

PROCEDURE AND PRIVILEGES COMMITTEE

REPORT ON AN ORDER OF REFERENCE MADE DECEMBER 5 2002 RELATING TO TABLING A PAPER ON JUNE 18 2002

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1. The background to the reference

On June 25 2002, the President referred a petition to the Environment and Public Affairs Committee (EPAC) under SO 134(f)(iii). The petition was from Barry G Waller denying the factual accuracy of statements and allegations set out in an affidavit in the name of Michael J Murphy. The affidavit had been tabled, by leave, by Hon John Fischer during the adjournment debate on June 18 2002.

EPAC, while considering the Waller petition, reported to the House that material supplied by the petitioner, if verified, raised questions about possible breaches of the privileges of the House with respect to the tabling of the affidavit which EPAC was not empowered to investigate. For that reason, EPAC recommended that those matters be referred to the Procedure and Privileges Committee. The House made the reference on December 5 2002.

In June 2003, the EPAC tabled its report on the petition.¹ Consideration of matters of privilege by this Committee had been deferred pending EPAC's report on the merits of the Waller petition.

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2. Matters of privilege restricted to tabling of affidavit

Evidence provided to EPAC includes a suggestion that the affidavit came into existence at the behest of persons connected with One Nation. That is not a matter for this Committee's inquiry. It would be different if the evidence had established third party involvement or influence in any decision that lead to the tabling of the affidavit.² Mr Murphy has never suggested that any person sought to persuade or pressure him to have the affidavit tabled³ and nothing before this Committee raised the issue. Accordingly, there was no basis for pursuing that line of inquiry.

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¹ EPAC, Report on Petition of BG Waller, 7th Report 2003.

² References to named persons in One Nation members' offices are as points of contact or being concerned with Mr Murphy before preparing the affidavit.

³ As noted later in this report, Mr Murphy has disclaimed prior knowledge of an intention to table the affidavit.

In the result there were 2 persons whose involvement with tabling the affidavit came within the scope of this Committee's inquiry – Mr Murphy and Hon John Fischer⁴.

3. The exclusive jurisdiction of the House to control its proceedings

5 The privilege of freedom of speech afforded proceedings of the House and its committees allows members and non-members alike to speak with absolute immunity from legal or other consequences that might otherwise result. Because the immunity is absolute, fact and fiction, equally, are protected, but it should be noted that the protection applies within an extremely narrow compass.⁵

10 The immunity aspect of the privilege is relevant only as between Mr Murphy and Mr Waller and the bar it presents to the latter's right to commence defamation proceedings. It is the corollary of the immunity, the exclusive right of the House to determine the lawfulness of its own proceedings, that is relevant here.⁶

15 Freedom of speech, although exercised by members and non-members, is a privilege of the representative components of the parliamentary institution.⁷ The immunity it provides from external inquiry or adverse consequences does not confer a right to act irresponsibly or a license to impugn another person gratuitously. What is acceptable use, and what is misuse or abuse of the privilege is to be judged by the House and not in any court or other forum.

20 In context, "freedom of speech" includes things done in the course of a parliamentary proceeding such as, in this case, obtaining leave of the House to table a document. But causing a document to be laid before the House, or the act of tabling itself, does not attract issues of privilege.

4. Nature of the breach of privilege

25 Any breach of privilege by reason of tabling Mr Murphy's affidavit falls into the category commonly described as abuse of the process of the House. The *Easton* case illustrates the type of acts (or omissions) that may be held to constitute a breach. Abuse of process can take many and varied forms and will continue so to do for as long as ingenuity remains a human characteristic. It follows that what amounts to an abuse of process stands to be judged on its own facts and not because the matter falls or does not fall into a predetermined class of acts previously found to constitute an abuse of process.

