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Miscellaneous Paper 5

THE LAW OF PARLIAMENTARY PRIVILEGE IN NEW ZEALAND

A reference paper

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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand.

Its purpose is to establish law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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Preface

This paper is about the law of Parliamentary privilege in New Zealand.

This paper originated in work done in 1995 and 1996 for the Law Commission's project to codify the law of evidence and for the Legislation Advisory Committee's submissions on the Parliamentary Privilege Bill 1994. The Commission acknowledges the work of Ross Carter, a member of the research staff, who drafted this paper, and the assistance and advice of Dr Jim Allan, the Hon David Caygill, Mr Grant Huscroft, and Mr David McGee, Clerk of the House of Representatives, who provided helpful comments on the draft.

The Commission presents this work as a miscellaneous paper. It contains no proposals for changes to the law of New Zealand. It is a paper for reference use. We expect it to be used by members, officials and witnesses in the House of Representatives. Judges, public sector officials, the legal profession in general and law students may also find it helpful to refer to. Its purpose is to make the law of Parliamentary Privilege, a little-known but sometimes controversial area of the law, easier to find, interpret and understand.

1
Introduction

1 Recent New Zealand events have renewed interest in the law of Parliamentary privilege.

2 Court cases on this area of the law have gained notoriety. In 1993 the Judicial Committee of the Privy Council advised on the use of *Hansard* in defending members' defamation actions against those outside the House: *Prebble v TVNZ.*[1]

3 The *Prebble* case may not be the Committee's last advice on New Zealand's law of Parliamentary privilege.[2] The District Court's *Cushing v Peters* decisions[3] (that *Hansard* may be used to prove that a member's allegedly defamatory statement identifies a plaintiff) raise serious questions about the scope of the privilege of free Parliamentary speech. These decisions have aroused considerable news media[4] and academic[5] interest. They may well be considered further by courts[6] and the House[7] alike.

4 Between the *Prebble* and *Cushing* cases, representatives of a political party, in lawful actions which can still amount to a contempt of the House,[8] applied without success to the High Court for declarations and interim injunctions to prevent the House enacting clauses of the Electoral Reform Bill 1995: *Thomas v Attorney-General.*[9] The Privileges Committee report on the

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1 [1994] 3 NZLR 1, [1995] 1 AC 321. For discussion see para 27.

2 Despite the New Zealand Courts Structure Bill 1996, which would abolish appeals to the Judicial Committee of the Privy Council. Clause 13 provides that in "any proceedings commenced in any New Zealand Court before the commencement of this Act" appeals to the Committee may continue as if the Bill had not been enacted. The Bill was included in the carry-over motion for further consideration by the 45th Parliament: (1996) 553 NZPD 14361 (27 August 1996, Rt Hon Don McKinnon).

3 For discussion see para 40.

4 See, for example, "Cushing sues Peters in defamation action", *Evening Post*, 17 June 1996, 3; "*Hansard* report at centre of Peters' Defamation case", *The Dominion*, 18 June 1996, 2; "Judge Rules Peters can't use privilege", *Evening Post*, 18 June 1996, 1; "Peters renews bid to rule out remarks", *Evening Post*, 18 June 1996, 2; "Peters refuses to defend claim of defamation", *The Dominion*, 19 June 1996, 1-2; "Caygill Tackles Privilege", *Evening Post*, 20 June 1996, 3; "Cushing increases claim to $200 000", *The Dominion*, 20 June 1996, 1-2; "Judge unlikely to have the last word", *Evening Post*, 21 June 1996; "Peters to fight $50 000 award", *The Dominion*, 4 July 1996, 1; "Cushing wins $50 000 off Peters for Defamation", *The Dominion*, 4 July 1996, 3; "Clear-cut case of malice – Judge", *Evening Post*, 4 July 1996, 2; "Party stands by Peters; backs appeal", *Evening Post*, 4 July 1996, 3; "Benchmark Rules", *The Dominion*, Saturday 6 July 1996, 14; "Reforming Parliamentary Privilege" [1996] 19 TCL 25; "The Lowest of the Low", *The Dominion*, 9 July 1996, 6; "Importance of Being Honest", *Dominion*, 12 July 1996, 6.

5 See, for example, Joseph, "Why Peters could not use Parlt's privilege in his defamation case", *Christchurch Press*, 27 June 1996: "No, the judge did not get it wrong"; Kim Hill interviews Canterbury University Associate Law Professor Philip Joseph, *9am-Noon*, 19 June 1996, Newztel transcript; Joseph, "Parliamentary Privilege: *Cushing v Peters*" [1996] NZLJ 287; compare Allan, "Parliamentary Privilege in New Zealand" forthcoming [1996] 6 Canterbury LR: (*Cushing* decision takes statements in the *Prebble* case advice out of context and is incorrect); Dr Andrew Ladley: "[t]here are three legs to this [defamation] stool, and [if the third comes from *Hansard* and is protected] it can't stand on two": Geoff Robinson interview with the Hon David Caygill and Victoria University of Wellington Senior Law Lecturer Andrew Ladley, *Morning Report*, 20 June 1996.

6 Both parties have indicated willingness to appeal decisions against them, to the highest level if necessary. An appeal to the High Court could not progress at least until a ruling was made on who was to bear the costs of the District Court hearing, see, "Cushing to Privy Council", *National Business Review*, 21 June 1996, 1; "Peters to fight $50 000 award", *The Dominion*, 4 July 1996, 1; "Party stands by Peters; backs appeal", *Evening Post*, 4 July 1996, 3; "Peters appeal in defamation case stalled", *The Dominion*, 16 August 1996, 3. On 21 November 1996 Dalmer DCJ awarded Mr Cushing $75 000 in costs and disbursements, see "Peters ordered to pay $75,000", *The Dominion*, 22 November 1996, 1.

7 *Report of the Privileges Committee on the Question of Privilege Referred on 11 June 1996* (1996) AJHR I.15A. For discussion, see "Privileges Committee Ponders Peters' Case", *Greymouth Evening Star*, 13 June 1996; "Peters loses privilege case – MP's attempt to stall defamation action fails", *National Business Review*, 14 June 1996, 11; "MPs have second thoughts about bushwhacking Peters – In their rush to damage a fiery opponent, National and Labour politicians may have shot themselves in the foot", *National Business Review*, 21 June 1996, 13. See also the call by Prime Minister the Rt Hon Mr James Bolger (reportedly acting on a suggestion from ACT NZ political party leader the Hon Mr Richard Prebble), for the Hon Mr Peters MP to be summoned by majority resolution of the House before the Privileges Committee of the House and censured and/or fined for abusing free Parliamentary speech: "Bolger considers case against Peters", *The Dominion*, 10 July 1996, 2; "Censure bid unlikely to gain Labour help", *The Dominion*, 11 July 1996, 2; "Peters points to 'a little conspiracy'", *The Dominion*, 12 July 1996, 2.

