purpose”⁷⁸ of article 9 and opposed the decision in *Laurance v Katter*, which allowed the plaintiff to refer to privileged statements to establish defamatory meaning, as necessarily questioning proceedings in Parliament. Justice Tipping found both the Australian decisions and the judgment of the Majority in the case at hand to be inconsistent with the statements of law and principle set out in *Prebble*.

⁷⁶ *Buchanan*, supra note 2, 190.

⁷⁷ *Ibid* 192.

⁷⁸ *Ibid* 183.

The Privy Council Decision

In its brief judgment, the Privy Council⁷⁹ approved of and affirmed the reasoning and decision of the majority of the Court of Appeal in holding that a Member of Parliament might be held liable for a subsequent unprivileged comment which effectively repeated defamatory statements made during parliamentary proceedings.⁸⁰ The Privy Council stated that, while it was an important constitutional principle that “the legislature and the courts should not intrude into the spheres reserved to another,”⁸¹ in this case:⁸²

...[R]eference is made to the parliamentary record only to prove the historical fact that certain words were uttered. The claim is founded on the later extra-parliamentary statement...The situation is analogous with that where a Member repeats outside the House, in extenso, a statement previously made in the House.

It is unfortunate that the Privy Council did not undertake a deeper analysis of the important constitutional issues arising in this case.

An Erosion of Parliamentary Privilege?

The decision may be criticised on three main grounds: first, the majority’s failure to more carefully apply the wider principles behind article 9; second, the illegitimacy of the doctrine of effective repetition; and third, the Court’s focus on overly formulaic concepts in determining whether a Member may be liable in defamation.

1 Constitutional Issues

The Court of Appeal and Privy Council have disregarded the wider constitutional significance of parliamentary privilege and article 9 protection of free speech in debate. While it is a function of the privilege to protect Members from being inhibited in Parliamentary debate, this is only a small part of the underlying protection provided by article 9 and the wider principle.⁸³ Parliamentary privilege also plays an essential role

⁷⁹ Jennings, *supra* note 2.

⁸⁰ *Ibid* 17-18.

⁸¹ *Ibid*.

⁸² *Ibid*.

⁸³ Joseph, “Constitutional Law” [2003] NZ Law Rev 387, 431.

in the constitutional balance. It protects Parliament from the control of both the courts and Crown to facilitate the effective performance of their legislative function.⁸⁴

This wider principle was discussed at length in *Prebble*. Lord Browne-Wilkinson treated article 9 and its protection of proceedings in Parliament from questioning or impeachment as secondary to the preservation of separation and mutual respect in the relationship between the Courts and Parliament. In more recent cases, however, there has been a trend for the courts to address parliamentary privilege as being encompassed by the article, without examining its wider implications.⁸⁵ This is evident in the decision of the Court of Appeal whereby the majority stated that wider principles, such as those stated in *Prebble*, were not of great assistance and instead relied upon the text of article 9. More general statements about wider principle were not “helpful in resolving this case.”⁸⁶ This focus on textual analysis contradicts the historical perception of the article as an expression of political will rather than a precise statement of law.⁸⁷ The subsequent judgment of the Privy Council gave only cursory consideration to the far-reaching constitutional implications of article 9. While their Lordships stated that “it is...an important principle that the legislature and the courts should not intrude into the spheres reserved to another”⁸⁸ they maintained that such concerns were not relevant in the case at hand:⁸⁹

In a case such as the present, however, reference is made to the parliamentary record only to prove the historical fact that certain words were uttered. The claim is founded on the later extra-parliamentary statement...

This superficial consideration of the constitutional reach of article 9 does not touch on one of the central issues at play in any parliamentary privilege decision, namely the implication any erosion of privilege has on the relationship of comity and mutual self-restraint which must exist between the courts and Parliament for constitutional stability. As such, neither the majority of the Court of Appeal nor the Privy Council gave the constitutional impact of such a decision the careful consideration it warranted.

⁸⁴ McGee, “The Scope of Parliamentary Privilege” [2004] NZLJ 84, 84.

⁸⁵ *Ibid.*

⁸⁶ *Buchanan*, supra note 2, 164.

⁸⁷ McGee, supra note 84, 85.

⁸⁸ *Jennings*, supra note 2, 595.

⁸⁹ *Ibid.*

2 *The Courts' Interpretation of Prebble and the Historical Exception*

While it is apparent that the courts have chosen to ignore the broader constitutional issues central to the judgment in *Prebble*, this reflects just one element of the contradictory limiting and expansionary interpretation of *Prebble* by the courts throughout the *Jennings* proceedings. General principles contained in *Prebble*, such as direct statements prohibiting the inference of improper motive or untruth and the authoritative status of section 16(3) of the Australian Parliamentary Privileges Act 1987 (Cth), were distinguished by the Court of Appeal through superficial factual differences and a supposed lack of consistency. In contrast, the statement of principle that Members ought not to be inhibited *at the time they speak* was seized upon in a highly literal sense.

