Chapter 4 Privilege conferred by legislation and related matters

4.1 Defamation Act 2005

In 2005, all States and Territories in Australia enacted uniform defamation legislation to ensure that defamation law is applied consistently across Australian jurisdictions. The legislation ensures that the link between parliamentary privilege, freedom of speech and parliamentary proceedings is maintained.

Section 27 of the *Defamation Act 2005* extends parliamentary privilege by providing that all documents/debates connected with the "proceedings of the House", including submissions to committees or papers tabled during committee proceedings, enjoy absolute privilege. It provides that there is a defence of absolute privilege for any defamatory matter that "… is published in the course of the proceedings of a parliamentary body". The position both within the United Kingdom and New South Wales would seem to be that absolute privilege does not attach to the publication of a speech otherwise than as part of the whole debate or proceedings of the House.

In addition, section 27(2)(c) extends the defence of absolute privilege to the publication of "matter" that would be subject to absolute privilege under the corresponding law of another jurisdiction. This reciprocity provision ensures that the absolute privilege attached to parliamentary proceedings in New South Wales is maintained if a defamation case arises in another Australian State or Territory. It should be noted that beyond defamation matters the broader parliamentary privilege powers exercised by a House of Parliament are limited in their application to the borders of the relevant state or nation.

Despite the uniform legislation, provisions of the *Defamation Act 2005* are still open to judicial interpretation. In particular, the provisions regarding the publication of "matters" in the course of parliamentary proceedings are very broad and not exhaustive.

As already noted in section 3.11, provisions of the *Defamation Act 2005* also provide a defence of qualified privilege in certain situations. For example, section 28 of the *Defamation Act 2005* provides a defence for defamatory material published in a public document. A public document is defined to include "any report or paper published by a parliamentary body, or a record of votes, debates or other proceedings relating to a parliamentary body."[1]

The new defamation laws also provide for a choice of law. Section 11 ensures that if there are multiple publications of defamatory matter across Australian jurisdictions that the substantive law of the jurisdiction in which the most harm has been occasioned by the publication will apply.

There are a number of difficulties with the *Defamation Act 2005* with regard to privilege for members of Parliament. For example, protection is not afforded to communications between members and Ministers, nor to correspondence received by committees and passed on to other investigatory bodies such as the Independent

[1] This defence is defeated if it is proved that the matter was not published honestly for the information of the public or the advancement of education.

Commission Against Corruption and the Ombudsman. In respect of this second issue, in New South Wales parliamentary committees use the hearings mechanism to afford such correspondence protection. With regard to communications between members and Ministers, in the House of Commons in 1958, when a member was threatened with libel action in respect of a letter to a Minister, the House of Commons decided that the letter was not a proceeding in parliament, and thus not absolutely privileged.[2] The issue of whether absolute privilege should be afforded to all communications between members and Ministers was a subject considered by the United Kingdom Joint Committee on Parliamentary Privilege, which reported in 1999.[3] The committee concluded that absolute privilege should not extend this far, arguing that the protection afforded by article 9 of the *Bill of Rights* "should remain confined to the core activities of Parliament, unless pressing need is shown for an extension."[4]

It should be noted that in 1984-85 the New South Wales Joint Select Committee upon Parliamentary Privilege argued that, in the context of the law of defamation, "proceedings in parliament" appeared to cover the formal transaction of business in both Houses and committees, and also everything said and done by a member in the exercise of their functions as a member of the House or a member of a committee. However, given the absence of legislation defining the extent of "proceedings in Parliament", in New South Wales it is determined by the courts on a case by case basis.

4.2 Such privileges as conferred by other Acts

Privilege is also conferred by other statutes such as the *Parliamentary Evidence Act 1901*, the *Parliamentary Papers (Supplementary Provisions) Act 1975*, and the legislation establishing the statutory committees of the Parliament.

4.2.1 The Parliamentary Evidence Act 1901

The *Parliamentary Evidence Act 1901* provides protection for any defamatory words spoken by a witness while giving evidence before a committee or the House.[5] As previously noted, the Act provides the House and its committees with the power to summon persons. The summons must specify the date, time and place for compliance and witnesses are entitled to their reasonable expenses for appearing before the House or a committee.[6] For further information see Chapter 27 of Part One.

4.2.2 Tabled papers and the Parliamentary Papers (Supplementary Provisions) Act 1912

The publication of papers presented to Parliament is subject to the protection of absolute privilege under the *Defamation Act 2005*[7] and to clarify the law, the *Parliamentary Papers (Supplementary Provisions) Act 1975* gives authority to either House, a joint sitting or a committee to publish any documents laid before it or any

[2] See the Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985, p. 11. (Reference to *Strauss* case in the UK).
[3] Report of the Joint Parliamentary Committee on Parliamentary Privilege (UK), dated 9 April 1999.
[4] Campbell, Enid, *Parliamentary Privilege*, 2003, pp. 42 and 44.
[5] Section 12 of the *Parliamentary Evidence Act 1901.*
[6] Section 6 of the *Parliamentary Evidence Act 1901.*
[7] See section 27 of the *Defamation Act 2005.*

evidence given before it. The status of documents tabled but not ordered to be printed is a vexed one as there is no definition in the *Parliamentary Papers (Supplementary Provisions) Act* of "publish" although it seems to be limited to printing. Under Article 9 of the *Bill of Rights*, absolute privilege arguably attaches to the action of tabling as being "a proceeding in Parliament".

