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At: MR CHODRES

RECEIVED
24/96

Re: Nigerian Bidder.

Second advice still to come.

SWW

1.4.96

with the compliments of
STUART LITTLEMORE QC

St James Hall Chambers Thirteenth Floor 169 Phillip Street Sydney 2000
Telephone 335 3097 Fax: 335 3099 DX 266

MEMORANDUM OF ADVICE

Re: Anglican Diocese of Newcastle - Sexual harassment complaints

My opinion is sought for the purposes of those concerned that lodging complaints of sexual harassment, or responding to such complaints, may make them liable to a suit for defamation.

1. Such complaints are inevitably defamatory.

A defamatory (libellous or slanderous) statement is one which tends to lower the person about whom it is made in the opinion of right-thinking people.

Thus, to allege that any person is guilty of an act of sexual harassment is plainly defamatory. Right-thinking people deplore sexual harassment and those who engage in it.

To make such a statement about a priest is even more serious. It may be one thing to complain that men digging the roads made lewd comments to passing women; but to make the same allegation against a person whose profession demands the highest standards of ethicality is self-evidently harmful in the highest degree.

2. A defamatory statement is not always actionable.

There are many circumstances in which a private citizen may make a defamatory statement to the appropriate person without fear of liability.

The law recognizes these circumstances in which free speech is essential to the proper functioning of the community; hence anything said in Parliament or a court of law is absolutely privileged, and cannot be the subject of litigation.

There are also occasions protected expressly by legislation: examples include complaints to the Ombudsman and the Anti-Discrimination Board.

3. A non-malicious complaint to the proper Church authorities is not actionable.

Complaints against Ministers (including those in the Diocese of Newcastle, of course) will be granted the protection of qualified privilege.

The difference between absolute privilege and qualified privilege is that in the latter case, the privilege will be lost if the person making the statement does so without due care, or for an ulterior motive. This is what the law calls malice.

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Examples of malice include: making the complaint knowing it to be false; recklessly as to whether it is true or false; or for the purpose of hurting the person against whom it is made.

So long as the complainant believes the complaint to be true, does not act without proper consideration and enquiry, and is not motivated by an improper purpose, the complaint will be deemed to be made on an occasion of qualified privilege.

It is important to understand that this protection still holds good, even where the complaint is untrue.

A complaint that is substantially true (it need not be literally true in every particular) could never be the subject of a successful suit for defamation.

3. The complaint must be made to the proper authorities.

The protection provided by the law is for complaints where there is a duty (moral, legal or social) imposed on the complainant and a corresponding interest in the recipient.

A person who is the victim of sexual harassment, or a witness to it, has a duty to bring it to the notice of the designated persons within the Diocese. Those designated persons have a corresponding responsibility to receive the complaint so that it may properly be dealt with.

To make such a complaint to people at large is improper, and will destroy the privilege otherwise available. It would not be proper, for example, to speak or write about the complaint to parishioners in general - least of all where proper processes have been put in place.

Where allegations are made to people at large, and not to the proper authorities, a court would hold that to be evidence of malice.

4. Those who receive complaints must take care.

Persons who are designated to participate in the process of dealing with complaints of sexual harassment may well have to repeat them. The law refers to this as republication.

A republication can itself amount to an actionable defamation, but only where it is made maliciously.

For example, a designated person may pass on details of a complaint he or she has received to a person other than a proper authority - perhaps because of its sensational nature, or because the new recipient is familiar with the people involved.

Such a republication must be avoided, and would be actionable.

So long as the designated person restricts republication to proper recipients, and makes it only for purposes of resolving the complaint, that republication will be made on another occasion of qualified privilege.

On occasions, a complaint will be made to a person who is not a proper authority, because the complainant is unaware of the established processes. In such cases, the recipient's duty is to direct the complainant to the appropriate person - and not to republish the allegation to any person.

5. The rights of those complained about.

The law also recognises that a person may defend himself or herself against any complaint - and, most obviously, a false complaint.

To do so will inevitably raise the problem of a defamatory statement in self-defence.

The same rules apply: a person is entitled to tell the truth in their own defence without fear of litigation. So may that person make a false statement in their own defence, so long as they conscientiously believe it to be true, and make it solely for the proper purpose - and not to 'get square' or harm the complainant.

This is not to say that a statement in self-defence will not be harmful to the complainant. On many occasions it will, but so long as that harm is not the dominant purpose of the person making the statement, it will be privileged.

6. Rulings on the complaint.

The end result of the conciliation and adjudication process will (or may) involve the publication of a statement setting out the result of the dispute.

This, too, will be a privileged publication - even though it may involve condemnation of the Minister, or the complainant/s or all of them.

Those making the publication must comply with the same rules as complainants and defenders as to malice, due care, and motive. Importantly, they must not publish (and no person may republish) the decision beyond those recipients with a proper interest in it: complainants, witnesses, defenders, and those affected or likely to be affected by it - usually, one imagines, the parish concerned.

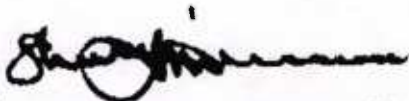
7. Summary.

Sexual harassment is a serious matter in the community. It is in the interests of all persons that non-malicious complaints of such conduct (even ones that prove to be untrue) should be made without undue inhibition, and that the subjects of such complaints must be free to respond to them in the same way, in order that the allegations may promptly and effectively be dealt with.

The law recognises this necessity, and will protect all those involved in the process, so long as they are acting for proper reasons, responsibly, and without malice.

Care must be taken to restrict the complaint, the defence, and the result of such processes to the people validly interested in the subject-matter of the complaint.

There will be no legal protection for rumour-mongering, or for publication (in speech or writing) to people not legitimately concerned with the resolution processes.



Stuart Littlemore QC
Chambers
1 April 1996