

Defamation and Parliamentarians

It is well known that no action for defamation can be founded

on a statement made by a member of parliament in a speech made in the House.

But should parliamentarians also be protected from defamation proceedings for material they publish outside the House?

In this article Sally Walker explores the extent of the protection given to members of parliament as well as media organisations who publish reports of defamatory statements made by parliamentarians.

The absolute privilege accorded to Members of Parliament against liability for defamation is based on Article 9 of the Bill of Rights (1688).

Article 9 declares that:

"the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament".¹

The privilege of freedom of speech, as confirmed by Article 9, is enjoyed by Members of all Australian Houses of Parliament.²

It follows from Article 9 that no civil or criminal proceedings may be instituted against a Member of Parliament for anything said or done by the Member in parliamentary proceedings. For two reasons, it is important to emphasise that the immunity from liability for defamation is an application of the general rule embodied in Article 9.

First, if a Member's words cannot be said to be part of "proceedings in parliament" they are not privileged. Thus, May says that:

"it does not follow that everything that is said or done within the Chamber during the transaction of business forms part of the proceedings in Parliament. Particular words or acts may be entirely unrelated to any business which is in the course of transaction, or is in a more general sense before the House".³

A remark made by a Member during a debate in a House, but in the course of a casual conversation, is not protected by absolute privilege: although the statement is made in the House, it is not part of the "proceedings in Parliament".

The second reason why it is important to emphasise that the Members' absolute privilege from liability for defamation is based on Article 9 is that the immunity is expressed to extend to "proceedings in parliament" rather than simply to parliamentary debates.

This indicates that Members of Parliament may be protected from liability when they publish defamatory material outside their Houses of Parliament, provided the publica-

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tion of the material is part of "proceedings in parliament".

Before discussing the meaning of "proceedings in Parliament" it is instructive to examine the significance of this issue to the media and to explain the object of the privilege.

Importance to the media

At common law, a fair and accurate report of parliamentary proceedings in the jurisdiction in which the report is published is protected by qualified privilege.⁴ As privilege is qualified, rather than absolute, the defence will fail if the publisher was actuated by malice. In 1987 the Commonwealth Parliament enacted legislation protecting fair and accurate reports of proceedings at a meeting of a Federal House of Parliament.⁵ The legislation preserves the common law.

Thus, a media organisation may rely on the common law to obtain qualified privilege for the publication of a fair and accurate report of proceedings which were not part of a meeting of a House, but which were, nonetheless, "proceedings in parliament".

Thus, the extent to which the publication of material outside Houses of Parliament is part of "proceedings in parliament" is of significance to the media.

The position regarding the publication of reports of State and Territory parliamentary proceedings is more complicated. In each State and Territory the common law qualified privilege accorded to fair and accurate reports of parliamentary proceedings is embodied in legislation although, with exception of

the Victorian provision, the sections are expressed to apply to reports of "proceedings of a House" rather than "parliamentary proceedings"⁶ It follows that, except in Victoria, to obtain qualified privilege for the publication of a fair and accurate report of proceedings which did not take place in the House, a media organisation would have to rely on the common law. This would be possible in all jurisdictions except Queensland, Tasmanian and Western Australian where the statutory provisions are part of a code. In these jurisdictions a media organisation could, however, rely on the qualified privilege accorded to the publication of material "for the purpose of giving information" to protect it from liability for publishing a fair report of parliamentary proceedings which were not part a parliamentary debate.⁷

The object of the absolute privilege from liability for defamation is to enable Members to carry out their functions; it enables Members of Parliament to speak freely in the House, making assertions and allegations which they could not otherwise make without the risk of liability for defamation.