8 Report of the Privileges Committee on the Question of Privilege Referred on 28 November 1995 (1996) AJHR I.15A.

9 (unreported, High Court, Wellington, CP 289/95, 27 November 1995, Gallen J); For a discussion see Joseph, "Constitutional Law: The High Court Challenge to the Ballot Paper Legislation" [1996] NZ Law R 1. For news reports see: "Court rejects

Thomas case confirms that the fact that it is usually perfectly lawful to seek declarations and injunctions from a court is not a complete answer to an allegation of contempt of the House.

5 On the advice of the Privileges Committee the House, in 1994, accepted that it had power to override court orders for non-disclosure. It ordered the publication of the "Wine box" documents tabled by the Member for Tauranga, despite the documents being the subject of court orders prohibiting their publication.[10]

6 Other events in the House itself have, in two ways in particular, renewed interest in Parliamentary privilege and contributed to developments.

7 First, the privilege of free speech and debates in Parliament has, on a number of occasions in recent years, been alleged to have been abused. For example:[11]

- In 1988, then Opposition Leader the Rt Hon JB Bolger MP named in Parliament a person connected with allegations of corporate fraud whose name was subject to a court suppression order.[12]
- In 1993, in the House, MP for Tasman Mr Nick Smith accused a Wellington lawyer of having "systematically fleeced" or defrauded the Druids' Friendly Society of about $18 million.[13] The lawyer denied the allegations.[14]
- In 1996, before a Justice and Law Reform Select Committee inquiry into gang activities police commissioner Richard Macdonald allegedly named a Wellington man, Mr Yan, who then declared his intention to sue for defamation.[15]

8 Second, it has been asked whether proposed inquiries by House committees would have respected properly witnesses' rights to the observance of natural justice.

9 For example, in September 1984, a subcommittee of the Public Expenditure Committee was set up to inquire into the 20 percent devaluation of the New Zealand dollar following the "run" on the currency around the 1984 general election. The inquiry subcommittee was composed partly of members who had publicly opposed devaluation, including the former Prime Minister the Rt Hon Sir Robert Muldoon. Treasury officers involved in the devaluation might have faced questions about personal fault from a body of questionable neutrality with few procedural protections. State Services Commission Chairman Dr Mervyn Probine issued a media statement questioning whether the inquiry would be seen to be disinterested and fair. Shortly afterward the inquiry was terminated. In a February 1985 submission to the Standing Orders Committee, then reviewing Standing Orders, Dr Probine called for protection of witnesses similar to that afforded to witnesses by tribunals established under the Tribunals of Inquiry (Evidence) Act 1921 (Eng).[16]

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ballot paper challenge", *Evening Post*, 28 November 1995; "Oversight stalls MMP ballot vote", *Christchurch Press*, 29 November 1995; "Failed court bid puts Lee's party under fire", *The Dominion*, 29 November 1995, 2. On 27 August 1996 the Hon Graeme Lee, Leader of the Christian Democrats political party, in thanking the Clerk of the House and his staff for their expert counsel during the 44th Parliament, said: "and I note we are still friends after the Christian Coalition took the Government and the Labour Party to the High Court within the last 12 months": (1996) 553 NZPD 14376.

10 (1994) AJHR I.15A. See Parliamentary Privilege Bill, Explanatory Note, para 100, 18.

11 For further examples, see Parliamentary Privilege Bill, Explanatory Note, paras 104-113 and 121-122; 19-20, 22; Palmer, "Parliament and Privilege: Whose Justice?" [1994] NZLJ 325, 325. See also note 187.

12 Parliamentary Privilege Bill, Explanatory Note, para 110, 20; Best, "Freedom of Speech in Parliament: Constitutional Safeguard or Sword of Oppression?" (1994) 24 VUWLR 91; New Zealand Law Society, "Parliamentary Privilege: Public Interest v Individual Rights" (1988) 291 *Lawtalk* 1; Auckland District Law Society Public Issues Committee, "Speaking Out: Members of Parliament and the Judicial Process" [1988] NZLJ 300.

13 Parliamentary Privilege Bill, Explanatory Note, para 121, 22; Best (1994) 24 VUWLR 91, 93.

14 See "Druids' Lawyer Denies MP's Allegations", *The Evening Post*, 19 August 1993, 1.

15 "Yan sues police for defamation", *The Dominion*, 13 August 1996, 3. If the action proceeds, a question arises as to how the allegation might be proved, since there are no *Hansard* reports, and transcripts of Select Committee proceedings have not been made routinely since before World War I; recent motions by the House that transcripts of oral evidence given to a Select Committee be published have been rare (for an example, see (1992) 532 NZPD 13286). The Official Information Act 1982 provides a disclosure regime for information held only by the executive government, see ss 2(6)(a), 4, 18(c)(ii), 52(1); Eagles, Taggart and Liddell, *Freedom of Information in New Zealand* (OUP, Auckland, 1992), 455.

16 See "State officials say devaluation probe was 'unfair trial'", *Evening Post*, 20 February 1995, 3; on the Tribunals of Inquiry (Evidence) Act 1921 (Eng), see note 142.

10 Similar concerns provided some reasons for procedures other than those of House committee inquiries being used to inquire into similarly "politically charged" allegations concerning

- the circumstances in which a senior public servant left the Public Service (urgent judicial inquiry by retired Chief District Court Judge),
- the Druids' Society accounts (an independent accountant appointed by the Registrar of Friendly Societies and Credit Unions), and
- the "Wine box" transactions (Commission of Inquiry undertaken by retired Chief Justice).[17]

11 New Standing Orders adopted by the House for use after 1 January 1996 have, to a degree, responded to these developments. The Standing Orders now afford Select Committee witnesses natural justice, illustrate conduct amounting to a contempt, permit some responses to allegations made under the protection of privilege, and refer to courts' use of *Hansard*.[18]

12 At the same time as the Standing Orders Committee considered reform of the Standing Orders, the Parliamentary Privilege Bill 1994 was introduced to the House to reform Parliamentary Privilege in New Zealand.

13 The first House elected under the Mixed Member Proportional (MMP) electoral sytem, introduced by the Electoral Act 1993, has of course more members than its predecessors. It remains to be seen

- whether this greater number of members may increase competition for news media and public attention, and
- whether this increased competition leads to greater use (and allegations of abuse) of free Parliamentary speech and debates.

17 See Rt Hon Sir Geoffrey Palmer [1994] NZLJ 325, 326; Response of the Hon Winston Peters MP [1994] NZLJ 329-330; Finance and Expenditure Select Committee, *Interim Report on the Income Tax Amendment Bill* (1994) AJHR I.3C.

18 (1995) AJHR I.18A.

2
What is Parliamentary Privilege?

PARLIAMENT IN NEW ZEALAND

14 Before 1 January 1987, the Constitution Act 1852 (UK)[19] and the prerogative[20] were the immediate legal sources of Parliamentary government in New Zealand. Before this legislation was enacted, New Zealand had a system of Crown-colony government. Section 32 of the 1852 Act established a General Assembly consisting of the Governor, a Legislative Council of appointed members and an elected House of Representatives. Parliament, styled as "The General Assembly of New Zealand", met for the first time on 24 May 1854 in Auckland. The Legislative Council was abolished in 1950.[21] A series of Acts, both of the General Assembly of New Zealand and of the Parliament of the United Kingdom, clarified and increased the independent law-making power of the General Assembly of New Zealand. From 1 January 1987, the Constitution Act 1986 ss 14-15 have provided that the Parliament of New Zealand consists of the Sovereign in right of New Zealand and the House of Representatives and continues to have full power to make laws. Moreover, no Act of the Parliament of the United Kingdom passed after the commencement of the Constitution Act 1986 extends to New Zealand as part of its law.