35 A breach of privilege or a contempt of the House may occur without any intention by the person that his/her acts should amount to a breach or a contempt. The mere doing of the acts constituting the breach or contempt is sufficient. It is not necessary to show that the person intended those acts should be seen as a breach or a contempt. The presence or absence of intent is relevant to, and may have a significant influence on the House in deciding what, if any, penalty should be imposed.

⁴ In Mr Murphy's case, the current action taken by the House on the recommendation of the EPAC has no relevance to Mr Murphy's involvement (if any) in tabling of the affidavit and whether that conduct raises a matter of privilege.

⁵ A member who says in a doorstep interview "I stand by what I said [in the House]" may find that a defamation action can be taken on the basis that the member is deemed to repeat by adoption what was said inside the House outside the House – *Buchanan v Jennings* [2002] NZLR 145 (NZ Court of Appeal)

⁶ Although imprisoned for failing to obey an order of the House, it was the petition of Brian Easton the House found was an abuse of the right of petition and therefore a breach of privilege.

⁷ Neither the House nor a member may waive parliamentary privilege unless authorized by enactment. The *Defamation Act 1996 (UK)* allows waiver by a member or non-member in defamation litigation so far as it applies to that person. By reason of s 1 of the *Parliamentary Privileges Act 1891 (WA)* apply Commons' privileges, the UK Act changed WA law as well.

Conversely, mind and body must combine before abuse of process is to be found. Whatever manifestation the breach takes in a particular case, it is essential to show that what the person did was done in the knowledge that the evidence given, or the document provided, was false or misleading and the person intended that the House should be deceived or misled by the evidence given or the form or content of a document provided.

Without the threshold requirement that there be an intent to mislead or deceive, this Committee could find itself swamped if the mere physical act, shorn of the improper intent, constituted an abuse of process. Were innocent misrepresentation, mistakes of fact, and editorial error sufficient to constitute abuse of process, cases would arise on a daily basis. Obviously there has to be something more before issues of privilege can be put in issue.

It is against this background that the involvement of Mr Murphy and Hon John Fischer was examined

4.1 Mr Murphy

As previously stated, the involvement of other persons in the preparation of Mr Murphy's affidavit falls outside this Committee's order of reference and there was nothing to suggest that other persons sought to influence Mr Murphy to have the affidavit tabled. Indeed, the evidence points to the conclusion that Mr Murphy never had any intention that his affidavit should surface in the Legislative Council.

The EPAC noted in its report –

“
The Committee has seen nothing to suggest that Mr Murphy, personally, sought to have the affidavit tabled or that its contents be the subject of a parliamentary inquiry. Who decided to put the affidavit before the Council, and the reasons for so doing, have no bearing on the purpose of this Committee's inquiry

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The wealth of material supplied to EPAC puts beyond any doubt Mr Murphy's genuinely-held beliefs, and his determination to obtain vindication of those beliefs by means of an inquiry, eg, the recent Poice Royal Commission.⁹ The quote in ¶6.2 of EPAC's Report, attributed to Mr Murphy, suggests that tabling was done without his prior knowledge and was an initiative of Hon John Fischer.

There is sufficient, uncontradicted, evidence for this Committee to conclude that Mr Murphy had no intention to have his affidavit tabled and did not prepare it for that purpose. It would be perverse to find that Mr Murphy, unaware that his affidavit would be tabled, was nonetheless guilty of abusing the process of the House and thus in breach of privilege.

The Committee finds that there was no breach of privilege committed by Mr Murphy with respect to the tabling of his affidavit. On that basis, it was unnecessary to consider how this Committee would proceed had the finding been to the contrary.

⁸ *Waller Petition*, EPAC, June 2003, §7.15, p.6.

⁹ *Royal Commission into Whether there has been Corrupt or Criminal Conduct by any Western Australian Police Officer* (Jan 2004)

4.2 *Hon John Fischer*

The immunity derived from freedom of speech in proceedings in parliament applies whether used as a sword or shield and regardless of its likely effect on others. As already noted, the privilege exists for the community's benefit. As the community's "trustee" the House is entitled to insist that the privilege will be used responsibly and with honesty of purpose. It is that breach of trust that the House will treat as an abuse or misuse of the privilege.