Another example of such inconsistent application of *Prebble* is seen in the extension of the historical exception. This exception to the article 9 prohibition provides that reference could be made to parliamentary proceedings to establish something that was done or said in Parliament as a matter of history as long as this did not lead the court to question the motives or truth of statements made in the House.⁹⁰ In *Jennings*, however, this exception was used in an expansive fashion, providing the foundations of the defamation action by using such evidence to establish the defamatory meaning and the identity of the plaintiff.⁹¹

Prebble has been applied by both the Court of Appeal and the Privy Council in a highly selective manner, tailoring it to the circumstances of the case at hand without consideration of wider statements of principle which underscore this significant decision. The Court of Appeal's claim that there is a lack of consistency in statements concerning the scope and content of parliamentary privilege is also questionable. Statements made in *Prebble* were subsequently affirmed in their entirety in the decision of the House of Lords in *Hamilton v Al Fayed*.⁹²

3 *A Legitimate Doctrine?*

The doctrine of effective repetition was embraced almost unanimously as part of New Zealand law throughout *Jennings'* progression through the courts. However, in the author's opinion, the development of the

⁹⁰ *Prebble*, supra note 20, 11.

⁹¹ McGee, supra note 84, 87.

⁹² Supra note 30.

doctrine is illegitimate, both in its disregard for constitutional principles and its non-conformity with the language and purpose of article 9 itself.

The inherent uncertainty and artificiality of effective repetition was raised by the Solicitor General⁹³ when labelling the doctrine a ‘fictional device’.⁹⁴ The defendant, in being held liable for defamation, has not actually repeated defamatory comments made in Parliament. To do so would be clearly outside the protection of parliamentary privilege. In fact, the defendant has only been deemed to have repeated the offending comments. The doctrine’s status as a “legal fiction” is underlined by comments made by both the Court of Appeal and Privy Council. The majority of the Court of Appeal stressed that the doctrine of effective repetition was not being used to question privileged parliamentary statements but rather the “properly understood”⁹⁵ subsequent unprivileged statements. In order to properly understand the unprivileged statement, however, the parliamentary statement must in essence be incorporated into the later statement. There is in effect no actual repetition, but an integration of the earlier privileged statement to provide the defamatory meaning.

The judgment of the Privy Council provides further evidence of the fictional nature of the doctrine. Their Lordships state that the “situation is analogous with that where a Member repeats outside the house, *in extenso*, a statement previously made in the House.”⁹⁶ The phrase ‘in extenso’ provides confirmation of the fact that the court is in fact *extending* the true definition of repetition. This also avoids consideration of the fundamental reasoning behind holding Members liable for repetition of statements made in Parliament. In such circumstances the action can be founded without reference to privileged statements and is defamatory in and of itself.

The development of effective repetition was justified in the Court of Appeal decision because it would not have inhibited the Member *at the time they spoke* in Parliament. This development from comments made in *Prebble* places great emphasis on the sequence of statements, particularly whether the privileged statement preceded the unprivileged statement. Therefore, as in *Peters v Cushing*, effective repetition would not be available and no defamation action would lie if the statement in Parliament was subsequent to the non-privileged comment. This distinction is highly superficial and unprincipled given that the effect on

⁹³ The Solicitor-General represented the Attorney-General at court.

⁹⁴ *Buchanan*, supra note 2, 152.

⁹⁵ *Ibid* 164.

⁹⁶ *Jennings*, supra note 2, 595.

the rights of the individuals who have sought compensation is the same and that it is only a matter of chance as to whether liability will fall on the defendant.

If the application of article 9 protection were so confined, it would be left up to the courts to decide on a case by case basis whether reference to parliamentary materials would negatively impact on the freedom of speech as it would be impossible for Members to know a priori whether the protection would apply.⁹⁷ Members could in fact be inhibited at the time they spoke as they might decide, given the uncertainty as to whether comments outside of the House could found a defamation action and examination of statements in Parliament, that it would be safer not to raise the issue at all.⁹⁸ The issue is exacerbated by the potential for media pressure. While the danger of such inhibition is hypothetical, the operation of the doctrine in this way would still be in conflict with one of the fundamental purposes of article 9.⁹⁹