NATURE AND ORIGINS OF PARLIAMENTARY PRIVILEGE

15 Parliamentary privilege is "the sum of the peculiar rights" enjoyed by the *House of Representatives* collectively and by members of the House individually "without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals".[22] The privileges originate in the 16th-century practice of the Speaker claiming from the Crown on behalf of the English House of Commons

> their ancient and undoubted rights and privileges; particularly to freedom of speech in debate, freedom from arrest, freedom of access [to the Sovereign] whenever occasion shall require; and that the most favourable construction shall be placed upon all their proceedings.[23]

16 These words describe a number of the privileges that Speakers, on behalf of the House, "ceremonially and symbolically" continue to lay claim to at the beginning of each Parliament.[24] These peculiar rights are recognised by the courts as part of the common law because, and

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19 15 and 16 Vict c 72, enacted by the Imperial Parliament at Westminster.

20 So far as the executive government was concerned: "The Crown still retains a constituent legislative power in respect of New Zealand, the office of the Governor-General and the Executive Council are constituted by prerogative instrument": Joseph, *Constitutional and Administrative Law in New Zealand* (Law Book Co, Sydney, 1993) 23, 33-34, 79 (hereafter Joseph); A Quentin-Baxter, *Review of the Letters Patent 1917 Constituting the Office of the Governor-General of New Zealand* (Cabinet Office, Wellington, 1980), summary, paras 3, 7-10. See also note 136.

21 See Legislative Council Abolition Act 1950. For a brief summary of salient events in the history of the Legislative Council and a 1952 proposal to reinstate a second chamber see: *Report of a Constitutional Reform Committee* (1952) AJHR I.18; Scott, *The New Zealand Constitution* (OUP, London, 1962), 9-10. For later discussion see Palmer, *Unbridled Power* (2nd ed, OUP, Auckland, 1987), 231-238; *Report of the Royal Commission on the Electoral System: "Towards a Better Democracy"* (1986) AJHR H.3, 280-282, A69-A72, O'Connor [1988] NZLJ 4, Downey [1990] NZLJ 421, Joseph, 113-116. Another proposal to reintroduce an upper chamber (the Senate Bill in the Electoral Bill 1993), was not put to the people in the 1993 electoral referendum, and was rejected in the House in 1995.

22 Boulton (ed), *Erskine May: Parliamentary Practice* (21st ed, Butterworths, London, 1989) 69 (hereafter *Erskine May*); *Report of the Standing Orders Committee of the House of Representatives on the Law of Privilege and Related Matters* (1989) AJHR I.18B, 6.

23 Gordon (ed), *Erskine May: Parliamentary Procedure* (20th ed, Butterworths, London, 1983), 73, quoted in Parliamentary Privilege Bill 1994 Explanatory Note, 6.

24 (1992) PSO 16; (1995) PSO 22 and Joseph, 354. On 22 December 1993 the Hon Peter Tapsell, Speaker of the House, informed the House that he had laid claim to, and had had confirmed by the Governor-General, the rights and privileges of the House: New Zealand House of Representatives, *Notes on Parliamentary Law and Procedure* (December 1993-March 1994, 94/1), para 66.

only to the extent that, "a legislative body must have certain powers and its members must enjoy certain immunities if it is to discharge its functions as a legislature effectively".[25]

17 Parliament has powers and immunities to help it run its affairs (by protecting interests the House has), for example:

- The powers to regulate its own composition, and to regulate and be sole judge of the lawfulness of its own proceedings: to constitute itself, and organise and transact its business, with due independence from interference or control by the courts or the executive.[26]
- The power of freedom of speech in debates or proceedings: to seek, receive, consider, withhold and impart information relevant to the House's proceedings.[27]
- The powers of freedom of access to the Sovereign and to have the Sovereign construe the House's proceedings favourably: to have its views heard, and fairly considered by the executive, without retribution.
- The power to punish for contempt: to protect the independence, integrity, confidentiality, security, timeliness, relevance and reputation of proceedings, by punishing and deterring obstructions, impediments, threats, intimidation, fraud, misrepresentation, bribery, conflict of interest, theft, wrongful disclosure and refusal to supply information.
- The immunities from civil arrest, court summons and service of court process, the application to adjourn civil proceedings and the disqualification from jury service: to have all members, officers and witnesses available to attend and contribute to proceedings.

18 There is often a tension between the powers which Parliament requires to operate and the rights of individuals (including members) who become involved in Parliamentary proceedings, for example:

- access to the courts to obtain redress for alleged wrongs;[28]
- the right to the protection of the law against arbitrary and unlawful attacks on honour and reputation;[29]
- the right to the observance of natural justice by a public authority determining rights, obligations or interests protected or recognised by law;[30]
- the rights to personal liberty and freedom from arbitrary arrest or detention;[31]

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25 McGee, *Parliamentary Practice in New Zealand* (2nd ed, GP Publications, Wellington, 1994), 468 (hereafter McGee).

26 For judicial recognition of the wider convention of comity between the House and the Courts, and the mutual respect each accords generally to the other's sphere of operation see, for example, *Bradlaugh v Gossett* (1884) 12 QBD 271; *British Railways Board v Pickin* [1974] 2 WLR 208; *Rost v Edwards* [1990] 2 QB 460, 2 All ER 641; *Eastgate v Rozzoli* (1990) 20 NSWLR 188; *Hyams v Peterson* [1991] 3 NZLR 648; *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301; *Prebble v TVNZ* [1993] 3 NZLR 517, [1994] 3 NZLR 1; *Report of the Privileges Committee on the Question of Privilege concerning the printing of the documents tabled by the member for Tauranga* (1994) AJHR I.18A; *Thomas v Attorney-General* (unreported, High Court, Wellington, CP 289/95, Gallen J); *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140. For recognition of this convention by the House see, for example, the rules concerning members of the House referring in debate to members of the Judiciary and to matters awaiting judicial decision: (1992) PSO 170, 172; (1995) PSO 115-117, on which see Mullen, "The Parliamentary *Sub judice* Convention and the Media" (1996) UNSW LJ 303. See generally the Hon Justice Sir Kenneth Keith's learned and subtle discussion of the doctrine of "Separation of Powers – Some Pacific Reflections" (Paper presented to 15th Pacific Island Law Officers' Meeting, Nadi, Fiji, 16-18 October 1996), especially 5-8.

27 *Prebble v TVNZ* [1994] 3 NZLR 1, 10. See also the recent decision of the Western Samoan Court of Appeal in *Su'a Rimoni D Ah Chong v Legislative Assembly of Western Samoa* (unreported, 17 September 1996, CA 2/96), ruling that decisions of the Samoan House relating to a report tabled by the Auditor-General could not be reviewed.

