



Report on the Freedom of Expression vs. Parliamentary Privilege

Introduction

As stated in Section 116(2) of The Cayman Islands Constitution Order 2009 (the Constitution), the primary responsibility of the Human Rights Commission shall be “promoting understanding and observance of human rights in the Cayman Islands”. Additionally as in accordance with Sections 116(6)(e) and (f) the Human Rights Commission (HRC) has a constitutional mandate “to contribute to public education about human rights; and issue reports relating to human rights issues on its own initiative”. It is the view of the HRC that one such topic the citizens of the Cayman Islands would benefit from gaining an understanding of is Freedom of Expression as it relates to Parliamentary Privilege.

The right to Freedom of Expression is enshrined in Part I of the Constitution – The Bill of Rights, Freedoms and Responsibilities (BoRFR) which comes into force in November, 2012 however the Cayman Islands is currently governed by the European Convention on Human Rights which protects Freedom of Expression in Article 10 and which reads:

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The codified source for Parliamentary Privilege in the Cayman Islands is found in the Legislative Assembly (Immunities, Powers and Privileges) Law (1999 Revision). Additionally Section 82 of the Constitution provides this law with a constitutional backing and seeks to affix boundaries to the contents of the law. It should be noted however that no law may be enacted in the Cayman Islands which would seek to allow the Legislative Assembly’s powers and privileges to exceed those of the House of Commons or its members. It is considered that both the Legislative Assembly (Immunities, Powers and Privileges) Law (1999 Revision) and Section 82 of the Constitution meet those guidelines.

What is the Right to Freedom of Expression?

The right to Freedom of Expression is contained within Section 11 of the BoRFR and says:

11.—(1) No person shall be hindered by government in the enjoyment of his or her freedom of expression, which includes freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his or her correspondence or other means of communication.

(2) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society—

- (a) in the interests of defence, public safety, public order, public morality or public health;
- (b) for the purpose of protecting the rights, reputations and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telecommunications, posts, broadcasting or other means of communication, or public shows or entertainments; or
- (c) for the imposition of restrictions on public officers in the interests of the proper performance of their functions.

The term "expression" includes speaking aloud, publishing articles, books or leaflets, making television or radio broadcasts, and producing works of art.

Can government interfere with Right to Freedom of Expression?

The right to Freedom of Expression is a limited right with qualifications. As stated in Section 11(2)(a), (b) and (c) of the Constitution there are instances in which the Government has the ability to restrict the right of any resident of the Cayman Islands. The restrictions in this section may, at first glance to some, seem so broad that on the surface they defeat the purpose of freedom of expression; however, there are some key factors to note. Firstly, the interference has to be allowed by law. Government cannot arbitrarily deny access to freedom of expression and state as justification that it is in the interest of public order; secondly, the interference must be reasonably justifiable in a democratic society; and thirdly as Section 19(1) of the Constitution sets out - all decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.

Parliamentary Privilege

Parliamentary Privilege is described by *Erskine May's Parliamentary Practice*¹ as “the sum of the peculiar rights enjoyed by each House collectively and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies and individuals”.

Erskine May notes that the privileges afforded to parliament are “rights absolutely necessary for the due execution of its powers and on the other hand the privilege of Parliament granted in regard on public service must not be used for the danger of the commonwealth.”² It is a notable privilege that the House of Commons has a penal jurisdiction to enable them to “defend the dignity of Parliament against disrespect and affronts which could not be brought, or could be brought only by implication, under the head of any of

¹ *Erskine May's Parliamentary Practice* is seen as the primary codified source for House of Commons privileges, immunities and powers.

² *ibid*

the specific privileges.”³ The House of Commons, however, has resolved to exercise its penal jurisdiction as sparingly as possible and only when satisfied that it is necessary to do so.

