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Parliament of South Africa

SUBCOMMITTEE ON REVIEW OF THE ASSEMBLY RULES

Chairperson:
Adv M T Masutha

Committee secretary:
Victor Ngaleka ☎ 3824

Redistributed on Tuesday, 7 March 2006, with supporting document

NOTICE OF MEETING

Please note that a meeting of the subcommittee will take place as follows:

Date: Thursday, 9 March 20006
Time: 14:00 – 16:30
Venue: E305

DRAFT AGENDA

1. Opening and welcome
2. Apologies
3. Consideration of agenda
4. Resumption of discussion: Rules pursuant to adoption of Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act [Adv F Jenkins]
   - "Abuse" of freedom of speech
5. Consideration of minutes of meeting held on 13 December 2005 NCOP Joint
6. Matters arising
7. Closing

- Supporting document: Draft Rules pursuant to Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act (adjusted)
- Please forward apologies to vngaleka@parliament.gov.za

ANNEXURE 1
2006-03-09

Draft rules pursuant to the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004 – Assembly Rules – amendment following meeting of Sub-Committee on the Review of the NA rules on 13 December 2005

NA Rules in respect of having one committee to deal with matters relating to contempt of Parliament, misconduct and a written request to have a response recorded by a person other than a member:

Rule 1 to be amended to include the following definitions in the appropriate alphabetical position:

"**Act**" means the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004

"misconduct" means a breach of the standing rules of Parliament, as defined in the Act, by a member, except a breach of the Code of Conduct contained in the Schedule to the Joint Rules or conduct amounting to contempt of Parliament as defined in the Act.

The present rules 191 - 194 should be amended as follows:

Establishment

191. There is a Powers and Privileges Committee as required by section 12 of the Act.

Composition

192.

Option 1:

(1) Every party represented in the Assembly may nominate one member to be appointed by the Speaker. The majority party may nominate one additional member.

(2) The Committee may elect an acting chairperson when the chairperson is not available.

This option does not allow all the minority parties represented in the Assembly representation in the Committee, but is more reflective of the proportional chairperson when the chairperson is not available.

This option allows flexibility and is largely a copy of rule 200 relating to the composition of portfolio committees.

Meetings

193. The chairperson of the Committee convenes meetings of the Committee.

Functions

194(a) The Committee must consider any matter referred to it by the Speaker relating to contempt of Parliament or misconduct by a member or a request to have a response recorded in terms of section 25 of the Act, except a breach of the Code of Conduct contained in the Schedule to the Joint Rules.

(b)(i) Upon receipt of a matter relating to contempt of Parliament or misconduct by a member the Committee must refer the matter to the political parties represented in the Assembly then deal with the matter in accordance with ~~follow~~ the procedure contained in the Schedule to the Joint Rules.

(ii) The Committee must table a report in the Assembly on its findings and recommendations in respect of any alleged contempt of Parliament, as defined in section 13 of the Act, or misconduct.

(iii) If it found that a member is guilty of contempt or misconduct, the Committee must recommend an appropriate penalty from those contained in section 12(5) of the Act.

(iv) The Assembly may impose the recommended penalty, an alternative penalty contained in section 12(5) of the Act, or no penalty.

(c) The Committee may on its own initiative or upon request by the Speaker conduct research relating to, and comment on matters relating to the powers, privileges and immunities of Parliament~~, and report to the Assembly~~.

(d)(i) The Committee must consider a request to have a response recorded in terms of section 25(2) of the Act.

(ii) After receiving the request referred to in (i) above, the Committee must, without delay, ~~forward a copy of the~~inform the member or witness concerned that a request to have a response recorded has been received~~to the member or witness concerned~~, and thereafter consider the request.

(iii) In considering the request the Committee may invite verbal or written submissions by the member, witness or any other person concerned.

(iv) After considering the request to have a response recorded, the Committee must ~~recommend to the Assembly whether to~~ publish the response, refer it back to the person for amendments, or not ~~to~~ publish the response, having regard to the all relevant circumstances, including –

- Whether the statement could be defamatory if it was not protected by parliamentary privilege;
- Whether the statement was made wilfully;
- Whether the statement was withdrawn;
- The time elapsed since the statement was made;
- The content of the requested response; and
- Whether the statement amounts to abuse of privilege.

(v) If approved, the response must be recorded in the ATC.

Relevant rules of Part 3 of Chapter 15 could be amended as follows:

Abuse of privilege

320.

(1) A breach or abuse of the privilege provided for in sections 45(2) and 58 of the Constitution, or as set out in rule 44 of these Rules, is contempt of Parliament as envisaged by section 13(d) of the Act.

