ADVICE NO. 45

UPDATE ON OVERSEAS AND DOMESTIC DEVELOPMENTS

Past practice of Clerks has been to provide the Committee with information about developments in other jurisdictions where it may be of interest to it. I am pleased to continue that practice.

The developments covered by this note are:

- a decision by the United Kingdom Supreme Court in *R v Chaytor and ors* [2010] EWCA Crim 1919; [2010] WLR (D) 218;
- a decision by the New Zealand Court of Appeal in *Erin A Leigh v The Attorney-General in respect of the Ministry of Environment* CA483/2099;
- the various opinions given on the power of committees of the New South Wales Legislative Council to meet after prorogation;
- the tabling by the Speaker of the New South Wales Legislative Assembly of an exposure draft Parliamentary Privileges Bill.

R v Chaytor and ors

Chaytor and three other members of the House of Commons were committed to stand trial for offences connected with their expenses claims. They challenged the charges on the ground that the criminal proceedings were an infringement of parliamentary privilege, arguing that the expenses scheme was for the purposes of enabling the Parliament to perform its core business and therefore attracted the Article 9 immunity. It was also argued that the doctrine of "exclusive cognisance" prevented the Crown Court from having any jurisdiction in the matter. (Under that doctrine, only the House of Commons could deal with conduct by its members.) The appeals were dismissed by the Court of Appeal (Criminal Division) but that decision was itself appealed to the Supreme Court which dismissed the appeal, with the reasons being published on 1 December 2010.

The Court reaffirmed the basic principle that members of parliament have no immunity from criminal justice and concluded that the submission of allegedly false expenses claims had nothing to do with the need to preserve a member's right to freedom of speech in Parliament or with the core business or functions of Parliament. Their Lordships were unable to envisage the circumstances in which the performance by a member of his or her core responsibilities would require or permit the member to commit a crime. No question of privilege arises in relation to ordinary crimes.

Leigh v Attorney-General

In this New Zealand case, reasons for which were published on 17 December 2010, briefing material provided to a minister to answer questions in Parliament was allowed to be used to found an action in defamation against him and the briefing-provider, a senior public servant.

Erin Leigh had been contracted to a departmental communications unit to develop a communications strategy on climate change issues but left suddenly when a person was appointed to oversee the strategy on which she had been working. Questions were asked in Parliament about the appointment of the supervisor and briefings, both written and oral, were sought and given. The minister answered questions in Parliament in the course of which he made criticisms of Ms Leigh.

Ms Leigh commenced proceedings for defamation on the basis of the written and oral briefings and claimed that the republication of the defamations in the House aggravated the damage suffered as a result of the original defamation. Action was taken by the respondents in the High Court to strike out Ms Leigh's claims (not all of which are covered here because not all raised issues of parliamentary privilege). The action based on the written briefing was struck out on the basis that it was incapable of bearing the defamatory meanings claimed, while the action based on the oral briefing was struck out in respect of one statement for the same reason. The judge found that Article 9 of the *Bill of Rights* precluded the claim that the minister's statements in the House amounted to a republication. Ms Leigh appealed.

The Court of Appeal confirmed the last finding but upheld the appeals in respect of the written and oral briefings.

The relevant parts of the reasons concern the issue of whether the briefings fell within the meaning of "proceedings in Parliament". In upholding the appeal, the Court of Appeal found that they do not. I understand that an appeal to the relatively new Supreme Court is under consideration.

The reason for concern is that the judgment applies a rather narrower view of "proceedings in Parliament" than has previously been accepted to apply in New Zealand. Because New Zealand has now abolished appeals to the Privy Council and established its own Supreme Court as the final court of appeal, there is also some concern that the Supreme Court might not necessarily follow Privy Council precedents in such cases as *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC) in which subsection 16(3) of the Australian *Parliamentary Privileges Act 1987* was found to be declaratory of the effect of Article 9 of the *Bill of Rights*. While the *Leigh* judgment referred to this finding, it nonetheless preferred a less inclusive interpretation of "proceedings in Parliament". In doing so, it took guidance from the judgment of Lord Phillips in *Chaytor*, and from the following statement of principle:

> In considering whether actions outside the House and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament.

While noting Lord Phillips' conclusion that the examination of expenses claims forms by a court would have no adverse impact on the core or essential business of Parliament and therefore distinguishing the situation in Chaytor from the circumstances in the present case

where there was a link to the proceedings and a potential constraint on the minister's response to parliamentary questions, the Court of Appeal nonetheless considered the balance was best struck by not extending absolute privilege to the briefing material. It did not provide explicit reasons for arriving at that particular balancing point.

