Agreement in Principle

Ms VERITY FIRTH (Balmain—Minister for Education and Training, and Minister for Women) [10.10 a.m.]: I move:

That this bill be now agreed to in principle.

Today the Parliament has the chance to correct one of the most ill-conceived and disproportionate legislative errors ever committed by this Parliament. A bizarre alliance of the Liberal-Nationals Coalition, the Greens and the minor parties put through a bill to create a criminal offence for newspapers to republish what was already public. Conceived in desperation, without reflection on its consequences, the Greens-Coalition amendment now has been exposed to the fresh air of public scrutiny. This bill will undo the folly of the 24 June amendment. It will remove subsections (4) and (5) of section 18A of the bill and restore the Act to the position it would have been in had the Greens-Coalition amendment not been moved. Let me be clear: The Greens-Coalition amendment created a criminal offence for a person to publish in a newspaper or other publicly available document any ranking or comparison of particular schools according to school results or anything from which a school can be identified as being in a percentile of less than 90 per cent in relation to school results unless the principal of the school has given permission.

There are many substantive arguments against the Greens-Coalition amendment. Today I will list these arguments and detail the most serious. It is wrong in principle. It lacks proportionality. It will cause people outside New South Wales to commit offences without being aware they are committing them. It fetters free speech, public debate and academic freedom, possibly so as to be unconstitutional. It irrationally discriminates between what can be published by different kinds of media organisations. It thwarts responsible public reporting of school performance, not just irresponsible reporting. It overturns the system of accountability of government schools. Any one of these arguments would be sufficient to justify the repeal of the Greens-Coalition amendment. Together, the case is unassailable. Let me consider the most serious of these issues: that it is wrong in principle. The Greens-Coalition amendment is deeply wrong in principle because it creates a criminal offence for republishing material school results that are already public, and lawfully public. All governments of all the States and Territories have agreed that school results should be made public in a responsible fashion that allows each school's performance to be seen in a rich context. The publication of this material would be banned in New South Wales but for the exemptions allowing publication in accordance with a national agreement.

So a Government can make information widely available to the public, but a media organisation cannot repeat that same information. It is lawful for a media publication to create a website link to the material, but not to publish the material itself. It is lawful to comment on the educational implications of results but only if the media organisation does not make comparative reference to the results themselves. All parents are allowed to see all the school results for every school. They are allowed to create their own lists of schools or comparisons, but they are not allowed to share these with other parents. They are not allowed to rely on experts and commentators who publish analysis to help them understand the results of particular schools. They are not allowed to save time and draw on the conclusions of others if they are interested in working out what is the right school for their child. They must instead all become statistical experts and wade through all the analysis themselves. This legislation is wrong in principle because it is riddled with such absurdities that lack rational justification.

The Greens amendment also lacks proportionality. It fails the maxim: let the punishment fit the crime. Make no mistake, 50 penalty units for a crime is a serious penalty. It is a monetary penalty the same as or greater than the following offences—albeit some of these offences also provide for a prison term—serious racial vilification under the Anti Discrimination Act; failing to ensure a child attends school under the Education Act; providing false information to the Commission for Children and Young People about a child protection matter; possessing explosives suspected of not being for a lawful purpose; dealing with property suspected to be the proceeds of crime; and obstructing an Independent Commission Against Corruption officer. These are all potentially serious offences that may compromise the safety of individuals or impede the carriage of justice. Yet a similar level of penalty is being applied to republication of material already lawfully in the public domain. This level of penalty is totally out of step with the gravity of the offence when it is realised that the information not to be published will already be public.

These offences are also troubling because they will undoubtedly cause people to commit offences who are not aware they are committing offences. The High Court has held in the case of *Dow Jones v Gutnick* that when a newspaper based in New York publishes an article on its website, which has its servers in New Jersey, if the web page is opened and read in Australia, it is published here. The same applies within Australia. If a company in South Australia places material on its website that is accessed in New South Wales, it is published in New South Wales. The definition of "school results" under the Education Act 1990 includes results of national basic skills testing. This includes the new NAPLAN test—the National Assessment Program in Literacy and Numeracy. NAPLAN is the national basic skills test. Every student at every school does the test. There is nothing in the definition "school results" that limits the application of the Act to New South Wales school results. It clearly

specifies all national school results.

So if a table comparing the results of Queensland schools in NAPLAN is published on a website in Queensland, opening the website in New South Wales is publication in New South Wales. Therefore, an offence is committed in New South Wales by publication in Queensland. This is not an extra-territorial effect of the Education Act. This is the natural effect of preventing the publication of something within New South Wales. It means publication is prevented within New South Wales, whatever the location of the original publication. It is the same effect as if the hard copy version of the *Courier Mail* was sold in newsagents in Tweed Heads. It is an infringement of the Act. Members should be in no doubt that the Greens-Coalition amendment's inclusion of the words "other document" extends to publication over the Internet. The Interpretation Act 1987 states:

> "Document" means any record of information, and includes:

(a) anything on which there is writing, or

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else.