28 This principle can be seen in courts presuming, when interpreting statutes, that Parliament does not intend to (perhaps even cannot) take away citizens' access to the courts; see, for example, *Chester v Bateson* [1920] 1 KB 829; *L v M* [1979] 2 NZLR 519, 527; *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390; *TVNZ v Prebble* [1993] 3 NZLR 513, 541. See also Harris, "Equal Access to Justice: A Constitutional Principle in Need of a Higher Profile" [1995] NZLR 282; *Cooper v Attorney-General* [1996] 3 NZLR 480; Pepperell, "The Courts and Parliament: Preserving the Conventions" [1996] 19 TCL 18-1; Russell, "Fishing for Fundamental Rights" (1996) 8 Auckland ULR 227.

29 *Stockdale v Hansard* (1839) 9 A & E 1, 112 ER 1112; Parliamentary Papers Act 1840 (UK); International Covenant on Civil and Political Rights (1966, 999 United Nations' Treaty Series (UNTS)) 171, open for ratification 23 March 1976, New Zealand ratification deposited 28 December 1978, entered into force for New Zealand 28 March 1979, for the text see (1979) AJHR A.69, hereafter *ICCPR*), art 17.

30 New Zealand Bill of Rights Act 1990 s 27(1).

31 *Burdett v Abbot* (1811) 14 East 1, 104 ER 501; *Case of the Sheriff of Middlesex* (1840) 11 Ad & E 273, 113 ER 419; R v *Richards, ex p*

- the right of freedom of expression generally;[32] and
- the right to vote and to be a candidate for membership of the House of Representatives and the executive government.[33]

19 If Parliament's interests conflict with those of individuals who become involved in its proceedings, then the law of Parliamentary privilege reconciles that conflict.

LEGAL SOURCES OF PRIVILEGE IN NEW ZEALAND

20 The common law held that colonial legislatures enjoyed only those privileges of the House of Commons which were incidental to and necessary for their efficient functioning.[34] A committee of the New Zealand General Assembly recommended in 1854 that remedial legislation be introduced to extend the privileges of the Assembly, and the Privileges Act 1856 was enacted. While authorising punishment of contempts affecting orderly conduct of sittings of the Assembly, the 1856 Act did not extend to contempts committed outside the precincts of the Assembly, such as attacks by newspapers on members. In the Privileges Act 1865, the Assembly arrogated to itself all the powers and privileges of the House of Commons as at 1 January 1865, and this provision continues today in the Legislature Act 1908 s 242.[35] The Legislature Act 1908 s 242(1) provides for the following:

> **242 Privileges of the House of Representatives. Journals as Evidence**
> (1) The House of Representatives and the Committees and members thereof shall hold, enjoy, and exercise such and the like privileges, immunities, and powers as on the 1st day of January 1865 were held, enjoyed, and exercised by the Commons House of Parliament of Great Britain and Ireland, and by the Committees and members thereof, so far as the same are not inconsistent with or repugnant to such of the provisions of the Constitution Act as on the 26th day of September 1865 (being the date of the coming into operation of the Parliamentary Privileges Act 1865) were unrepealed, whether such privileges, immunities, or powers were so held, possessed, or enjoyed by custom, statute, or otherwise.

Fitzpatrick and Browne (1955) 92 CLR 157, 171; *Donahoe (Speaker of Nova Scotia Legislative Assembly) v Canadian Broadcasting Corporation* [1993] 1 SCR 319, 350, 370; New Zealand Bill of Rights Act 1990 ss 22; ICCPR art 9(1). See also the decision in *Moala, I'Aau'ola and Pohiva v Superintendent of Prisons* (unreported, Supreme Court Tonga, Nuku'alofa Registry, 14 October 1996, C 1076/9), where the Chief Justice of Tonga granted *habeas corpus* to news media reporters who had been gaoled for contempt of Parliament, because the applicants were deprived of their constitutional protected rights to due process before deprivation of personal liberty.

32 New Zealand Bill of Rights Act 1990 s 14; ICCPR art 19(2); *Hyams v Peterson* [1991] 3 NZLR 648; *Donahoe (Speaker of Nova Scotia Legislative Assembly) v Canadian Broadcasting Corporation* [1993] 1 SCR 319, (1993) 100 DLR (4th) 212; *Prebble v TVNZ* [1994] 3 NZLR 1, 10; see Huscroft, "Defamation, Racial Disharmony and Freedom of Expression" in Huscroft and Rishworth, *Rights and Freedoms* (Brooker's, Wellington, 1995), 171, 192 (hereafter Huscroft and Rishworth); Tobin, "Defamation of Politicians, Public Bodies and Officials: Should *Derbyshire* and *Theophanous* apply in New Zealand?" [1995] NZLR 90, 106; Harris (1996) 8 Auckland ULR 45; Loveland, "Libel: Australia takes the Plunge" (1996) 146 NLJ 1558.

33 *Ashby v White* (1703) 2 Ld Raym 938, 92 ER 126, (1703) 3 Ld Raym 320, 92 ER 710; John Wilkes' case, 32 HC Journal 178 (3 February 1769), 38 HC Journal 977 (3 May 1782); *Bradlaugh v Gossett* (1882) 12 QBD 271, 302 Parlt Deb 1176 (27 January 1891), Oaths Act 1888 (Eng) 51 & 52 Vict c 46; compare *Powell v McCormack* (1969) 395 US 486; Palmer, "Adam Clayton Powell and John Wilkes: An Analogue from England for the Men in the Marble Palace"(1971) 56 Iowa LR 725; New Zealand Bill of Rights Act 1990 s 12; ICCPR art 25; *Report of the Royal Commission on the Electoral System: "Towards a Better Democracy"* (1986) AJHR H.3, para 9.3, 231-232. See also the discussion below on the House's power to regulate its own composition.

34 *Kielley v Carson* (1842) 4 Moo PC 63, 88-90; 13 ER 225, 234-235 (holding that the Newfoundland Legislative Assembly had no penal power of arrest for contempt); *Donahoe (Speaker of Nova Scotia Legislative Assembly) v Canadian Broadcasting Corporation* (1993) 100 DLR (4th) 212, 226-228 Lamer CJC, 265-273, McLachlin J, citing Maingot, *Parliamentary Privilege in Canada* (Butterworths, Toronto, 1982), 2-3.

35 Joseph, 356-358.

3
Content of Privilege

INTRODUCTION

21 The Clerk of the House of Representatives says that as the House has not codified its privileges, "any classification of them is therefore inherently subjective". The Clerk nevertheless divides the privileges of the House of Representative "into two broad categories: those which are in the nature of *immunities from legal processes* which would otherwise apply, and those which consist of a *power* to do something".[36]

POWERS

22 Some of the privileges in the nature of powers are exercised by the House, collectively, ordering something to be done. Others are exercised by individuals, but for the benefit of the House. The privileges in the nature of powers include the privilege of free speech and debates and the power to punish for contempt of Parliament.