The Courts stressed that Members are able to acknowledge statements made in Parliament without affirming them. This distinction, however, is itself highly ambiguous and is likely to leave Members in a state of uncertainty, especially when debating political matters in the media. Even on a basic interpretive level the differences between the terms 'acknowledge' and 'affirm' are negligible. In the *Oxford English Dictionary* 'acknowledge' is defined as "to agree to the truth of" while 'affirm' is defined as "to assert strongly, state as fact".¹⁰⁰ It would seem counterintuitive (tautologous almost) that a Member could agree to the truth of a statement they had made in Parliament and yet not be able to assert this truth strongly. Thus the Member seems to be expected to judge, on a case by case basis, what may amount to an effective repetition. At the current time this may be met by refraining from saying 'I do not resile from what I said.' Tomorrow, the line in the sand may have moved.

This legal development does not reflect the modern political arena, whereby the public interest is not limited to the desire for free speech in parliamentary debate, but extends to political free speech which is usually expressed through the mass media.¹⁰¹ Responses such as "no comment" are unlikely to meet the needs of the public, or, arguably, the aims of democracy.

⁹⁷ McGee, *supra* note 84, 88.

⁹⁸ Allan, "Parliamentary Privilege: Will the Empire Strike Back?" (2002) 20 NZULR 205, 212.

⁹⁹ *Ibid* 213.

¹⁰⁰ *Ibid* 215.

¹⁰¹ Joseph, *supra* note 83, 431.

The doctrine of effective repetition and the *Jennings* decision also appear to conflict with the text of article 9 itself. Essentially, under the article, parliamentary proceedings cannot be impeached or questioned outside the House. In referring to statements made to establish the defamatory meaning the court is necessarily questioning proceedings in parliament. It is essentially judging whether the statements made were truthful and is looking to the motives of the Member. This assertion is made clearer when considering the English Attorney-General's analysis of the definition of the terms 'question' and 'impeach' in *Pepper v Hart*:¹⁰² questioning occurred "where it was proposed to use parliamentary statements to support an action arising independently outside the House" and to impeach was "to attempt to hold Members or others directly liable for their parliamentary statements".¹⁰³ In applying the doctrine of effective repetition, the courts are in fact using privileged statements to support an independent action and, arguably, could be holding Members directly liable for what they have said in the House.¹⁰⁴ Therefore, the doctrine of effective repetition appears to be illegitimate on the terms of article 9 itself.

While the doctrine of effective repetition seems at best of questionable legitimacy, the majority of the Court of Appeal stressed that there was a long line of authority in both Australia and New Zealand supporting this development and further stated that there had been no critical response from the legislature or commentators.¹⁰⁵ This statement seems to imply that there is a highly authoritative background and development of effective repetition, when in reality the only authorities for application of such a doctrine to parliamentary privilege are at the Australian state court level.¹⁰⁶ Such cases, therefore, have a relatively low persuasive value. They have not come before Australian federal courts, particularly the High Court of Australia, where a more authoritative constitutional dialogue would take place.

In addressing New Zealand authorities, the Court of Appeal in *Buchanan* relied on dicta from Cooke P (as he then was) in *Hyams* to the effect that:¹⁰⁷

"[T]here is no reason of common sense or policy why some artificial legal barrier should be placed in the way of the

¹⁰² *Supra* note 59. This analysis found favour with Lord Browne-Wilkinson.

¹⁰³ McGee, *supra* note 84, 88.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Buchanan*, *supra* note 2, 168.

¹⁰⁶ *Beitzel*, *supra* note 36; *Laurance* *supra* note 40.

¹⁰⁷ *Hyams*, *supra* note 42, 656.

plaintiff in proving what the public in fact would have understood from what was published to the public.”

This judgment, however, was not made in the context of parliamentary privilege and did not even involve a Member of Parliament. Therefore any construction of effective repetition on a “common sense” basis would seem spurious.

The Court of Appeal’s statement that there had been a lack of critical response from legislators seems to overlook the Attorney-General’s decision to seek leave to participate in the proceedings on the basis that the case was likely to involve important issues concerning the scope of parliamentary privilege.¹⁰⁸ This comment also ignored the strong argument made on behalf of the Attorney-General to the effect that the application of such a doctrine would limit parliamentary privilege and cause confusion and uncertainty at a practical level.

Overall it appears that both the Court of Appeal and the Privy Council have embraced effective repetition on the most insecure of foundations and, in doing so, have broken with both the constitutional and textual understanding of the protection provided by article 9. Ultimately, parliamentary privilege has been unacceptably eroded by these decisions.