The Australian Law Reform Commission concluded that, because debate should not be impeded by the consequences of plain speaking, this absolute privilege should not be abolished or curtailed.⁸

Owing to the importance of the committee system in modern parliaments, it has been recognised by the courts and the legislature that witnesses who give evidence before parliamentary committees are to be accorded absolute privilege from liability for defamation in respect of statements made by them in the course of the committee's proceedings.⁹

One area where it is uncertain whether the law has taken into account the modern nature of Parliamentary work concerns the unresolved question of the protection accorded to communications between Members.¹⁰ Such a communication may be accorded qualified privilege,¹¹ but there is some doubt whether it would be protected by absolute privilege as part of "proceedings in

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parliament". It has been suggested that, for policy reasons, such a communication should be seen as part of parliamentary proceedings:

"When his House is not sitting, the only way a Member can make criticisms or seek information on controversial subjects is by communication with relevant Ministers, departments or Government instrumentalities. ...it would be against the public interest if Members, because of fear of possible defamation proceedings, were to be dissuaded when their Houses were not sitting from raising urgent and important matters."¹²

Traditionally, it has been assumed that a Member is not protected by absolute privilege if he or she re-publishes a speech made in the House outside the House.¹³

Recent decisions suggest that the courts may take a wider view of what is encompassed by "proceedings in parliament" so as to accord absolute privilege to the republication of a speech in certain circumstances.

The Privy Council opened the way for a broader interpretation in 1963

The Privy Council opened the way for a broader interpretation in 1963 when it said that: "it generally recognised that it is impossible to regard (a Member's) ... only proper functions as a Member as being confined to what he does on the floor of the House itself."¹⁴ Subsequently, in *Roman Corp*, Canadian courts were called upon to decide whether a telegram sent by Prime Minister Trudeau and a press release by a Minister were absolutely privileged. The plaintiffs proposed selling their interests in a uranium mine to a company controlled by non-Canadian interests.

Prime Minister Trudeau and the relevant Minister made statements in the House indicating that they intended to prohibit the transaction. The telegram, which was sent to the plaintiffs, informed them of this decision; the press release set out the decision announced in the House. As a result, the transaction was not completed and the plaintiffs sued for damages; their action was based on a number of grounds, including wrongful procurement of breach of contract.

It was decided that, as such, they were protected by the same absolute privilege as those communications made in the House itself

The Ontario High Court and the Ontario Court of Appeal held that the telegram and the press release were mere "extensions" of statements made by Trudeau and the Minister in the House; it was decided that, as such, they were protected by the same absolute privilege as those communications made in the House itself.¹⁵ The Court of Appeal suggested that, because of the "complexities of modern government and ... the development and employment in government business of the greatly extended means of communication", courts were justified in broadening the meaning and application of the phrase "proceedings in parliament".¹⁶ The Supreme Court of Canada dealt with an appeal from this decision "without dissenting from the views expressed in the Courts below as to the privilege attached to statements made in Parliament".¹⁷

Following *Roman Corp* the Ontario High Court has held that it is part of the "proceedings in parliament" to release to the media information used in Parliament.¹⁸ Nonetheless, in the most recent relevant case, the Ontario High Court held that the fact that a Member's answer to journalists' questions was in substance the same as a statement which the Member has already read to the House was not in itself sufficient to bring it within the *Roman Corp* principle. The Court distinguished *Roman Corp*:

"A bona fide statement of Government policy concerning proposed legislation as in *Roman* is quite a different matter from the facts ... (here) where the defendant, in response to questions by reporters, made allegations of a serious nature against an individual."¹⁹

In 1986 in *Chatterton* the Full Court of the South Australian Supreme Court had occasion to consider the meaning of "proceedings in parliament". *Chatterton*, a Labour Party Member of the South Australian Legislative Council sued the ABC and a Liberal Party Member, Chapman, for defamation.

Chapman had asked questions in the House regarding an application made by *Chatterton's* family farming business for drought relief; the application was made while *Chatterton* was Minister of Agriculture. The ABC program which was the subject of the

proceedings, consisted of segments of question time in the House, segments by the two Members and comments by ABC journalists.