Power to regulate own proceedings

23 The House's power to regulate its own proceedings is exercised collectively.

24 Parliamentary Standing Orders are the usual internal means by which the House regulates its own procedure. Standing Orders Committees are usually appointed for considering amendments. The previous Standing Orders were adopted in 1985 and amended in a relatively minor manner in 1986 and 1992. The Standing Orders Committee reviewed the 1992 Orders and recommended new Orders which the House adopted for use from 1 January 1996.[37]

25 The Standing Orders provide that the Speaker is responsible for maintaining order in the House.[38] The Standing Orders require that in cases for which they do not provide, the Speaker (or presiding member) is to decide, guided by Speakers' rulings and practices of the House.[39] The Standing Orders make clear that the Speaker's powers do not deprive the House of the power to proceed according to its privileges.[40] They are called Standing Orders because they remain in force until suspended[41] or amended. Standing Orders can be contrasted with Orders which have a time-limited effect or which have to be re-adopted at the commencement of each new Parliament (like Sessional Orders).

26 Parliament also enacts legislation regulating the House's proceedings.[42]

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36 McGee, 470 (emphasis added). This paper departs from McGee's classification by treating freedom of speech and debates as a *power* rather than an immunity from a legal process; privileged free speech and debates is not only immune from legal processes, but also creates no *substantive* liability under the general law. See *Interim Report of the Privileges Committee* (1993) AJHR I.15B, 4. Compare Best (1994) 24 VUWLR 91, 95.

37 For discussion of the Standing Orders Committee Report 1995 see Chapter 4.

38 (1992) PSO 146; (1995) PSO 82. For the Speaker's (or presiding member's) powers, see: (1992) PSO 195-199 and 202; (1995) PSO 87-90.

39 (1992) PSO 2; (1995) PSO 2.

40 (1992) PSO 200; (1995) PSO 1.

41 (1992) PSO 437; (1995) PSO 4-5.

42 See, for example: Constitution Act 1986 ss 11 and 20; compare *Bradlaugh v Gossett* (1884) 12 QB 271; New Zealand Bill of Rights Act 1990 s 7 (For discussion and references to the s 7 process see Huscroft, "The Attorney-General, the Bill of Rights, and the Public Interest" in Huscroft and Rishworth, 133, 136-151); Electoral Act 1993 s 268, formerly Electoral Act 1956 s 189 (see Robertson (1968) 2 Otago LR 222-227). The House has devised special rules for testing the special majority required by s 268 at the time a Bill goes through the Committee of the whole House stage: (1980) 433 NZPD 3512-3513; (1992) 524 NZPD 8190-8191.

Freedom of speech and debates

27 GENERALLY: Freedom of speech and debates is a specific privilege reaffirmed by article 9 of the Bill of Rights 1688 (an Act of the English Parliament expressly preserved as part of the law of New Zealand).[43] Article 9 is said to merely re-state the prior common law and therefore does not create the privilege of freedom of speech and debate (the privilege has been traced back to the 14th century: *Haxey's Case* in the 20th year of Richard II, 1396-1397).[44] Article 9 provides

> that the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament.

This privilege ensures

> so far as possible that a member of the legislature and witnesses before Committees of the House can speak freely without fear that what they say will later be held against them in the courts. The important public interest protected by such privilege is to ensure that the member or witness at the time he speaks is not inhibited from stating fully and freely what he has to say.[45]

28 As Best says, this privilege is said to be in the public interest, for "without it, new ideas may be suppressed, and public and private wrongs may remain unrighted".[46] The Australian Commonwealth House of Representatives justified this privilege as permitting members "to debate matters of importance freely, to ventilate grievances and to conduct investigations effectively".[47]

29 The common law recognised this protection as founded in necessity: ". . . absolute privilege in respect of statements made in the House is so essential for free discussion and the proper conduct of business that the setting-up of any legislative assembly necessarily implies the creation of that immunity".[48] In 1993, a New Zealand High Court said that "[t]he real concern of [P]arliamentary privilege is that to secure freedom of expression and conscience, no Member of Parliament should ever feel constrained by the knowledge that he or she may one day be penalised by another person or body for his or her conduct there".[49] It has also been said that a member of Parliament should be able to speak in the House "with impunity and without any fear of the consequences".[50]

30 It is in the nature of the privilege of free speech and debates that it provides protection only for words which would otherwise give rise to legal or other liability in courts or places out of Parliament. The privilege makes the public interest in free Parliamentary speech and debates decisive if another recognised right or interest conflicts with this interest. In the *Prebble* case, Lord Browne-Wilkinson identified the public interests in defamation proceedings involving members' words in the House, and the primacy that public policy accords to free Parliamentary speech and debates:

> There are three issues in play in these cases: first, the need to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information; second, the need to protect freedom of speech generally; third, the interests of justice in ensuring that all relevant evidence is available to the Courts. Their Lordships are of the view that the law has long been settled that, of these three public interests, the first must prevail.[51]

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43 Imperial Laws Application Act 1988 s 3(1) and First Schedule (now volume 30 of the Reprinted Statutes; RS 30).

44 Joseph, 362; *Erskine May*, 71; Munro, *Studies in Constitutional Law* (Butterworths, London, 1987), 138: "The privilege, claimed in the Speaker's petitions since 1541, was effectively secured at the Revolution." In the *Prebble* case [1993] 3 NZLR 513, 517, Cooke P pointed out that article 9 of the Bill reflects the eighth grievance recited in the Declaration of Rights earlier in 1688 – the prosecution in the King's Bench of suits only cognisable in Parliament, as in *Eliot's Case* (1629) 3 State Tr 294. See East, "The Role of the Attorney-General" in Joseph (ed) *Essays on the Constitution* (Brooker's, Wellington, 1995) 184, 196, citing Holdsworth, *A History of English Law* (1924) vol VI. Compare the Constitution of the United States of America, Article I, s 6.

45 *Prebble v TVNZ* [1994] 3 NZLR 1, 9, Lord Browne-Wilkinson.

46 Best (1994) 24 VUWLR 91, 93, citing Auckland District Law Society [1988] NZLJ 300.

47 *Parliamentary Privilege* (House of Representatives Fact Sheet, No 5, Revised May 1994, Canberra, Australia).

48 *Prebble v TVNZ* [1993] 3 NZLR 513, 517 Cooke P discussing *Chenard and Co v Joachim Arissol* [1949] AC 127, 133-134.

49 *Peters v Collinge* [1993] 2 NZLR 554, 573.

50 *Sankey v Whitlam* (1978) 141 CLR 1, 34, Gibbs ACJ.

51 [1994] 3 NZLR 1, 10.