(2) The Committee established in rule 191 may make a finding that the privilege referred to in (1) above has been breached or abused only if the action complained of pertains to hate speech or is malicious and unrelated to the proceedings of Parliament.

Notes:

The Act requires that the section 12 Committee can consider whether a breach or abuse of privilege amounts to contempt of Parliament if the standing rules provide as such. However, as such a finding should be rational, it is necessary to set substantial guidelines pertaining to this function of the committee.

Paragraph 4.1.1.2 of the Report on Powers and Privileges of Parliament (January 1999) elaborates on the issue of abuse of freedom of speech in Parliament. The parliamentary privilege of free speech is essential for free debate in the Assembly, but is subject to the standing rules. However, the standing rules should limit this privilege only to the extent necessary.

In this regard chapter 5 of the NA Rules sets out limitation on time limits for speech as well as substantial limitations relating to reflections upon persons whose office is dependent upon a decision of the Assembly (rule 66) as well as matters sub judice rule (rule 67). In my view it is not necessary that the present rule intrude upon these issues that are essentially in the domain of the Presiding Officer.

Furthermore, the remedy to request to have a response recorded covers some issues relevant in deciding what speech constitutes breach or abuse of privilege. As this remedy is contained in section 25 of the Act, it is not necessary to include it in the rule under discussion.

In my opinion, the necessary issues not covered by the rules relate to hate speech and malicious speech unrelated to parliamentary proceedings. The Committee considering whether speech amounts to hate speech could use the available body of jurisprudence concerning hate speech. Similarly, the Committee can consider whether malicious speech (in other words speech intended to do harm) is related to parliamentary proceedings. The concept "parliamentary proceedings" is intended to refer to matters considered parliamentary similarly to section 20 of the Act.

Fines

321. The amount of a fine that can be imposed under the Act for each of the offences mentioned therein, and for each offence referred to in these Rules or any resolution

of the Assembly, must be determined in every case by a resolution of the Assembly; but such fine may not exceed the amounts provided in the Act.

Recovery of fines

322. All fines must be recovered by the Secretary and paid into Parliament's bank account.

Fines remitted

323. A fine or portion thereof may be remitted by resolution of the Assembly.

Additional draft NA rule 332:

Request to have a response recorded by persons other than members

332. The Secretary must refer a written request to have a response recorded by a person, other than a member, regarding a statement or remark made by an Assembly member or a witness in or before the Assembly, a committee of the Assembly, or in or before a joint sitting of the Houses or joint committee, to the Speaker.

privilege and the necessary separation between the courts and Parliament and following the lead of the US Supreme Court, interpret the provisions to encompass the full traditional privilege. Relying on this obviously carries a risk; it also leads to uncertainty as it would require litigation to clarify the situation. A more cautious approach would be either to amend the Constitution to make it clear that all the elements of the privilege referred to above are covered or to include in an Act of Parliament a fuller description of the privilege.

4.1.1.2 Abuse of freedom of speech and limiting freedom of speech in Parliament.

Although freedom of speech in Parliament cannot be limited in the usual way (by common law or statutes),[24] the Constitution subjects the freedom of speech in Parliament to the Rules and Orders. At present the *Standing Rules for the National Assembly* do this in two ways:

(i) by controlling the proceedings of the Assembly (limiting the time of debates, structuring the way in which different issues are to be dealt with etc); and

(ii) by specific provisions controlling the content of speech (interruptions are not permitted - rule 80, irrelevance or repetition may be stopped - rule 83, offensive or unbecoming language may not be used - rule 96).

These provisions have two main purposes. First they control debate, allowing the presiding officer to maintain order in the House and to ensure that debate appropriate to a democracy occurs. Secondly, they compensate to some extent for the absence of normal remedies for defamatory speech. Thus although a member cannot bring a legal action for defamation against another member, the presiding officer protects members by controlling the use of defamatory language.

One implication of this is that legislation outlawing or criminalising certain types of speech, such as hate speech, for instance, would not apply in Parliament. However, parliamentary rules and orders could impose similar limits on speech.

Cross-parliament sledging: It is considered unparliamentary to use abusive language or impute dishonesty to other members of the same House. In South African parliamentary practice this does not extend to members of other legislatures. Abusing members of other legislatures is known as 'cross-parliament sledging' and can become particularly problematic during elections if national and subnational elections are not synchronised.

