NEW ZEALAND LAW SOCIETY

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PARLIAMENTARY PRIVILEGE BILL

28/02/2014

SUBMISSION ON THE PARLIAMENTARY PRIVILEGE BILL

Introduction

1. The New Zealand Law Society (Law Society) is pleased to make comments on the Parliamentary Privilege Bill (Bill). It recognises that, if enacted, the Bill will define and clarify the scope of parliamentary privilege.

2. In particular it will alter the approach to parliamentary privilege taken by the Supreme Court of New Zealand in *Attorney-General and Gow v Leigh* [2011] NZSC 106 (scope of proceedings in Parliament) and by the Privy Council in *Buchanan v Jennings* [2005] UKPC 36 (effective repetition).

3. Members of the Law Society hold differing views on the merits of reversing those judicial decisions. Some support the courts' approach which, by narrowing the scope of privilege, allowed more scope for redress by individuals claiming to have been defamed or otherwise wronged. Others favour the policy behind this Bill because it may better protect Members of Parliament and their advisers from litigation and any associated "chilling effect" as they discharge their duties.

4. In this submission the Law Society does not enter into the merits of the policy choices represented in the Bill. It concentrates instead on three technical points. These are:
   (a) Clause 8: is the definition of "proceedings in Parliament" as clear as it could be?
   (b) Clause 8(4): how the concept of effective repetition statements works when the repeater is not the maker of the original statement.
   (c) Select Committees and responses: should Standing Orders be amended to permit persons to make responses to things said about them in parliamentary committees?

Clause 8: Scope of proceedings in Parliament

5. A critical threshold question in this field is the scope of "proceedings in Parliament". *Attorney-General and Gow v Leigh* turned on this, and it has prompted the crafting of a statutory definition that is intended to be broader than that applied by the Supreme Court.

6. The Law Society notes that, necessarily, lines will need to be drawn. These will turn on applying the phrases "in the course of", "for the purposes of", and "incidental to" the "transacting of the business of the House or of a committee".

7. It is unavoidable that statutory phrases will be applied to unforeseen and possibly complex scenarios. But a useful exercise when crafting legislation is to examine some of the hypothetical cases that *can* be imagined, so as to see how the new law would operate.

8. Then a judgment can be made as to whether it is desirable it operate that way, and if not, clarifying or amending words can be added to the Bill.

Some possible scenarios follow.

9. *What if a conversation of the type involved in Gow v Leigh had been prompted not by a Parliamentary question but by the quite reasonable apprehension by a Minister and her advisors (say over the Christmas break) that a parliamentary question was likely to be asked on a certain topic at the next scheduled sitting? What if, for any reason, the anticipated question is never asked?*
In principle, making prudent preparations for likely events in the House is capable of being seen as for the purpose of transacting the business of the House. And no less so if the eventuality does not occur. But this could be put beyond doubt by appropriate amendment.

10. *What if, on similar facts, unsolicited information is tendered by a CEO to a Minister relating to current events that might be the subject of a parliamentary question?*
This differs from the previous scenario only in that the initiative is taken by a CEO. Of course, if as a result of the initiative the Minister enters into the dialogue then the case is like hypothetical 1.

11. *What if material submitted by a CEO (solicited or not) then becomes important in employment disciplinary proceedings brought against that CEO. It might, say, contain evidence of dishonesty by the CEO relating to the subject matter of the contemplated question. Or it may disclose negligence by the CEO. Is it then covered by the privilege in clause 8 such that it cannot be inquired into and its honesty or effect queried?*
This scenario has some affinity with *R v Chaytor* in the UK Supreme Court ([2010] UKSC 52) which held that allegedly false expense claims made by members could not be conceived as covered by parliamentary privilege. But the reasoning of that case relied substantially on the fact that members' remuneration arrangements could be separated from the proceedings of Parliament itself. That might not be so easily done in the hypothetical case of the CEO whose report was indeed generated for purposes of proceedings in Parliament and not incidental remuneration claims.

12. *What if the CEO is called a liar, publicly, on the basis of that material? Can he or she sue for defamation and can the Minister (or anyone sued) rely on the material as part of the Minister's defence?*

    Comment: the *Television NZ Ltd v Prebble* decision ([1994] 3 NZLR 1 (PC)] would suggest not. Although there might then be cases in which the inability of a defendant to adduce parliamentary material precluded a fair trial.

13. *What if a member of the public writes to a Minister or Member with facts or allegations of a type that are adjudged capable of giving rise to a Parliamentary question?*

14. *What if, say, persons approach opposition members with allegations that they hope will become "business of the House". Are documents prepared for their purposes "incidental to the business of the House"?*

    In each of the above cases the conclusion as to whether a matter is incidental to the transacting of business could be difficult. It is possible to envisage cases where the member of the public brings information that it is in the public interest to know and where iniquity is exposed. Other cases also can be envisaged where motivations and outcome may not be so benign.

15. It is suggested that members of the Committee ought to consider:
    (a) Can the outcome be reasonably predicted in these hypothetical cases?
    (b) Is the Committee satisfied with the likely outcomes and if not, what changes are appropriate?

Effective repetition rule

16. The Law Society notes that an effective repetition statement will receive the protection of absolute privilege (so overruling the *Jennings* case). By clause 8(4)(b) the privilege will apply even when the person who does the affirming or repeating is not the person who made the original statement.

17. This is understandable – the mischief of "impeaching or questioning" the parliamentary statement could indeed occur in a defamation case (or some other type of proceeding) whether the "effective repeater" was the original maker of the statement or a third party expressing agreement with the statement.

18. Even so, the extension of the effective repetition rule may have the unintended effect of establishing a "currency" that allows numerous persons to repeat defamatory material by saying, for example, that they too support and affirm what was said in the House by a member.

19. Of course, a fair and accurate account of what was said in the House can be published without attracting liability (in terms of the Defamation Act 1992). But the effective repeaters get absolute privilege, while the reporters get a qualified privilege.

20. There is also the possible consequence that a CEO, or any person, in the hypotheticals posed above, could make defamatory allegations against others to Members or Ministers (that are not aired publicly in the House) but which would attract absolute privilege and be repeatable with impunity.

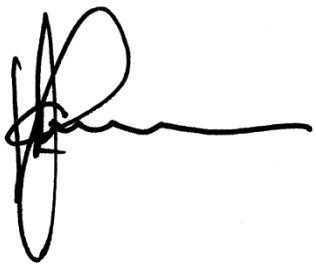
21. The Law Society invites the Committee to consider whether these results are intended and if not whether a suitable amendment is appropriate.

A need to amend Standing Orders?

22. The Law Society notes that because select committee hearings are proceedings in Parliament there is immunity for words spoken at such hearings, just as there is on the floor of the House. But whereas there is a process (SO 156-159) for recording a response by a person who is named in the House, there does not seem to be any provision for responses when a person is named in a select committee hearing. That gap could be addressed by a reform to Standing Orders.

Conclusion

23. The Law Society wishes to be heard.



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