31 SCOPE OF ARTICLE 9: Article 9 protects members', officers' and witnesses' words spoken or written in debates or proceedings in Parliament from actions in courts or other places out of Parliament. It has been said that "anything said or done within the House is absolutely privileged and cannot be judicially reviewed or made the basis of a civil or criminal action".[52] Article 9 protects against actions including, for example, for breach of a contractual,[53] tortious, equitable or fiduciary duty of non-disclosure, for obscenity, incitement of racial hatred, sedition[54] or contempt of court. Statutory provisions granting immunities to causes of action (for example, breach of copyright[55] and civil libel and slander[56]), or making particular publications[57] immune from actions, can apply to provide protection consistent with but in place of the general article 9 privilege. Similarly, there is no duty to disclose official information when disclosure would constitute contempt of the House.[58]

32 A corollary to this broad privilege is that convention obliges members to refrain from any course of action (including entering legal obligations) directly prejudicial to the privilege they enjoy. On 15 July 1947, the House of Commons declared by resolution that

> it is inconsistent with the dignity of the House, with the duty of a member to his constituents, and with the maintenance of the privilege of freedom of speech, for any member of this House to enter into any contractual agreement with an outside body, controlling or limiting the member's complete independence and freedom of action in Parliament or stipulating that he shall act in any way as the representative of such outside body. [59]

33 As members should declare their pecuniary interest in matters before the House or a Committee,[60] and will often choose to exempt themselves from the proceedings concerned, breaches of legal duties of confidentiality owed to outsiders should be rare. Recent controversy in the United Kingdom concerning allegations of members accepting money to ask or refrain from asking particular questions provides an example of conduct prejudicial to the privilege.[61] Such conduct may be adjudged a contempt of Parliament and punished by the Privileges Committee.

34 The prohibition on courts calling into question members' freedom of speech and debates or proceedings in Parliament is to protect the House in its corporate capacity, not individual members personally. "The privilege protected by article 9 is the privilege of Parliament itself. The actions of any individual member of Parliament, even if he has an individual privilege of his own, cannot determine whether or not the privilege of Parliament is to apply."[62]

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52 Joseph in (1995) I.18A, Appendix F, 218. See also: Report of the Privileges Committee *Concerning the Printing of the Documents Tabled by the Member for Tauranga on 16 March 1994* (1994) AJHR I.15A; *Prebble v TVNZ* [1994] 3 NZLR 1, 9 Lord Browne-Wilkinson. For exceptions to this general rule see below.

53 Hence a coalition agreement between members of different political parties included terms of non-disclosure, if (as is questionable) it amounted to a contract (rather than a convention like collective ministerial responsibility, breach of which results in only political sanctions), would not be binding in House debates.

54 See, for House of Commons examples, the 1938 draft Parliamentary question of Duncan Sandys MP including information obtained in breach of an Official Secrets Act and the 1987 proposal to screen in the House precincts a film on secret security project code-named Zircon; *Report of the Select Committee on the Official Secrets Acts*, HC 101 of 1938-39; *First Report of the Privileges Committee*, HC 365 of 1986-87; Griffith and Ryle, *Parliament – Functions, Practice and Procedures* (Sweet and Maxwell, London, 1989), 88, 103-104; *Erskine May*, 94.

55 Copyright Act 1994 s 59.

56 Defamation Act 1992 s 13(1). Crimes against reputation (criminal libel and publishing, formerly Crimes Act 1961 Part IX) were abolished from 1 February 1993 by the Defamation Act 1992 s 56(2).

57 Legislature Amendment Act 1992 ss 4-5.

58 Official Information Act 1982 ss 18(c)(ii), 52(1); Eagles, Taggart and Liddell, (OUP, Auckland, 1992), 455-477. The definition of "agency" in the Privacy Act 1993 s 2 means that the principles in Part II of that Act expressly do not apply to the House of Representatives and a Member of Parliament in his or her official capacity.

59 *Erskine May*, 85.

60 (1992) PSO 144; (1995) PSO 167-169 and 396. Ministers of the Crown are, by their office, subject to further requirements to ensure that no conflict of interest exists or appears to exist between their private interests and their public duty. For example, Ministers must register their private interests (and changes to these interests) and gifts and payments to them with the Registrar of Ministers' Interests (an office held by the Secretary of the Cabinet) and the Register of Ministers' Interests is tabled by the Prime Minister in the House each year: *Cabinet Office Manual* (Cabinet Office, August 1996) paras 2.75-2.91, 27-30. See, for an example of the Register, (1996) AJHR B.4, tabled by the Prime Minister on 25 June 1996: *Parliamentary Bulletin* 96.14, 1 July 1996, 16.

61 "Privilege Rebounds on Plaintiffs in Libel Case", *The Guardian Weekly*, 30 July 1995, 8.

62 *Prebble v TVNZ* [1994] 3 NZLR 1, 9, Lord Browne-Wilkinson.

35 This may sometimes prejudice a member his or her personal capacity. For example, a member may be unable to give evidence of Parliamentary proceedings to support a personal cause of action against an outsider. In *Rost v Edwards* [1990] 2 QB 460, 475-476, the Court held that the member could not adduce evidence about his appointment and de-selection from a Select Committee, even though no question arose of the evidence "questioning the validity of any decision of the House or its committee or making any suggestion of improper motive".

36 Similarly, an outsider may be unable to give evidence of Parliamentary proceedings to prosecute an action against a member. For example, in *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522, the plaintiff could not rely on a member's statements in the House to prove the member's malice, and thus could not prevent the member from relying on the defence of fair comment.

37 Outsiders may also be prevented from giving evidence of Parliamentary proceedings to defend a member's action against them. (See, for example, *Prebble v TVNZ* [1994] 3 NZLR 1.) However, in the *Prebble* case their Lordships conceded that if the inability to rely on Parliamentary material would prevent the defendant from mounting a proper defence, the defendant is entitled to a stay of proceedings: [1994] 3 NZLR 1, 11-12 Lord Browne-Wilkinson. Stays were granted in two 1995 English libel actions by members against newspapers on the grounds that privilege prevented the newspapers from mounting a proper defence, but a statutory reform has, since 4 September 1996, changed the law on this point in England.[63]

38 Article 9 has been described as "badly drafted and ambiguous".[64] A number of questions have been raised about how the terms of article 9 should be interpreted, for example:[65]

- Should "freedom" qualify "speech" alone or "speech and debates"? – both.[66]
- Should "questioned" (coloured by "impeached") be interpreted narrowly as meaning "criticise", or more widely to also include "examine or discuss"? – narrowly.[67]
- Should "place" be read *ejusdem generis* as limited to places of the same genus as "court"? – yes.[68]
- Should "proceedings in Parliament" include some actions outside the precincts of Parliament and exclude some inside those precincts? – yes.[69]

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63 See *Allason v Haines and Anor* [1996] EMLR 143, (1995) 145 NLJ 1576-1577, [1995] PL 653; "Privilege Rebounds", *The Guardian Weekly*, 30 July 1995, 8; Gorman, "MPs Discover the Unwelcome Face of Parliamentary Privilege" (1995) SJ 772-773, discusses the second case, heard and decided by May J in July 1995, where Mr Neil Hamilton MP and Ian Greer Associates (a lobbying company) sued the *Guardian* for libel for an article published in that newspaper on 20 October 1994. The article was the first report of the so-called "Cash-for-Questions" affair; allegations that Mr Hamilton and Mr Tim Smith (another Conservative Party MP and Minister) used their right to ask questions of Ministers in the House for improper private gain; payments and benefits in kind provided by Mr Mohammed Al-Fayed (Harrods businessman) through Mr Greer's lobbying company, none of which were declared in the Register of Members' Interests. For the statutory reform these cases prompted, see the discussion below on 'waiver' of the article 9 privilege. For the further House of Commons inquiry into the scandal, see note 142.