This position has not been the subject of any parliamentary or court inquiry in New South Wales. However, it was considered by the Australian Senate in relation to documents tabled by a senator, which had been supplied to the Senator by a non-member. The Senate's Privileges Committee concluded that these documents had a privileged status.[8]

The issue of whether a document is protected when it has been tabled but also publicly released or provided to other persons was considered *In the matter of the Board of Inquiry into Disability Services.*[9] Crispin J held that whilst the copy of a document tabled in parliament would be protected as a proceeding in Parliament this protection did not extend to other copies of the document if it had not been prepared for the purposes of transacting the business of the Parliament.[10]

Members (except as committee chairs) do not have power to table documents. In very unusual circumstances however, leave may be granted for members to table documents. For example, on 17 November 1998, during the second reading debate on a bill, a member referring to an "internal memorandum" was directed by the Acting Speaker to identify the document. A Minister raised a point of order that the member had identified two people alleged to have been the subject of the memo and that "it is clear from the content and the way it has been written that it is not a memo". The Minister then requested that it be tabled and the document was subsequently tabled. This action ensured that the document was considered a "proceeding in Parliament". However, as it was not ordered to be printed it was not covered by the provisions of the *Parliamentary Papers (Supplementary Provisions) Act 1975.*

Members sometimes will refer to a particular document during the course of debate and for the interest and convenience of members may "leave it on the Table". This is not tabling and the document has no official status and rulings have been made that it is not the Speaker's duty to state whether a document placed upon the Table is privileged or not.[11] The types of "papers" which have been laid upon the Table for the information of members include not only papers but also digital images[12] and compact disks.[13] Laying "papers" on the Table is considered to be part of parliamentary proceedings. However, as with papers tabled in the House but not ordered to be printed they are not covered by the *Parliamentary Papers (Supplementary Provisions) Act 1975.*

There are provisions in legislation such as the *Independent Commission Against Corruption Act 1988*, which allow reports to be presented to the Speaker when the

[8] Senate Committee of Privileges, Report No. 72 – *Possible Improper Action Against a Person*, June 1998.
[9] (2002) ACTSC 28. This case is also cited as *Szwarcbord v Gallop* (2002) 167 FLR 262.
[10] Ibid at paragraph 22 and 23.
[11] PD 05/12/1967, pp. 4091-2.
[12] PD 29/11/2000, p. 11199.
[13] PD 28/02/2001, p. 12113.

House is not sitting. The report is deemed to be tabled and the Speaker authorises it to be made public. Similarly, under the annual reporting legislation, annual reports may be presented to the Clerk out of session and similarly deemed to be tabled and published.

With regard to reports presented to Parliament it has been argued that parliamentary privilege attaches to the reports and any documents used to produce them if reporting to Parliament is the agency's primary role regardless of the document being tabled in Parliament. For example, the Commonwealth Auditor-General's Office notified the Senate in November 2002 that it would be claiming, in a pending court case, that parliamentary privilege attached to working documents associated with audit reports and that such documents were immune from the discovery process because they were produced for the purpose of a "proceeding in Parliament", namely, the submission of audit reports to Parliament. The Senate has argued that such a claim is well founded as "unlike other bodies which only incidentally have their reports presented to Parliament, the Audit Office has reporting to Parliament as its essential purpose."[14]

As already noted a defence of qualified privilege would most probably apply to tabled papers even if absolute privilege does not in accordance with section 28 of the *Defamation Act 2005*, which provides a defence for defamatory material published in a public document. A public document is defined to include "any report or paper published by a parliamentary body, or a record of votes, debates or other proceedings relating to a parliamentary body."

In addition, section 24 of the *Defamation Act 2005* provides a common law defence of qualified privilege if a document is published on an occasion where the person who makes the communication has an interest or a duty, legal, social or moral, to make it and the person to whom it is made has a corresponding interest or duty to receive it. Arguably documents tabled by a member in Parliament would be such an occasion.

4.2.3 Other legislation

Legislation which establishes statutory committees also confers privileges on members of Parliament by empowering committees to take evidence as part of their inquiry process, by enabling them to take action against people who fail to attend as a witness to any committee inquiry or wilfully provide false evidence and enabling the Chair, or their representative to table papers of the committee in the House.[15]

[14] Australian Senate, *Procedural Information Bulletin*, No. 165 for the sitting period 11-19 November 2002, 21 November 2002.
[15] See for example, Part 4 of the *Public Finance and Audit Act 1983* which establishes the Public Accounts Committee and Part 7 of the *Independent Commission Against Corruption Act 1988* which establishes the Joint Committee upon the Independent Commission Against Corruption.