So far as the action was based on what was said in the House, it was held that Chapman was protected by absolute privilege and the ABC by qualified privilege. Zelling ACJ said that it was "arguable" that a Member who repeated outside the House what he or she said in the House was protected by absolute privilege.²⁰ Prior J acknowledged that the privilege attaching to proceedings in parliament does extend to some things happening outside the House, but he rejected the view that Chapman's repetition outside the House of what he said in the House attracted absolute privilege in this case.²¹ The other member of the Court, Jacobs J, did not deal with this question.

It is regrettable that the judgments of members of the South Australian Supreme Court do not attempt to extract a principle from the Canadian cases regarding the meaning of "proceedings in parliament" and decide whether that principle should be adopted in Australia.

It is suggested that a principle can be extracted from the Canadian cases

It is suggested that a principle can be extracted from the Canadian cases: absolute privilege protects a Member of Parliament from liability for defamation for publishing a statement outside the House which releases information used in the House, but only where the Member's action outside the House in an "extension" of the proceedings in the House; to amount to an "extension" of proceedings in the House, the action outside the House must be necessary for the proper discharge of the Member's duties. This broadening of the protection accorded to Members of Parliament does not take it outside the rationale for granting the privilege.

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It is to be hoped that Australian courts, like the Canadian courts, will recognise that the nature of parliamentary work and developments in methods of communication are such that the meaning of "proceedings in parliament" must be broadened, at least to this extent.

The Parliamentary Privileges Act 1987 (Cth) defines "proceedings in Parliament" as "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".²² The reference to "incidental" matters extends the protection accorded to statements made by Federal Members of Parliament beyond statements made in the House or in committee proceedings; it is suggested that the courts should not allow the legislation to be used to protect Members of Parliament in respect of the publication of material unless this was necessary for the proper discharge of the Member's duties.

It follows from the common law and legislative developments outlined in this note that media organisations will have to make a judgment regarding the nature of statements made by Members outside their Houses to assess whether they are part of "proceedings in parliament"; if the statement is part of parliamentary proceedings, a fair and accurate report will be protected by qualified privilege.

The material in this article forms part of the book - The Law of Journalism in Australia - written by Sally Walker and published by The Law Book Company early next year. Sally Walker is a senior lecturer in law at the University of Melbourne.

The ABC Bill

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to the licence. Also the holder of a limited licence may transfer the licence to another person or admit another person to participate in its benefits or to exercise any of the powers or authorities granted by the licence.

The holder of a limited licence shall not broadcast an advertisement if (my emphasis) the licensee receives payment or other consideration for broadcasting it. But this does not apply to a certain kind of licence and any holder of a special limited licence can broadcast details about a sponsor.

Clause 8 of the Bill repeals the existing 26 page section about staff and service, replacing it with 28 lines including, "the terms and conditions of employment shall be determined by the Corporation".

References to "officers" are replaced

Notes

1 I Will and Mr Sess 2, c 2 (1688).

2 The privilege applies:

(a) pursuant to legislation which adopts the privileges of the House of Commons (see, for example, Commonwealth Constitution s 49 and Constitution Act 1975 (Vic) s 19(1) and *Sankey v Whitlam* (1978) 142 CLR 1 per Gibbs ACJ 35);

(b) pursuant to legislation which provides that the Bill of Rights is part of the law (see, for example, *Parliamentary Privileges Act 1987* (Cth) sub-s 16(1) and *Imperial Acts Application Act, 1969* (NSW) s 6); or

(c) at common law, on the basis of necessity (*Gipps v McElhone* (1881) 2 LR (NSW) 18 per Martin CJ 21-22, *Manning J 24* and *Windeyer J 25-26*; *Chenard and Co v Arissol* (1949) AC 127, 133-134).

In the Northern Territory, freedom of speech is confirmed by the *Legislative Assembly (Powers and Privileges) Act 1977* (NT) s 5(1).

3 Gordon C (Ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (20th ed, 1983) 94.

4 *Wason v Walter* (1868) LR 4 QB 73.