As far as we can ascertain, most jurisdictions do not regulate this matter. However, Standing Order 193 of the Australian Senate prohibits Senators from making allegations about members of State and territory parliaments as well as ... members of the

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[24] For instance, an Act of Parliament relating to defamation cannot limit the right nor is the right subject to limits on speech imposed by the Bill of Rights (such as section 10 (human dignity)). See *MSM Sharma v SriKrishna Sinha (Searchlight case)* All India Reporter 1959 SC 395 cited in Kaul and Shadkdher *Practice and Procedure of Parliament* (4th ed S C Kashyap) p 206.

Commonwealth House of Representatives.[25] Odgers comments that this order reflects the 'need for mutual respect between ... the Commonwealth and state governments'. In South Africa, a rule such as this would be consonant with our constitutional commitment to co-operative government.[26]

Parliament, cases and judges
Two rules regulate discussion of matters relating to courts in Parliament, the so-called sub judice rule which disallows discussion of matters in which a judicial decision is pending and a rule which prohibits discussion of judicial conduct except by means of a motion demanding dismissal of the judge.

National Assembly rule 100 and NCOP rule 44 contain the so-called sub judice rule. Thus the NCOP rule states: 'No delegate may reflect on the merits of any matter on which a judicial decision is pending.'

The basis of the rule is two-fold: first that cases should not be prejudiced by their discussion in Parliament and, secondly, that the independence of the judiciary should be maintained and the separation of powers between Parliament and the judiciary respected.

This provision is not uncontroversial. The Standing Rules of the Gauteng Provincial Legislature (Version 3, Revision 10, 1998) contain a revised version of the rule: 'In the interests of preserving the rights of litigants to a fair trial, members shall refrain from comment upon matters pending before the courts, which actually interfere with the proper administration of justice.'

In reconsidering the rule consideration needs to be given to the fact that Parliament itself may be a party to court proceedings (as in the present *De Lille* case) and that in such circumstances prohibiting all discussion of the matter is inappropriate.

Reflections on the holders of an office whose removal is dependent on a decision of the House: National Assembly rule 99 disallows any reflection on the 'competence or honour' of anyone (including judges) whose removal from office is dependent on a resolution of the house unless such comments are made 'upon a substantive motion alleging fact which, if true, would in the opinion of the Speaker *prima facie* warrant such a decision [ie removal]'. This rule serves a number of functions. It protects the independence and dignity of holders of certain offices and ensures that, if a substantive motion for removal is introduced, challenges to the fairness of the procedure cannot be based on the fact that views were aired on the matter before.

The rule that judicial conduct may not be discussed has been criticised by Gilbert Marcus

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25 Odgers p 217.

26 Each legislature would have to adopt such a rule independently. The constitutional protection of freedom of speech in provincial legislatures (section 117(1)) means that the national sphere could not require provinces to adopt it.

who argues that it is too restrictive.[27]

The rule carries with it the concern that Parliament's oversight role may be compromised. For instance, the Human Rights Commission, Pubic Protector, Auditor-General and other chapter 9 institutions report to Parliament. In debating those reports, parliamentary committees may wish to comment on the quality of the report without intending to suggest removal of the officer concerned.

Some of the concern raised in connection with the Rule, however, appears to be caused by the range of different officials who are subject to removal from office by Parliament. The function should be reserved for those cases in which the threat of removal by the executive would undermine the particular official's role.

Defamation of outsiders

Although freedom of speech in Parliament is widely accepted to be necessary to protect democracy, it carries costs for ordinary people because it deprives them of their right to sue members for defamatory statements made in Parliament. In Australia a number of legislatures, including the Senate, have responded to this concern by providing an opportunity to people who have been adversely referred to have a response recorded in *Hansard*.

The Australian Senate procedure for this is that an aggrieved person must make a submission to the President of the Senate requesting that a response be published. The Privileges Committee considers this request but, in doing so, may not inquire into the truth or merits of either the original statement or the response. According to Odgers, provided that the response is not offensive and meets certain other criteria, it may be incorporated into *Hansard* or ordered to be published.[28]

In commenting on the procedure, Odgers writes:

> This resolution was opposed in the Senate and was agreed to only after a division, with cross-party voting by the senators. The main grounds of the opposition were that persons referred to in the Senate had the normal political avenues open to them to respond, the suggested procedures could be over-used and the President [of the Senate] and the Privileges Committee could be unduly occupied by these submissions.
>
> These criticisms have not be justified by experience so far,[29] as several cases of such responses have been dealt with ... without the apprehended difficulties.

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27 G Marcus 'Afterword' in Barend van Niekerk *The Cloistered Virtue Freedom of Speech and the Administration of Justice in the Western World* (Praeger New York 1987) p 360

28 Odgers p 67.

29 The resolution implementing this procedure was adopted in 1988, *Odgers* was published in 1997.

4.1.1.3 Waiving privilege

(a) *May the privilege of freedom of speech and proceedings be waived in South Africa?* In other words, can Parliament itself or an individual member permit parliamentary speech or proceedings to be questioned in a court? We have not found authority on this point and so assume that, following the Westminster approach, privilege may not be waived here.