64 Bennion, "Hansard – Help or Hindrance? A Draftsman's View of *Pepper v Hart*" (1993) 14 Statute LR 149, 152.

65 For general discussion, see Parliamentary Privilege Bill 1994, Explanatory Note, 8-10.

66 Bennion (1993) 14 Statute LR 149, 152.

67 *Cushing v Peters* (unreported decision on merits, District Court, Wellington, NP 1340/92, 3 July 1996, Dalmer DCJ); McGee, 473-474, *Prebble v TVNZ* [1994] 3 NZLR 1, 10; Pepper *(Inspector of Taxes) v Hart* [1993] 1 All ER 42, 68; compare *Rost v Edwards* [1990] 2 QB 460, 466, 469, 2 All ER 641, 647, 650; Evans, "Parliamentary Privilege: Changes to the Law at Federal Level" (1989) 11 UNSW LJ 31, 36-38.

68 Mummery, "The Privilege of Freedom of Speech in Parliament" (1978) 94 LQR 276; Mummery, "Due Process and Inquisitions" (1981) 97 LQR 287; Parliamentary Privileges Act 1987 (Cwlth Aust) s 3 "tribunal"; *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, 68; Bennion (1993) 14 Statute LR 149, 153; Joseph, 364-365; McGee, 478-479; Parliamentary Privilege Bill, Explanatory Note, 18-19; Carmody, "Royal Commissions, Parliamentary Privilege and Cabinet Secrecy" (1995) 11 QUT LJ 49.

69 *Re Parliamentary Privileges Act 1770* [1958] AC 331, Wade [1958] CLJ 134-135; *Attorney-General of Ceylon v De Livera* [1962] 3 All ER 1066, 1069-1070; *Rost v Edwards* [1990] 2 QB 460, 2 All ER 641; *Report of the Select Committee on the Official Secrets Acts*, HC 101 of 1938-39; Joint Committee on the Publication of Proceedings in Parliament (1969-1970) (UK), Second Report, HL 109, 1969-1970 Sess, paras 27-28; *First Report of the Privileges Committee*, HC 365 of 1986-87; Parliamentary Privileges Act 1987 (Cwlth Aust) ss 3, 16; *Erskine May*, 92-94; McGee, 474-475; Parliamentary Privilege Bill 1994 cl 2.

39 EXCEPTIONS TO ARTICLE 9: The Standing Orders Committee has said that

> any use of Parliamentary proceedings in court must be for the purposes described by the Privy Council in *Prebble v Television New Zealand* to be consistent with article 9. This is a matter primarily to be enforced by the courts themselves, although the House could in an appropriate case intervene through counsel instructed by the Speaker to ensure that its privileges are not overlooked. [70]

40 In the *Prebble* case Lord Browne-Wilkinson considered that courts may use Parliamentary material without breaching article 9 for these purposes:

- *To prove material facts in court generally*: Article 9 only proscribes the "impeaching" or "questioning" of proceedings in Parliament. In *TVNZ v Prebble* [1993] 3 NZLR 513, 518, Cooke P expressly adopted the Attorney-General's submissions that *Hansard* and other House records are admissible to prove the material facts that:
  - a statement was made in Parliament at a particular time, or that it refers to or identifies a particular person;[71]
  - a Government decision was announced in Parliament on a particular day;[72]
  - a member of Parliament was present in the House and voted on a day;[73]
  - a report of Parliamentary debates corresponds with the debate itself and is fair and accurate and therefore attracts qualified privilege in the law of defamation;[74] or
  - an Act was passed.[75]
- *To interpret statutes*: New Zealand courts have used *Hansard* as an aid to interpreting statutes for some time. The decision of the House of Lords in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 marked a more recent English endorsement of the courts' use of Parliamentary material to aid statutory interpretation.[76]
- *To prosecute* the offences of *perjury, bribery of members* and *bribery of ministers*.[77]

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70 (1995) AJHR I.18A, 79; *Report of the Privileges Committee on the Question of Privilege Referred on 11 June 1996* (1996) AJHR I.15A. In the *Prebble* case Cooke P in the Court of Appeal [1993] 3 NZLR 513, 517 said that "[o]n the question of parliamentary privilege the [High Court] Judge had heard argument from the Attorney-General and Crown counsel as *amici curiae* and we had the same advantage in this court". In the Privy Council's advice Lord Browne-Wilkinson acknowledged that the Council had had "the great advantage of hearing" the Attorney-General: [1994] 3 NZLR 1, 6. For the Attorney-General's account of these appearances, see East in Joseph (ed), *Essays on the Constitution* (Brooker's, Wellington, 1995), 184, 197-200.

71 [1993] 3 NZLR 513, 518 Cooke P citing *Hyams v Peterson* [1991] 3 NZLR 648 (on which see Joseph, 369-371; *Onama v Uganda Argus* [1969] EA 92) and *New South Wales Branch of the Australian Medical Association v Minister for Health and Community Services* (1992) 26 NSWLR 114. See also *Wittmann v Airways Corporation of New Zealand Ltd* (unreported, High Court, Wellington, 27 September 1993, CP 98/93, Master Thomson) [1993] BCL 2001, [1993] 16 TCL 44-10, [1994] NZ Recent LR 352-353; *Cushing v Peters* [1994] 3 NZLR 30, 31, [1994] DCR 803, 809-810 (unreported interim ruling on use of *Hansard*, District Court, Wellington, NP 1340/92, 17 June 1996, Dalmer DCJ); (unreported decision on merits, District Court, Wellington, NP 1340/92, 3 July 1996, Dalmer DCJ). Compare Parliamentary Privileges Bill 1994 cl 7(2) (NZ), based on the Australian Parliamentary Privileges Act 1987 (Com) 16(3), which in the *Prebble* case their Lordships said "contains ... the true principle to be applied: [1994] 3 NZLR 1, 8. For an example of s 16 in operation, the explanatory memorandum, and references to the Commonwealth Senate and House of Representatives speeches on the Act see *Amann Aviation Pty Ltd v Commonwealth of Australia* (1988) 81 ALR 710, 716-717; Harders, "Parliamentary Privilege – Parliament versus the Courts: Cross-examination of Committee Witnesses" (1993) 67 ALJ 109; Walker, "Defamation and Parliamentarians" (1989) 9 Communication Law Bulletin 3; Evans (1989) 11 UNSW LJ 31, 36-38; Clerk of Senate, "Parliamentary Privileges Act 1987 (Cwlth)" (1987) 6(7) *The House Magazine*. See also how the drafter of the Defamation Act 1996 (UK) c 31 s 13 read their Lordships' advice in the *Prebble* case on the scope of the article 9 protection.

72 *Roman Corp v Hudson's Bay Oil and Gas Co Ltd* [1973] SCR 820.

73 *Forbes v Samuel* [1913] 3 KB 706.

74 Defamation Act 1992, ss 16-19, First Schedule, Part I, cls 1-2.

75 *Prebble v TVNZ* [1994] 3 NZLR 1, 11, Lord Browne-Wilkinson.