Although the decision has no implications for the Commonwealth because of the definitions in section 16 of the Parliamentary Privileges Act, the judgment is of concern because it weakens the position of parliament and the protection of parliamentary privilege as it has been previously understood to apply. Like the effective repetition decision (*Buchanan v Jennings*, another New Zealand case), it represents another chink in the parliamentary armour.

Committees of the NSW Legislative Council and prorogation

There was much attention in the press given to events in NSW. A committee of the Legislative Council had decided to undertake an inquiry into the sale of state electricity companies but the Parliament was prorogued and questions arose about the ability of the committee to meet after prorogation. The NSW Premier, armed with advice from the NSW Crown solicitor, suggested that any hearing of evidence by the committee would not be covered by parliamentary privilege. Although the Premier and one of her ministers gave evidence to the inquiry, former directors of the electricity company have declined. The President of the Legislative Council also declined to issue subpoenas for them to appear because there was reasonable doubt about the legal position.

Several advices have been published:

- advice from the NSW Crown Solicitor, dated 2 January 2011, confirming earlier Crown Solicitor's advice from 1994;
- advice from the Clerk of the Parliaments, Ms Lynn Lovelock, to the President of the Legislative Council, dated 11 January 2011;
- an opinion on the matter by Bret Walker SC, dated 21 January 2011.

Crown Solicitor's advice

The Crown Solicitor's advice is that committees cannot function during a prorogation without legislative authority and that standing orders permitting committees to operate for the "life of the Parliament" are beyond the authority of the relevant provision in the *Constitution Act 1902* (NSW). If committees are not able to function, they cannot therefore compel the attendance of witnesses. The Crown-Solicitor also advices that there is a risk that any evidence given would not be covered by parliamentary privilege, leaving witnesses potentially exposed to actions for defamation and breach of confidence. The advice also considers at what point legal action might be initiated to challenge the committee's actions and proposes that the service of a summons on a witness could support an action for declaration or injunction.

Clerk's advice

While noting that the legal position has not been tested, the Clerk advises that the Council is authorised by the Constitution Act to regulate its own business. In doing so, the Council has provided for the establishment of committees with the power to sit during the life of the Parliament, with no limitations on their power to sit during recesses. The only limitation is provided by a section of the Constitution Act which relates to the suspension of business before an election. The Clerk argues that the Legislative Council has a unique position in the system of responsible government operating in NSW, and that the power of modern standing committees to meet after prorogation is based on the principle of "reasonable necessity" as articulated by the High Court in *Egan v Willis*. The Clerk notes that the Crown Solicitor's advice is based on case law preceding *Egan v Willis* and goes on to present an extensive argument as to why the position, post-*Egan v Willis*, is different. The arguments are based on the changing nature of responsible government and the principle of reasonable necessity. The Clerk concludes that the proceedings of the committee will attract privilege, and that the standing orders and any orders issued by the committee are valid.

Advice of Bret Walker SC

In a relatively succinct opinion, Mr Walker agrees with the Clerk. He supports the importance of the judgments in *Egan v Willis* in changing the political landscape in NSW:

> It is clear from the reasoning of all justices in the High Court in Egan v Willis, various as their approaches were, that questions of parliamentary power depend not only on statutory wording but also on a broad, beneficial and purposive reading of provisions for such a central institution. And, at the heart of that approach, in my opinion, lies a paramount regard for responsible government in the sense of an Executive being answerable to the people's elected representatives.

He concludes by asking what justification there could be in modern times for permitting the Executive to evade parliamentary scrutiny by timing controversial actions just prior to advising the Governor to prorogue the Parliament.

Draft Parliamentary Privileges Bill

The NSW Parliament is in a different position to most Australian Parliaments in having no Constitutional or other statutory provision for its powers and privileges. In *Egan v Willis*, the High Court found that the Council had the powers and privileges that were reasonably necessary for it to carry out its functions as a central part of the system of responsible government in NSW. It therefore had the power to order the production of documents from the Executive (other than Cabinet papers). It did not, however, have the power to punish for contempt.

The exposure draft of the Parliamentary Privileges Bill 2010 confirms the scope of parliamentary privilege in NSW, provides measures to deal with offences against the Houses (contempts), including the imposition of penalties, and protects confidential communications of members from being discoverable in court proceedings except in certain circumstances. It borrows a number of things from the Commonwealth Parliamentary Privileges Act, including the threshold test for contempt in section 4 of the Commonwealth Act (that conduct must

amount to or be likely to amount to an ***improper interference*** etc). It goes a little further than section 16 of the Commonwealth Act in two respects:

- in defining "proceedings in Parliament", the bill makes it clear that the term covers persons who provide information to members for the purpose of asking questions or making statements (under the Commonwealth law, whether such actions are protected is subject to assessment by a court of the particular circumstances);
- it specifically provides for the problem of effective repetition, noting the Committee's 134th report on this subject and using the words suggested by the Committee in that report.