(b) *Should it be possible to waive privilege?* This question has a number of facets. It has been argued in other jurisdictions that it should be possible to waive privilege (see *Television New Zealand v Prebble* (1993)3 NZLR 513 (CA) at 521 but see the contrary view at 535). Legislation has been passed in the UK to allow the waiver of privilege.

Comment: Prebble, Hamilton and the English Defamation Act

Two cases in the last 10 years have led to the argument that privilege should be waived in certain cases.

In *Television New Zealand v Prebble* which is described above Prebble, an MP and Minister, sued TVNZ for defamation as a result of allegations made in a news commentary programme. TVNZ claimed that it was not libel because the allegations were true and fair comment. To substantiate this argument, TVNZ relied on certain statements made and things done in Parliament. The court of first instance ruled that these matters could not be considered because they were covered by privilege. On appeal and again in the Judicial Committee of the Privy Council this decision was upheld.

The problem that this use of the privilege raises is that an MP (like Prebble) can bring an action for defamation against a newspaper or broadcaster (like TVNZ) but the newspaper or broadcaster may be unable to put up a proper defence because material that it relied on in putting together its report or programme is protected by privilege. In short, the exercise of the privilege prevents the newspaper or broadcaster from being able to defend itself properly.

In the New Zealand Court of Appeal this problem was resolved by finding that if the material covered by privilege is central to the defence the action should be stayed. This would protect the public's right to comment on and criticise the actions of MPs but it deprives MPs of libel actions in certain cases.

A question discussed in the *Prebble* case was whether privilege could be waived. If so, Prebble could have waived the privilege, and TVNZ would have been allowed to rely on the parliamentary proceedings in its defence. the NZ Privileges Committee has said that a waiver of privilege is incompatible with the privilege.[30] When members speak in the

30 The Privy Council did not deal directly with the question of waiver but the Privileges Committee of the New Zealand Parliament noted that it views the Privy Council decision as incompatible with a right to waive: The Privy Council argued that privilege is important as an assurance to members when they speak and act in the legislature that they will be protected under all circumstances (see David McGee 'Freedom of Speech - The case of Prebble v Television New Zealand Limited' (1995) 63 *The Table* 17 at 21).

legislature they need to be assured that they will be protected under all circumstances.

A similar situation in Britain led to a different result. The politician concerned (Neil Hamilton) was obliged to resign as Minister because of allegations against him in *The Guardian* (the 'cash for questions' affair). He sued the paper for libel. The paper responded by saying that parliamentary privilege prevented it from putting its defence properly. The court stayed the proceedings. At that time the Defamation Act was before Parliament. It was amended to permit an individual member to waive parliamentary privilege in defamation proceedings. (See English Defamation Act 1996 section 13.) This meant that Hamilton could continue with his action against *The Guardian*. However, he chose not to.

These cases and the English response to them raise a number of issues. The argument in favour of the English amendment was -

- The traditional operation of privilege left MPs who were defamed unable to clear their names.

Arguments against the amendment and for the position that the privilege could not be waived were -

- The privilege is a collective privilege of the House (or Parliament) and is not susceptible to waiver by an individual member.
- MPs can waive privilege in cases in which it suits them but accept its protection in other cases - thus the amendment allows arbitrariness.
- Members of public defamed in parliamentary proceedings are not able to 'clear their names'.
- MPs will find themselves under pressure to waive the right and knowledge of such potential pressure will, in turn, have a 'chilling' effect on freedom of speech in the House. In other words it will act as a restraint on members.
- It will interfere with the freedom of speech of the media as the press and broadcasters will not know in advance whether, or on what basis, the privilege will be waived.

Would it be constitutional to waive privilege in South Africa?

This question needs to be divided into two parts. First, the legality of waiver of any privilege provided for in legislation rather than the Constitution would depend on the wording of the legislation and its intention. Express provision for waiver could be made. Secondly, the waiver of constitutionally granted privilege (the privilege of freedom of speech) will depend on our understanding of the purpose of protecting the privilege in the Constitution. A court is likely to decide that, although it is granted to individuals, as its purpose is to protect democratic processes, individual members cannot waive it. It could perhaps be argued that waiver agreed to by the house and the individual concerned should be permissible. This argument is not likely to succeed. This conclusion is backed by the fact that as far as we are aware there is only one precedent internationally for waiver of privilege (contained in the British Defamation Act).