For some reason the Greens and the Coalition have been under the misapprehension that the New South Wales Parliament cannot pass legislation with respect to the Internet. This is just false. The New South Wales Constitution states:

> The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever.

The New South Wales Parliament would only be prevented from creating laws that affected publication over the Internet if there was an inconsistent Commonwealth Act. If there is such an Act I am yet to have advice as to what that Act might be. It appears that the following publications and bodies have already, whether unwittingly or not, infringed the Act: the *Australian*, the *Courier Mail,* the *Hobart Mercury,* and the *Wynnum Herald* in the State of Queensland. One of those entities has based a newspaper report on information publicly available in New South Wales. Three of them have reported results of schools in other States. One is a State Government reporting on its website the results of its own schools. The State of Queensland is free to do what it likes in Queensland. One might think that would include the power to publish its school results on the Internet. But the Internet is available in New South Wales.

Because of the High Court's Gutnick decision, if I download the material in my office in Sydney that is published on the website of the Queensland Studies Authority, then that authority has published the material here. I have here the document published by that authority that infringes the New South Wales law. This is the absurdity of the Greens and Coalition amendment: It creates an offence committed by the State of Queensland here in New South Wales. The Greens-Coalition amendment hampers the capacity of this democracy to engage in its normal political process. Open public debate, the right of persons with disparate and inconsistent views to engage in the battle of ideas, is the fundamental core on which our democracy is built.

That is why the High Court held that free and open communication on matters related to Commonwealth elections is implied by the Constitution as limitation on the legislative powers of all Australian parliaments. Several constitutional law experts from across the political spectrum—Professor Peter Craven of Murdoch University and Professor George Williams of the University of New South Wales—have expressed the view that this law offends that principle. This is a potentially complex legal issue on which minds may differ, but this Parliament should create certainty. We should amend the law now rather than wait for a suitable case for the courts to declare the Greens-Coalition amendment invalid. Quite independently of whether there is a constitutional limitation, it is wrong for this Parliament to hamper public debate and academic freedom.

The Greens-Coalition amendment hampers legitimate academic debate about school performance. For example, if an educational or statistical academic sought to publish an academic journal article drawing school comparisons based on information published under the national agreement, they too would commit an offence. Progress in education is our understanding of what goes into making a good school, and even arguments by academics about whether there are better ways to report on school performance will be stifled by the Greens-Coalition amendment. Such progress depends on an open debate—on discussion, criticism, heated disagreement, refinement, competing proposals and ideas—all of which will be severely curtailed by the amendment.

The Greens-Coalition amendment applies differentially to different kinds of media. Radio broadcasters and television programs can all broadcast league tables with impunity. A broadcast does not come within the definition of a document. A broadcast is not a record of information; it is simply released into the airwaves

momentarily and is gone. However, a recording of a broadcast is another matter. The law would catch that. Radio stations could broadcast comparisons of school results and have experts on to talk about them. But—and this is where it gets truly absurd—if the *Sydney Morning Herald* or the *Daily Telegraph* published a transcript of the broadcast in a newspaper they would become corporate criminals. If the radio or television broadcasters tried to sell a CD or DVD of such broadcasts, or if they put an audio or video file of the broadcasts on their website and members of the public downloaded it, they would be in trouble.

The bottom line is that even within New South Wales the Greens-Coalition amendment does not prevent the publication of league tables in New South Wales; it only stops documentary publications. The simple conclusion is that the Greens-Coalition amendment was not properly thought through. It introduces an irrational discrimination between broadcasters and other media. Not only does the Greens-Liberal amendment prevent the publication of simplistic league tables, it also prevents the publication of any comparisons of a more sophisticated and complex kind. Everyone concedes that there may be valid comparisons reported in responsible ways of school performance, but creating an offence for doing so poses an unacceptable risk for those who would wish to develop the way in which school comparisons are made.

Giving principals the role of granting permission to publish school comparisons destroys the system of accountability of government schools to the public. Government schools are not separate legal entities; government schools are part of the Department of Education and Training. That, in turn, is part of the State of New South Wales. It is to this Parliament and, through it, to the electors of New South Wales that the State of New South Wales is accountable; it is not through the principal of a school. For this Parliament to hand the right to the individual principal of a school to decide whether or not the public is allowed to know particular information about that school's performance is to abrogate its accountability to the voters. The principal will not be held accountable at the next election for any decision that he or she makes that parents consider to be not in their interests but the members of this Parliament will.

Our principals are dedicated professionals and I trust their ability to make sound decisions, but it is wrong in principle for the chain of accountability for their decisions not to lead back to this Parliament. Any of these arguments would be sufficient to justify repealing the Greens-Coalition amendment, but the bottom line is that the parents of New South Wales should be able to have transparency of school performance. They get one level of transparency through the national agreement. All Australian governments are part of an agreement that will see those results published on a national website. But the parents and voters of New South Wales should not be prevented from having that information debated and digested through the news media—and not just the broadcast media but also the newspapers. Some reporting may be irresponsible, but equally some may be highly responsible and meritorious. The Greens-Coalition amendment throws out all comparative reporting whether or not it is responsible. This Parliament needs to act now to right this wrong. I commend the bill to the House.