UPDATE: ATTORNEY-GENERAL V LEIGH [2011] NZSC 106

In advice provided on 7 February this year, I informed the committee about a decision of the New Zealand Court of Appeal in *Erin A Leigh v The Attorney-General in respect of the Ministry of Environment* CA483/2099. The judgment confirmed that briefing material provided to a minister (in both written and oral form) to answer questions in Parliament was allowed to be used to found an action in defamation against him and the briefing-provider, a senior public servant. It did not fall within the meaning of "proceedings in Parliament" and was therefore not covered by absolute privilege. Ms Leigh's work performance was the subject of the briefing and the decision was given in relation to defamation proceedings which she instituted against the minister and senior public servant.

An appeal against the decision was recently determined by the New Zealand Supreme Court which has replaced the Privy Council as New Zealand's final court of appeal. The appeal was not successful and the judgment follows a recent trend to constrain the scope of parliamentary privilege across the Tasman, following on from *Buchanan v Jennings* (the effective repetition case). Repetition outside parliamentary proceedings of statements made in the course of those proceedings is not protected by parliamentary privilege. In the effective repetition case, the court allowed reference to protected statements made in the course of parliamentary proceedings to establish the meaning of unprotected statements made outside those proceedings (along the lines of "I do not resile from what I said in the House") to support a defamation action. In its 134th Report, the Committee examined the potential problem of effective repetition and advised the Senate that if the codification of the meaning and application of Article 9 of the Bill of Rights 1688[1] in section 16 of the *Parliamentary Privileges Act 1987* proved susceptible to similar erosion by Australian courts, then a clarifying amendment should be considered. There has been no occasion to revisit this issue.

Attorney-General v Leigh involved consideration of events that culminated in parliamentary proceedings (a minister answering questions in the House) and the extent to which those events (the provision of written and oral briefing to the minister) were protected by absolute privilege. Lower court decisions had found that the communications in question were not covered by absolute privilege. The communications could therefore be used to support Ms Leigh's defamation action.

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[1] That the freedom of Speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Courte or place out of Parliament.

The relationship between parliamentary privilege and defamation law has long been problematic. The use of parliamentary proceedings to support legal proceedings is prohibited by the law of parliamentary privilege but, as my predecessor, Mr Evans, advised the Committee in July 2004 (Advice No. 37):

> While this may be crystal clear to us, certain judges do not find it so. The problem appears to arise from a deeply-ingrained view in the legal system that the law of defamation is a fundamental law, and that the right to sue for defamation is the most fundamental human right, and every other law must give way to it.

This tendency is apparent in the decision in *Attorney-General v Leigh*. The key question was whether the communications between the senior public servant and the minister were within the scope of "proceedings in Parliament" and therefore covered by absolute privilege. In deciding this question, the Court followed the lower court in adopting the concept of connectedness, as expressed by Lord Phillips PSC in *R v Chaytor*[2]:

> [47] … In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament.

On this view, the test is one of necessity: "whether it is necessary for the proper and efficient conduct of the business of the House for the occasion in question to be classified as one of absolute privilege". Furthermore, where "the claim for absolute privilege would result, if successful, in depriving citizens of their common law rights, the courts will be astute to ensure that the claimed absolute privilege is truly necessary for the proper and effective functioning of Parliament. In such circumstances the privilege must be necessary in the sense of essential".[3]

Counsel for the Speaker of the New Zealand House of Representatives submitted that the proper test was whether the occasion was "reasonably incidental" to the discharge of the business of the House, a test based on the codification of "proceedings in

2 *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684. This case concerned the prosecution of members of the UK Parliament for offences involving misuse of their expenses. The plaintiffs' argument that their actions were covered by parliamentary privilege because they came within the exclusive cognisance of the House was rejected, allowing the prosecutions to proceed (covered in advice to the Committee, dated 7 February 2011).

3 At [7].

Parliament" in section 16(2) of the *Parliamentary Privileges Act 1987*.[4] While section 16 has generally been seen as a correct codification of Article 9 of the Bill of Rights,[5] the Court rejected this test. Its reasoning was based on consideration of *Prebble v Television New Zealand Ltd*[6] in which Lord Browne-Wilkinson for the Privy Council said that section 16(3) contained the true principles to be applied. (Section 16(3) concerns the meaning of "impeach or question" in Article 9.[7]) However, in *Prebble*, there was no need to consider the scope of parliamentary proceedings or its codification in section 16(2), because the conduct in question comprised statements made in the House, incontrovertibly a proceeding in Parliament. The scope of parliamentary proceedings was therefore not an issue in the case. Nevertheless, the Court in *Leigh* came to this conclusion:

> His Lordship's reference to "that Act" [ie, *the Parliamentary Privileges Act 1987*] can hardly have been meant, in context, to express the view that all of s 16 was a reflection of the common law. The focus was on subs (3). In the unlikely event that their Lordships did mean to say that s 16 as a whole reflected art 9 and the associated common law, we respectfully consider they

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4 **16 (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.

5 Relevant Australian and Commonwealth cases are cited in *Odgers' Australian Senate Practice*, 12th edition, 2008, p. 43. Also see the discussion of section 16(2), in particular, and the endorsement of it as a model for a statutory definition in the Report of the (UK) Joint Committee on Parliamentary Privilege 1998-99, HL Paper 43—I, HC 214—I, pp. 37-8.

6 *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC).

7 **16 (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.

> went too far, notwithstanding the Australian Parliament's use of the words "[f]or the avoidance of doubt" in s 16(1).[8]

The Court did not explain the basis on which they reached the conclusion that this could "hardly have been meant" or that any such view was "unlikely". Arriving at this destination also required the Court to reject the description of the scope of parliamentary proceedings and the basis for determining it, expounded by David McGee QC in *Parliamentary Practice in New Zealand*, 3rd edition, 2005 (the New Zealand *Odgers'*).

The Court proceeded to determine the case by asking whether in the circumstances it was necessary to afford the communication more than qualified privilege. Noting that nothing had been put before it to suggest that limiting the senior public servant's communications to qualified privilege would "cause problems for the proper functioning of Parliament," the Court was not persuaded that absolute privilege was necessary, and dismissed the appeal.

The Speaker referred the decision to the Privileges Committee for consideration but, as the New Zealand House of Representatives has now been prorogued for a general election, it will be some time before the next steps in the debate become clear. In the wake of the effective repetition case, the New Zealand Parliament considered, but did not proceed with, legislative action. After this further unsympathetic decision, the Parliament may be more disposed to consider a statutory definition of the scope and application of parliamentary privilege, a position also currently attracting greater support in the UK (having already been recommended by the 1998-99 joint select committee).

Incidentally, Australian courts have routinely accepted that briefing material of the kind at issue in *Leigh* was within the scope of "proceedings in Parliament" as defined by section 16(2) of the Act.[9]

I shall keep the Committee informed of any significant developments.

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8 At [10].

9 For relevant cases, see *Odgers*, pp. 46-7.