

ADVICE NO. 39

DRAFT NATIONAL DEFAMATION LAW (2)

Since I responded on 18 August 2004 to the committee's request for comments on the Draft National Defamation Law, the states and territories have issued a document called Model Defamation Provisions. The committee may be interested in some comparison between the parliamentary privilege clauses of the model and those of the draft national law.

Clause 31 of the model begins with a general defence of absolute privilege (subclause 31(1)). This effectively incorporates the *Parliamentary Privileges Act 1987* as well as any other pre-existing source of absolute privilege. It then specifically covers a publication occurring in the course of parliamentary proceedings (subclause 31(2)(a)). It applies to the proceedings of all parliaments and legislatures, domestic and foreign (clause 4). Parliamentary proceedings extend to words spoken and acts done in the course, or for the purposes, of parliamentary proceedings (subclause 31(3)). While this wording is slightly different from that of the *Parliamentary Privileges Act 1987*, the difference should cause no difficulties, and in any event the specification of parliamentary proceedings is subject to the general defence of absolute privilege contained in subclause 31(1).

The defence of fair report of parliamentary proceedings, in clause 33, mostly overcomes the questions which arise in relation to the equivalent provision in the draft national law. The following refers by number to the questions raised about the national draft.

- (1) The model also refers to fair report, rather than fair and accurate report. It may be that the omission of any reference to accuracy is thought to make the defence less onerous for the defendant.
- (2) The defence applies only to *public* parliamentary proceedings (clause 33(4)(a)), and therefore overcomes the problem relating to unauthorised reports of in camera proceedings. There may be a question about whether the defence would apply to evidence taken in camera by a committee and subsequently published by the committee or the house concerned, but I should think that such evidence would then be regarded as proceedings in public, because the publication would occur in the course of parliamentary proceedings. Section 10 of the Parliamentary Privileges Act lends itself more readily to that interpretation because it refers to proceedings at a parliamentary meeting. Perhaps this should be clarified in the model. The qualified defence of publication of a public document (clause 32) would certainly apply.
- (3) Because the definition of proceedings already referred to applies only to the defence of absolute privilege in clause 31, the defence of fair report would be confined to actual parliamentary proceedings and would not extend to the "penumbra" of matters incidental. It is therefore limited in much the same way as section 10 of the Parliamentary Privileges Act is limited.
- (4) It is clear that the defence of fair report would confer a qualified privilege only, by virtue of subclause 33(3).

On the whole, the parliamentary privilege provisions in the model are an improvement on those in the draft national law, subject to the clarification mentioned in (2).