Also within the ambit of Parliamentary Privilege is the ability to punish for contempt. Erskine May explains contempt as being “any act or omission which obstructs or impedes Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of the House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence.”⁴

In the Cayman Islands, the Members of the Legislative Assembly themselves are afforded an absolute right to Freedom of Expression through Section 3 of the Legislative Assembly (Immunities, Powers and Privileges) Law (1999 Revision) which states that:

(3) No civil or criminal proceedings may be instituted against any member for words spoken before, or written in a report to, the Assembly of which he is a member or to a committee thereof or by reason of any matter or thing brought by him therein by petition, bill, resolution, motion or otherwise, nor shall any such proceedings be instituted against any person in respect of such words broadcast or re-broadcast by any broadcasting station licensed under the Broadcasting Law (1997 Revision), or wholly owned by the Government of the Islands.

Limitations on Publishing

Sections 18(2) (a), (b) and (c) of the Legislative Assembly (Immunities, Powers and Privileges) Law (1999 Revision) states that:

(2) Whoever-

(a) publishes any statement, whether in writing or otherwise, which falsely or scandalously defames the Assembly or any committee, or which reflects on the character of the Speaker or the chairman of a committee in the discharge of his duty as such;

(b) publishes any writing containing a gross, willful or scandalous misrepresentation of the proceedings of the Assembly or a committee or of the speech of any member in the proceedings of the Assembly or a committee;

(c) publishes any writing containing any false or scandalous libel on any member touching his conduct as a member; or

(d) publishes any report or statement purporting to be a report of the proceedings of the Assembly in any case where such proceedings have been conducted after exclusion of the public by order of the Assembly,

is guilty of an offence and liable on conviction before the Grand Court to a fine of eight hundred dollars and to imprisonment for twelve months.

It is noted however that Section 19 states:

³Erskine May Parliamentary Practice 23rd Edition p. 80 para. 3

⁴ ibid

19. No prosecution for an offence under this Law shall be instituted except with the written sanction of the Attorney-General.

Publishing of Opinions vs. Facts

Section 18 (2)(a) of the Legislative Assembly (Immunities, Powers and Privileges) Law (1999 Revision) clearly states that “whoever publishes **any** statement”; therefore it could be argued that both published articles of fact and published opinions could be prohibited and the author liable for prosecution if either published document “falsely or scandalously defames the Assembly or any committee, or which reflects on the character of the Speaker or the chairman of a committee in the discharge of his(her) duty as such.”

Conclusion

Section 18(2) of The Legislative Assembly (Immunities, Powers and Privileges) Law (1999 Revision) exists alongside Section 11(2) of the Constitution. Section 18(2) is arguably “in the interest of public order and protects the rights, reputations and freedoms of other persons” (section 11(2) of the Constitution) (in this case the “other persons” are members of the House or MLA’s). It also appears to be justifiable in a democratic society as its stated purpose is to protect the formalities and propriety of the Legislative Assembly and its members.

Along with Parliament, it may well be thought that the media shares a responsibility to exercise its freedoms by reporting on and contributing to discussion on (inter alia) political, economic and social development. Parliamentarians should as individuals who volunteer to put themselves in the public domain, accept that the media’s coverage may include disagreement, criticism and a degree of cynicism. Persons who are particularly sensitive to criticism and may find such comments too intrusive should perhaps think twice before entering the public arena of politics. Mature critical reporting and fair comment are key features of the democratic process. However the public have the right to expect the media to provide balanced coverage without trivialising or denigrating the parliamentary process. This is how proper balance can be maintained between freedom of expression (particularly freedom of the press) and the long standing right and privilege of the Legislative Assembly to govern its own proceedings.

In the Hansard report on 9 December, 2010 the Honourable Minister of Education proposed the creation of a pamphlet to inform the public of their duties and of the privileges of the Legislative Assembly. The Human Rights Commission is very supportive of this educational initiative and is disappointed that such a publication by the Legislative Assembly is to date not available. The Speaker mentioned in that same Hansard report that copies of the Legislative Assembly (Immunities, Powers and Privileges) Law (1999 Revision) are readily available but in the opinion of HRC that is no substitute for a pamphlet in plain ordinary language easily understood by all.

**HUMAN RIGHTS COMMISSION
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