IV LEGISLATIVE REFORM

Legislative reform may prove to be the most effective method with which to curb the Court’s erosion of parliamentary privilege in *Jennings*. Before such action is taken, however, it is necessary to consider both what form any legislation should take and any negative implications potential amendments might have. There are three clear legislative options: first, a restatement of article 9 of the Bill of Rights 1688 in a fuller and clearer statutory form; second, the extension of absolute privilege through the amendment of provisions in the Defamation Act 1992; and third, the extension of qualified privilege by amending the Defamation Act 1992.

¹⁰⁸ Allan, *supra* note 98, 219.

1 Restatement of Article 9 in a Fuller and Clearer Statutory Form

This reform has already been made in Australia in section 16 of the Parliamentary Privileges Act 1987 (Cth), which was a response to an exceedingly narrow reading of article 9 by the court in *R v Murphy*.¹⁰⁹ Section 16 states:

16 Parliamentary Privilege in Court Proceedings

(1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.

(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, *proceedings in Parliament* means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

- (a) the giving of evidence before a House or a committee, and evidence so given;
- (b) the presentation or submission of a document to a House or a committee;
- (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
- (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

- (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
- (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

¹⁰⁹ *Supra* note 24.

- (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

This legislative statement was held in *Prebble* to have codified “what had previously been regarded as the effect of art 9” and subs (3) was considered to be “the true principle to be applied”.¹¹⁰ Section 16 is a highly comprehensive legislative assertion of the contents of article 9 and in some ways is preferable to minor amendments to the ambit of absolute privilege as it deals with the root of limiting interpretations by the courts; uncertainty as to the precise scope of the protection afforded by article 9 and the statutory meaning of its terms.

Section 16(3) clearly limits the nature of evidence open to the Court to examine when debating issues of parliamentary privilege. This subsection, however, has been subject to great variations in interpretation within the Australian judiciary. *Laurance*,¹¹¹ a central authority for the establishment of the doctrine of effective repetition in the Court of Appeal decision, was decided after the introduction of the Parliamentary Privileges Act. In this case the Queensland Court of Appeal held that subsection (3) should be applicable only in situations which offended article 9:¹¹²

[S]ubs (3) makes it unlawful in any such proceedings to tender or receive evidence, ask questions or make statements, submissions or comments concerning proceedings in parliament by way of or for any of these purposes if that would impeach or question the freedom of proceedings in parliament.

This interpretation seems to be in direct conflict with subsection (1), which states that the latter provisions were to operate in addition to the pre-existing protections encompassed by article 9.

This narrow interpretation of section 16 was, however, challenged in *Rann v Olsen*,¹¹³ in which Doyle CJ found that there was no need to limit the scope of the privilege to the existing ambit of article 9 and that subsection (1) and other subsequent provisions indicated that section 16 was in fact to have a more expansive operation than the original article. The Judge also found that when subsection 16(3) was

¹¹⁰ *Prebble*, supra note 20, 7.

¹¹¹ *Laurance*, supra note 40.

¹¹² *Ibid* 489-490.

¹¹³ (2000) 765 SASC 83.

given its ordinary meaning it prohibited the plaintiff from tendering evidence, asking questions and making submissions for the purpose of questioning the truth of the defendant's motives.¹¹⁴

On this interpretation of section 16 it appears that a *Laurance* effective repetition argument would not succeed in an Australian court today, as even the Supreme Court of Queensland admitted that such reference to parliamentary proceedings would come within the proscribed conduct of subsection 16(3)(c). While statements of principle in *Laurance* have subsequently been challenged in *Rann v Olsen*, *Laurance* still illustrates the latitude that may be exercised by the courts even when interpreting supposedly clear legislation. Greater clarity could perhaps be achieved by a clear statement that the protection for Members in such provisions is not limited by article 9, and that provisions should be judged on their own terms.

Such codification of article 9 protection would also increase the justiciability of such issues (which itself might be viewed as a negative) and would not touch on underlying constitutional issues, such as the fostering of an atmosphere of comity between the Courts and Parliament. Legislative restatement of article 9 protection can also produce, in the words of the majority of the Court of Appeal in *Jennings*, "conflicting or unclear answers."¹¹⁵ It is possible that a New Zealand Court could apply a restrictive interpretation of any such provisions as in *Laurance*.

Extension of Absolute Privilege under the Defamation Act 1992

The Defamation Amendment Bill, introduced by Dr Richard Worth MP, which is a direct response to the *Jennings* decision, supports this type of reform. The Bill would amend subsection 13(1) of the Defamation Act 1992 which currently states that "Proceedings in the House of Representatives are protected by absolute privilege".

