

STANDING COMMITTEE ON
ADMINISTRATION AND PROCEDURE

Person referred to in Assembly
Mr L Burke

AUGUST 2004

Report 7

Committee membership

Wayne Berry MLA (Presiding Member)

Roslyn Dundas MLA

Vicki Dunne MLA

John Hargreaves MLA

Secretary: Tom Duncan (from 6 June 2003)

Assistant Secretary: Janice Rafferty

Resolution of appointment

In 1995 the Legislative Assembly for the Australian Capital Territory ('the Assembly') adopted Standing Order 16, which established the Standing Committee on Administration and Procedure ('the Committee').

Standing Order 16 authorises the Committee to inquire into and report on, among other things, the practices and procedure of the Assembly.

Person referred to in Assembly

1 Mr Lindsay Burke has made an application under the procedure adopted by the Assembly on 4 May 1995, for the publication of a citizen's right of reply to references made in the Legislative Assembly on 5 August 2004.

2 In considering Mr Burke's submission, the committee has had regard to the terms of the Assembly resolution (see Appendix A).

3 The committee considers that Mr Burke's submission that he has been adversely affected has not been substantiated.

4 The committee recommends that no further action be taken by the Assembly in relation to the submission.

Wayne Berry MLA
Presiding Member
August 2004

CITIZEN'S RIGHT OF REPLY

Resolution agreed by the Assembly

4 May 1995

Protection of persons and corporations referred to in the Legislative Assembly

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

Citizen's Right of Reply (Continued)

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

Person referred to in Assembly – Mr L Burke

Dissenting comments on the Report of the Standing Committee on Administration and Procedure

I dissent from the majority report of the Standing Committee on Administration and Procedure into the application by Mr Lindsay Burke for publication of a Citizen's Right of Reply. Mr Burke wished to address comments made about him, and his dealings with employees of a business he formerly owned, in Question Time in the Legislative Assembly on 5 August 2004.

Specific Areas of disagreement

Specifically, I disagree with the claim in the majority report that

“3. The Committee considers that Mr Burke's submission that he has been adversely affected has not been substantiated”.

I consider that there is clear evidence that Mr Burke has been adversely affected.

Further, I believe that the approach taken by the Committee in assessing the evidence contravenes the principles of natural justice, and should be repudiated by the Assembly.

More specifically, I submit that the majority report contravenes 8(b)(ii)¹ of the Citizen's Right of Reply (CRR) resolution, in that it unreasonably adds to or aggravates the original adverse effect.

Basis for view on rules of evidence

The Standing Orders relating to a CRR require the Speaker to be satisfied that the submission is not “obviously trivial” or “so frivolous, vexatious or offensive in character as to make it inappropriate” before an application is referred to Standing Committee on Administration and Procedure.² The Speaker referred the matter on to the Standing Committee.

The Standing Committee may also reject an application on the grounds that it is not “sufficiently serious” or is “frivolous, vexatious or offensive in character”³. Clearly the Committee did not think the matters could be ruled out under this part of the Standing Orders because of the extensive time they took to deliberate over the matter.

¹ Appendix A to the Legislative Assembly Standing Orders, “Citizen's Right of Reply”

² *Ibid*, paragraph (1) (c).

³ *Ibid*, paragraph (2).

Unless an application for a CRR has been rejected as frivolous or vexatious (which this clearly was not), then it should proceed to the stage of negotiating the content of such a statement unless exceptional circumstances apply.

In particular, where the application was not considered either frivolous or vexatious, ie it was considered to have been presented in good faith, then the application should only be rejected if the committee has overwhelming evidence that the applicant is mistaken in matters of fact.

I use the term “overwhelming evidence” because I believe the nature of the parliamentary process and the power conferred by Parliamentary Privilege and the potential effect on citizens is such that we should err on the side of generosity in allowing an application under the Standing Orders. Unlike civil courts, in the Assembly there is no appeal, no legal representation for the complainant, no formal rules to ensure procedural fairness, and no guarantee that the persons making the judgement are free from bias. Indeed, we may ask ourselves: if this were a jury trial, how many of us would be considered sufficiently disinterested to sit on the jury?

Further, in not rejecting the application, the committee would only be agreeing to enter into negotiations for a form of words to be published in the Hansard. It would not be endorsing any words, or even accepting a particular form of words. In fact the Committee, under 7(b), retains a veto over the form of words – as well as, of course, Assembly members having an unlimited right of “counter-reply”, subject only to the generous rules about the duration of speeches, and standing orders which allow a level of defamation and detraction far beyond that available to non-members.