In the present context, the issue for the Committee was reduced to 2 questions alternative to each other, viz –

1. Did Hon John Fischer intend to mislead the House when he obtained leave to table the affidavit when he knew that –
 - (a) the truth or accuracy of assertions and allegations in the document were disputed; and
 - (b) in respect of one matter, the deponent had unreservedly published a retraction of the same allegations in 1994 as part of a settlement of proceedings in the Federal Court,

OR

2. Did Hon John Fischer breach privilege by acting recklessly in tabling the affidavit, not caring about the truth or accuracy of what it contained?

Tabling the affidavit was not an isolated act by Hon John Fischer. Documents annexed to EPAC's Report show that Mr Fischer had taken an interest in Mr Murphy's grievance(s) since 2001. That interest had translated, *inter alia*, into Mr Fischer putting questions to the Premier, and referring to the grievance in a second reading debate. Correspondence had passed between him and a person named in the affidavit and that person's solicitors relating to the 1994 Federal Court action.¹⁰ Mr Fischer was made aware that the settlement included Mr Murphy's undertaking not to make the same or similar allegations at any time in the future; the affidavit breached that undertaking. The member's letter to the solicitors for Mr McLean of March 26 2002 shows that he was fully aware of the 1994 retraction but was also aware of, and disposed to accept, Mr Murphy's assertion that the retraction had been made under duress.¹¹

It does not follow that because evidence of a dispossession of property fails to persuade a court that it was done unlawfully, the truth of the allegation is thereby disproved. Mr Murphy asserts that he abandoned the litigation (and published his retraction "under duress") because his evidence did not meet the requisite standard of proof. It was open to Mr Fischer to give credence to that assertion and the basis of the litigation that Mr Murphy had been dispossessed of his property by fraudulent acts and official corruption attributable to a number of persons. Mr Murphy's view may not be widely held but advancing it, as was done by tabling the affidavit, does not make Mr Fischer reckless. To the contrary, it is obvious that Mr Fischer did care about the truth of the allegations and did not consider them to be fanciful.

¹⁰ Cf ¶7.17-7.20 of EPAC report for summary of this case and its aftermath.

¹¹ The retraction published in the *West Australian* July 23 1994 was drafted by the solicitors for the respondents. The retraction published in the same paper on September 29 1994 was drafted by M's own solicitor. Both retractions were made unreservedly.

5 A sympathetic member in his/her electorate office does not become a dishonest member in the House because the member brings a matter within the protection of parliamentary privilege. It may have been imprudent to provide absolute immunity to a document made under oath knowing that the deponent, by repeating his allegations, was in breach of a settlement that he would never repeat them. However, that matter is one of many contained in the affidavit. The member had no authority to excise that part of the affidavit and seek to table the expurgated version. Moreover, the member's remarks show that he intended that the affidavit should speak for itself.

10 It was obvious to the Committee that Mr Fischer believed that the affidavit contained factual matter whose accuracy remained arguable. He tabled the affidavit to better inform members of events where allegations of corruption of, and by, public officers were made. Significantly, Mr Fischer made no claim as to his belief in their truth.

15 Distress, or loss or damage, suffered by a person that is attributable to what is said on an occasion of absolute privilege is not relevant to a finding that the privilege has been misused or abused. That finding arises from failing to act honestly and having an intention to mislead or deceive the House. The public interest depends on upholding the duty to act honestly in a parliamentary proceeding to the same extent that it applies in judicial proceedings.

5. Finding

20 The Committee finds with respect to the matters contained in the Order of Reference that there has been no breach of privilege committed by Hon John Fischer or Mr M Murphy with respect to the tabling of the Murphy affidavit on June 18 2002.

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Chairman

30 April 8 2004