This statement of the law presupposes the existence of article 9 and relevant case law to define 'proceedings in the House' and the true ambit of the protection afforded. The proposed amendment would add the following words to subsection 13(1):

[T]he privilege continues for the benefit of a Member of Parliament in proceedings for defamation brought against him or her for a statement made outside the House unless the

¹¹⁴ *Ibid* [407].

¹¹⁵ *Buchanan*, *supra* note 2, 154.

Member repeats the substance of the allegation giving rise to those proceedings.

This would send a clear message to the courts that the legislature viewed the *Jennings* decision as a limitation on their parliamentary privilege, but it will not necessarily have the effect sought due to the court's interpretive capacity.

The ability of the courts to interpret supposedly clear legislation in a manner contrary to the intent of Parliament has been illustrated in the Queensland Court of Appeal's interpretation of section 16 of the Parliamentary Privileges Act 1987 (Cth) in *Laurance*. The explanatory note to the Defamation Amendment Bill focuses on extending absolute privilege to cover situations where a potentially defamatory statement made inside the House has been affirmed but not repeated. However, it is possible that a determined court could interpret the amendment's clause stating that "unless the Member repeats the substance of the allegation giving rise to those proceedings" as not prohibiting the court from applying the doctrine of effective repetition, as in *Jennings* the courts deemed that the defendant had repeated the substance of the allegation outside of the House. This amendment does not rule out the implication of effective repetition or incorporation by a court. This interpretive avenue remains due to the ambiguity and interpretive scope attached to the words 'repeat' and 'substance'. Such an amendment is also likely to result in great argument over whether the "substance of the allegation giving rise to the proceedings" had been repeated, therefore adding an ambiguous preliminary element when establishing whether absolute privilege arises.

Therefore, while such an extension of absolute privilege in the Defamation Act 1992 might be a prompt and concise means of responding to the *Jennings* decision and the doctrine of effective repetition in general, the amendment might not fulfil its intended purpose given the interpretive flexibility open to the courts.

Extension of Qualified Privilege

Another option would be to extend the ambit of qualified privilege in subsection 16(1) and Part 1 Schedule 1 of the Defamation Act 1992 to cover situations where a Member has over-stepped the mark in affirming a statement made in the House. Although such a proposal might at first seem attractive it has a fatal flaw. If enacted such an amendment would be subject to section 19 which states that:

- (1) In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.
- (2) Subject to subsection (1) of this section, a defence of qualified privilege shall not fail because the defendant was motivated by malice.

Any argument based on section 19 could lead to an examination of the motives of the defendant when making an unprivileged statement. This would allow reference to be made to parliamentary proceedings to establish motive, thus defeating the purpose of any such reform.

Comment

Any legislative action in regard to effective repetition and the *Jennings* decision should form part of a comprehensive review of parliamentary privilege and its constitutional function. Those taking part in the review should also be aware of the potentially negative outcomes of any legislation, such as the possibility of unfavourable interpretation and the encouragement of greater justiciability in the area of parliamentary privilege as a whole.

Without careful drafting, any attempt to extend the ambit of absolute privilege by amendment of the Defamation Act 1992 could be rendered impotent by an unfavourable interpretation in a future judgment. A more comprehensive review and statutory restatement of the protection given by article 9 is needed, taking a similar form to that of the Australian Parliamentary Privileges Act 1987 (Cth) but with some clarifying adjustments.

Such a comprehensive statement of parliamentary privilege might shift emphasis away from article 9 and narrow readings of its text in favour of a wider more principled approach as favoured in *Prebble*. At the same time, all branches of government must be made aware that parliamentary privilege and the principles and constitutional safeguards it seeks to uphold are not confined to or limited by any legislative statement, but continue alongside as a constant reference point and ultimate check.

V CONCLUSION

Jennings v Buchanan undoubtedly marks the progressing tide of erosion of the parliamentary privilege afforded Members by article 9 of the Bill of Rights 1688. Such erosion is evident in the courts' disregard for the wider principles behind article 9 and their development of the "fictional"¹¹⁶ and illegitimate device that is the doctrine of effective repetition.

Legislative reform is clearly necessary to remedy the limitations placed on parliamentary privilege by the case. It is essential that any legislative action taken, however, should form part of a comprehensive review of the privilege and its constitutional function. Statutory restatement of article 9 in an extended form similar to that of section 16 of the Australian Parliamentary Privileges Act 1987 (Cth) would provide clarity and remove the possibility of overly narrow textual analysis of the privilege. Ultimately, such a decision may augment existing tensions between the courts and Parliament when considering the determination of the scope and limitations of parliamentary privilege, and may strain the delicate constitutional equilibrium existing between these two branches of government.

¹¹⁶ *Buchanan*, supra note 2, 152.