5 *Parliamentary Privileges Act 1987* (Cth) s 10. Although the explanatory memorandum describes the defence as one of "qualified privilege", in fact, the privilege is expressed as an absolute privilege.

6 *Defamation Act, 1974* (NSW) s 24 Sch 2 cl 2 (1) and s 26; *The Criminal Code* (Qld) s 374 (1); *Wrongs Act 1936* (SA) s 7 (1)(ab); *Defamation Act 1957* (Tas) s 13 (1)(a);

throughout by "employees" and there is nothing about training qualifications, retirement etc.

Also dubious is Section 70D, which gives the ABC, a publicly owned authority whose possessions are of public concern, the power to give these as security for moneys borrowed. This is because the legislation permits the ABC to borrow from sources other than the Commonwealth. However, the ABC is not a money-making industry like, for example, Qantas, so failure to pay back a private loan might mean loss of its property to private ownership.

These provisions, together with the proposed control of the ABC and SBS by the Australian Broadcasting Tribunal, spell out the end of ABC independence if they are implemented.

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Wrongs Act 1958 (Vic) s 3A (1); *The Criminal Code* (WA) s 354 (1); *ACT: Defamation (Amendment) Act 1909* (NSW) s 5(a) (applies only to newspaper reports); *Defamation Act* (NT) s 6(1) (ba) (applies only to newspaper reports). In New South Wales, Victoria, Western Australia and the Australian Capital Territory the statutory protection extends to the publication in that jurisdiction of a report of other State or Territory Parliaments.

7 *The Criminal Code* (Qld) s 377; *Defamation Act 1957* (Tas) s 16; *The Criminal Code* (WA) s 357.

8 Aust, *The Law Reform Commission, Unfair Publication: Defamation and privacy* ALRC 11 para 135.

9 *R v Murphy* (1986) 5 NSWLR 18, 26-27; *Parliamentary Privileges Act 1987* (Cth) para 16(2) (a); *Parliamentary Evidence Act, 1901* (NSW) s 12; *The Criminal Code* (Qld) s 372; *Defamation Act 1957* (Tas) s 11(b).

10 See the discussion of the Strauss case in UK, *Parl, Report from the Select Committee on Parliamentary Privilege* HC Paper 34 (1967-8) paras 80-81 and 86.

11 *Adam v Ward* (1917) AC 309 and *Horrocks v Lowe* (1975) AC 135.

12 Aust, *Parl, Joint Select Committee on Parliamentary Privilege Final Report* (October 1984) PP no 219, 1984 para 5.15.

13 *R v Abingdon* (1793) 1 Esp 226 (170 ER 337), 228 (338) and *R v Creevey* (1813) 1 M & S 273 (105 ER 102) per Lord Ellenborough CJ 278 (104), *Grose J 279-80* (104), *Bayley J 280-281* (104-105) and *LeBlanc J 281-282* (105). The Member might be able to rely on qualified privilege, but, where the common law operates, this would be most unlikely to protect the Member unless the material was published only to a limited audience (*Adam v Ward* (1917) AC 309 and *Horrocks v Lowe* (1975) AC 135).

14 *Attorney-General of Ceylon v De Livera* (1963) AC 103, 121.

15 *Roman Corp Ltd v Hudson's Bay Oil and Gas Co Ltd* (1971) 18 DLR (3d) 134, 142; (1971) 23 DLR (3d) 292, 298.

16 *Ibid* (1971) 23 DLR (3d) 292, 299.

17 (1973) 36 DLR (3d) 413, 419.

18 *Re Clark and Attorney-General of Canada* (1977) 81 DLR (3d) 33, 58.

19 *Stopforth v Goyer* (1978) 87 DLR (3d) 373, 382.

20 *Australian Broadcasting Corporation v Chatterton* (1986) 46 SASR 1, 18-19.

21 *Ibid* 30-36.

22 Sub-section 16 (2)