

ADVICE NO. 38**DRAFT NATIONAL DEFAMATION LAW**

Thank you for your letter of 12 August 2004, in which the committee seeks comments on the parliamentary privilege implications of the revised outline of a possible national defamation law, provided to the committee by the Attorney-General.

There are two provisions in the draft law which relate to the law of parliamentary privilege: the proposed statutory absolute privilege in respect of parliamentary proceedings (clause 12 of the draft law); and the defence of fair report (clause 15 of the draft law).

Parliamentary proceedings

This provision would provide a statutory defence to a defamation action that the contested publication occurred in the course of parliamentary proceedings, and also covers certain other transactions. The privilege giving rise to the defence is stated to be absolute, that is, the defence is not lost if the defendant makes the publication from malice or some other improper motive. The definition of parliamentary proceedings covers proceedings in the Houses of the Commonwealth Parliament and their committees, and is virtually identical to the definition contained in section 16 of the *Parliamentary Privileges Act 1987*.

The proposed provision would therefore duplicate, but only in relation to defamation actions, the parliamentary privilege provided by section 49 of the Constitution and the Parliamentary Privileges Act. The privilege under section 49 and the Parliamentary Privileges Act, of course, has a much wider application than in the defamation law.

It would be conceptually more accurate to say that the proposed law would merely reflect, rather than duplicate, that aspect of parliamentary privilege: the privilege is conferred by section 49, explicated in the Act and reflected, in one aspect, in the draft law.

The question which first arises is why it is necessary to reflect that aspect of parliamentary privilege in the proposed defamation law. The answer, no doubt, is that the proposed law is intended to be a code, and the defence of parliamentary privilege is included for the sake of completeness. There is no harm in this, provided that there is no difference in language which would enable some future judicial finding that the Act and the defamation law are inconsistent or in conflict. Given the copying in the proposed law of the language of the Parliamentary Privileges Act, this problem should not arise.

I therefore see no difficulty with clause 12 of the proposed law.

Fair report

Clause 15 of the proposed law would provide a defence to a defamation action of fair report of a range of public proceedings. Public proceedings are defined to include parliamentary proceedings within the meaning of clause 12. The outline of the proposed law refers to section 10 of the Parliamentary Privileges Act, which provides a similar defence.

In relation to this proposed provision a number of questions arise.

- (1) The traditional formulation of this defence, including in the common law, refers to fair and accurate report. Section 10 of the Parliamentary Privileges Act uses that expression. The outline of the proposed law also uses that expression in describing the draft law. Clause 15 of the draft law, however, refers only to fair report. This disparity between the outline and the draft law requires some explanation.
- (2) The proposed defence of fair report would apply to all parliamentary proceedings, including the proceedings of a parliamentary committee in private session. Section 10 of the Parliamentary Privileges Act explicitly excludes the defence in cases of publication of unauthorised reports of private meetings. In other words, any unauthorised publication of private committee proceedings is not protected under the Parliamentary Privileges Act but would be protected under the draft law.

It may be that the drafters of the proposed law would say that unauthorised publication of private committee proceedings is not a problem to be dealt with by the defamation law, that the appropriate course is to protect reports of all proceedings and to leave it to the House concerned to deal with any unauthorised disclosures. In order to establish the defence of fair report, however, the defendant in a defamation action would have to refer to the proceedings reported, and the law of parliamentary privilege, as explicated in section 16(4) of the Parliamentary Privileges Act, prevents the tendering of any evidence in a court about any private proceedings of a committee unless the committee has authorised the publication of the proceedings. The answer of the drafters of the proposed law may be that, in practice, their proposed defence would not be available in a case of unauthorised disclosure of private committee proceedings, so the effect would be the same as that of the Parliamentary Privileges Act. It would be better for the question to be completely clarified, and for the proposed provision to make the defence available only for reports of public or published proceedings. Perhaps the use of the expression “public proceedings” in the draft law is intended to convey this, but that interpretation is not available because of the way in which the expression is defined.

- (3) Section 10 of the Parliamentary Privileges Act refers only to proceedings at a meeting of a House or a committee, not to parliamentary proceedings under the broad definition of that expression in both the Act and the proposed law. Clause 15 of the proposed law, however, would confer the defence in relation to all parliamentary proceedings. This would include, for example, a report of the preparation of a document for purposes of or incidental to parliamentary proceedings. So a journalist could have the defence for a fair report of a witness drawing up a submission to a parliamentary committee even before the submission is presented: the drawing up of the submission is a proceeding in Parliament, so a fair report of the drawing up of the submission would be protected. It might be thought that the use of the expression “public proceedings” in the draft law excludes this interpretation, but as already noted that expression is defined to include all parliamentary proceedings. In some way the clause needs to be narrowed to avoid this unwanted consequence. It has been suggested that section 10 of the Act is too narrow, in that it may exclude from the defence, for example, a report of a submission published by a committee which was published under a standing resolution of the committee but not at a meeting of the committee. Regardless of that kind of contention, the application of the proposed clause 15 would be too wide.

- (4) The defence provided by section 10 of the Parliamentary Privileges Act is stated in the explanatory memorandum which accompanied the bill for the Act to be a qualified privilege for a fair and accurate report. The outline of the proposed defamation law also refers to that section as providing a qualified privilege. The description in the explanatory memorandum was based on a belief that the section did no more than make uniform across the country the common law defence of qualified privilege for a fair and accurate report in respect of Commonwealth parliamentary proceedings, that section 10 would therefore be interpreted as conferring a qualified privilege only, and that additional words would have to be added to the section in order to make privilege absolute. The section was based on the 1984 report of the Joint Select Committee on Parliamentary Privilege, which recommended qualified privilege only for a fair and accurate report.

The outline of the proposed defamation law, however, while referring to the common law privilege and that of section 10 as qualified, describes the proposed defence of fair report in clause 15 as “available, regardless of the defendant’s motive in publishing the matter”, that is, as absolute. The various statements in the outline of the draft law cannot all be correct. There is a contradiction in the outline. If section 10 of the Parliamentary Privileges Act confers only a qualified privilege, clause 15 must confer only a qualified privilege, but if clause 15 confers an absolute privilege, section 10 must also confer an absolute privilege. There is no difference in the language of the two provisions which would make one absolute and one qualified. This contradiction should be cleared up.

Unlike clause 12, clause 15 would in any event probably provide a very different defence from the equivalent provision in the Act. This may be thought to be of no consequence: a defendant can choose whichever defence is the most favourable. The difference between the provisions, however, is likely to cause difficulties when considered in conjunction with the matters set out above.

I hope that these observations are of some interest to the committee. I would be pleased to provide any elaboration of these points or any further information that the committee requires.