We should ask ourselves, what are we afraid of, that we dare not even *talk* to the applicant about the *possibility* of a CRR?

If the Committee disagrees with the applicant on matters of fact, then surely the applicant should be allowed an opportunity at least to discuss a form of words for a CRR

In addition it could be argued that while Odgers only gives defamation as an **example** of seriousness, we should not set the bar so high when citizens have little comeback against members of parliament that might make adverse comment about them.

Evidence of adverse effect

The Resolution agreed by the Legislative Assembly establishing a Citizen’s Right of Reply states that “where a person who has been referred to by name... in the Assembly...[he] can make a submission to the Speaker claiming that [he] ...has been adversely affected in reputation...”⁴. Mr Burke contended that the remarks reflected upon him personally and as a businessman and were incorrect and he was able to produce documentary evidence to support his claim.

⁴ *Ibid*, paragraph (1).

Standing Orders relating to a Citizen's Right to Reply specifically injunct the Standing Committee from considering the truth of any statements made in the Assembly or in Mr Burke's submission.⁵ The Standing Orders also specifically prevent me⁶ from referring in detail to the content of Mr Burke's submission to the Speaker, so I will not canvass here the substantive issues raised or the evidence put forward to support Mr Burke's claim.

The comments made in Question Time on 5 August which prompted Mr Burke's application include the following:

- 1 The former directors of Endoxos have also been informed of the board's decision but they have not made any comment.
- 2 Some people who speak Greek have informed me that "Endoxos" translates roughly as "glorious and honourable". As we can see, nothing could be further from the truth. Those who are responsible, directors and former directors, should hang their heads in shame at these actions.⁷

The Committee could not consider the truth of these statements. Mr Burke has tendered evidence that the first of these statements is factually incorrect. No contrary evidence has been produced.

The second of these statements is a statement of opinion, and is thus subjective, but it is clear that the import of these words is that the directors and former directors of Endoxos – of whom Mr Burke is one – are inglorious and dishonourable, and in fact "should hang their heads in shame".

Odgers states that "[r]eflections involving allegations of incompetence, negligence, corruption, deception or prejudice"⁸ should be regarded as adverse reflections. Odgers also contests that a reflection on a person must be "reasonably serious" and it gives the example of words which might in other circumstances give rise to an action for defamation⁹.

The clear intent of the second statement above is to reflect adversely on Mr Burke and his colleagues. Clearly they are intended to reflect adversely on their competence and in particular their integrity.

It could be argued, in theory, that words uttered in the Assembly, while they may be by their nature defamatory, did not in fact have significant adverse effect because they were

⁵ *Ibid*, paragraph (6).

⁶ *Ibid*, paragraph (5).

⁷ Hansard of Question Time of 5 August 2004, <http://www.pcug.org.au/~cmalot/qtime/pq040805.pdf>

⁸ p 436

⁹ loc cit

not reported, that in effect no-one took any notice of what we said or did. Whatever the validity of this as a general point, it is sufficient to note that in this case, the statements in question were repeated in the electronic media immediately after their being made in the Assembly.

Statement of interest

Three members of the Standing Committee on Administration and Procedure have an interest in this matter which needs to be declared. My interest is that Mr Burke is the husband of one of my Liberal Assembly colleagues. Mr Hargreaves asked the question without notice that gave rise to the comments. Mr Berry, in the 4th Assembly, asked questions and made critical comments about Mr Burke and his then business.

Conclusion

The statement by the majority of the Standing Committee that Mr Burke's claim cannot be substantiated has not, itself, been substantiated. I believe that to refuse outright to consider an application except in the most obvious cases of frivolousness is an obvious denial of justice.

The fact that the comments made during question time on 5 August were repeated and discussed in the electronic media on that day, I believe, substantiates Mr Burke's assertion that his reputation was adversely affected.

In conclusion, I believe that Mr Burke has established a *prima facie* case in support of his application for a Citizen's Right of Reply. I further believe that because of the high level of responsibility placed on us when we exercise our parliamentary privilege we should be open to allowing citizens a right of reply.

I believe that the Standing Committee has not taken Mr Burke's application seriously and almost as a matter of course, once we have decided that this is not a frivolous or vexatious matter, the only possible course of action was to agree between ourselves and Mr Burke the form of words that would address his application.

Vicki Dunne MLA

18 August 2004