76 *Pepper v Hart* can be viewed as a resumption of an earlier practice; see, for example, *In Re Castioni* [1891] 1 QB 149, where the Judges discuss John Stuart Mill's views as a member of Parliament on the meaning of offences "of a political character" in the Extradition Act 1870 (Eng) 33 & 34 Vict c 52. See also *TVNZ v Prebble* [1993] 3 NZLR 513, 530 Richardson J; McGee, 474; *A New Interpretation Act – To Avoid "Prolixity and Tautology"* (NZLC R17 1990), paras 100-126; *Legislation and its Interpretation* (NZLC PP8 1988), paras 151, 163, 170. Compare s 15AB Australian Acts Interpretation Act 1901 (Cwth) (inserted in 1984). For a more recent discussion of the law on this matter in Australia, New Zealand, Canada and Britain see Bale, "Parliamentary Debates and Statutory Interpretation: Switching on the Light or Rummaging in the Ashcans of the Legislative Process?" (1995) 74 Can Bar Rev 1.

77 Crimes Act 1961 ss 102-103, 108-109 and Legislature Act 1908 s 252.

41 PETITIONING THE HOUSE AND "WAIVER" OF ARTICLE 9 PRIVILEGE: This practice developed in Britain where litigants would petition the House of Commons if they wanted to present its records or proceedings as evidence in court.[78] Petitions for leave to adduce Parliamentary material in New Zealand have been only occasional, although there was an instance in 1880 of a petition being refused.[79] In 1993 the Attorney-General informed the Judicial Committee of the Privy Council that in practice the New Zealand House of Representatives no longer asserts the right to restrain publication of its proceedings.[80] The Standing Orders Committee of the House recommended in 1990 that the House formally abandon the practice of granting leave to litigants to adduce proceedings as evidence in court proceedings.[81] The 1995 Standing Orders, acknowledging article 9, reasserted that this practice no longer continues.[82]

42 The effect of the petition was only to ensure that the litigant would not be held by the House to be acting in contempt. The House is not competent to authorise by resolution alone the admission of Parliamentary materials contrary to the statutory terms of article 9 of the Bill of Rights 1688 (Eng). It is clearly accepted (even by the House itself) that no person or body may override the laws of Parliament, and that the House may not by resolution alone, extend, waive or abridge members' and others' freedom of speech in Parliament.[83] Even so, the courts, charged with deciding the scope and nature of the statutory privilege as a question of law, have at times introduced confusion about whether litigants might petition the House to waive its privilege and by resolution alone grant leave to refer to Parliamentary proceedings contrary to article 9.[84]

43 That the New Zealand House might of course at any time introduce by legislation some form of a waiver is clear from recent English developments: the Defamation Act 1996 c 31 s 13. This provision was enacted to prevent article 9, in defamation actions like that brought by Mr Neil Hamilton MP,[85] operating as "a blanket ban on questioning anything that went on in Parliament".[86] Following the Lord Chancellor Lord McKay's suggestion to him that the House of Lords debate this matter, on 2 April 1996, Lord Justice Hoffman introduced the provision which became section 13 in the Lords Committee stage of the Bill for the Act.[87] Lord Hoffman acted to emphasise his judicial independence and neutrality by saying that he was "not an advocate" for the provision, by outlining some of its drawbacks and by abstaining from votes on it. His Lordship explained that:

> [t]he injustice which the amendment seeks to remedy is that a Member of the House of Parliament cannot, like any other citizen, sue to clear his name if he is alleged to have acted dishonestly in connection with his Parliamentary duties.[88]

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78 *Erskine May*, 90-91, 758-759.

79 McGee, 477-478.

80 *Prebble v TVNZ* [1994] 3 NZLR 1, 10.

81 (1987-1990) AJHR I.18B, paras 22-23.

82 See the discussion below.

83 McGee, 477-478; Best (1994) 24 VUWLR 91, 100-101; Joseph, 373-374; (1993) 536 NZPD 16191-16195; Brookfield [1993] NZ Rec LR 278, 284; *Interim Report of the Privileges Committee* (1993) AJHR I.15B, 4-5; McGee, "The Application of Article 9 of the Bill of Rights 1688" [1990] NZLJ 346, 348; *Fitzgerald v Muldoon* [1976] 2 NZLR 615.

84 See, for example, *Rost v Edwards* [1990] 2 QB 460, 469-470, 2 All ER 641, 650-651 and *TVNZ v Prebble* [1993] 3 NZLR 513, 521-522, Cooke P; compare the tentative view to the contrary of Richardson J, 534-535. Brookfield [1993] NZ Rec LR 278, 284, says: "Since what would be in issue is the scope and nature of the privilege, it may be that Cooke P is right in deciding that the matter is one for the court. . . . However one would not expect the court to seek confrontation with the House on such a matter, which the resolution of the House is likely to determine."

85 See notes 63 and 142. Mr Hamilton's action was stayed by the court because it could not try the case fairly without "questioning", contrary to article 9, the Member's conduct and motives in tabling Parliamentary questions (the subject of allegedly defamatory allegations). Messrs Hamilton and Greer described the July 1995 court order staying their libel action as "a travesty of justice" and lobbied Parliament to change the law. Hamilton was quoted as saying "I am not asking for anything fantastic, just the right for an MP like me to clear their name", and that MPs were "uniquely hobbled": see "MP had the Law Changed to Secure his Day in Court", *The Times*, 1 October 1996.

86 571 HL Official Report (5th Series) cols 251, 251 (2 April 1996) Hoffman LJ.

87 See "Law Lord's 'Favour' that Backfired on MP", *Guardian*, 2 October 1996, 2.

88 571 HL Official Report (5th Series) cols 251, 251 (2 April 1996); Scott-Bayfield (1996) 140 SJ 866.

44 Lord Hoffman explained that s 13 gives any person whose conduct in Parliament is in question in defamation proceedings a discretion to disapply the article 9 rule for those defamation proceedings. This waiver would have two important limits. It would operate only in respect of the conduct of the person who exercised the discretion; no-one else's. It would also disapply article 9 only so far as that rule prevents what a person has said or done in proceedings the House being "questioned or impeached" in the sense of *considered*. (The section, whether or not a person exercised the 'waiver', would not affect the rule that no person is subject, in any court or place out of Parliament, to legal liability for what he or she said or did in proceedings in Parliament.) His Lordship said that:

> [t]he purpose of the amendment is to allow a person who may be a member of either House, or neither, to waive so far as concerns him, the protection of any rule of law which prohibits the investigation of proceedings in Parliament. The waiver does not affect the operation of the rule in respect of anyone else and, furthermore, the immunity of Members from any kind of action in respect of what they have said or done in Parliament remains sacrosanct and cannot be waived. Therefore . . . [a] Member could waive the protection of the rule so as to allow investigation of his own conduct by the court, but not that of anyone else. [89]

45 Section 13 allows individuals to 'waive' a right which is not personal to those individuals, but instead belongs to the House in its corporate capacity. Lord Hoffman explained how the wording and technique of section 13 account for this technical point.

> The Privy Council in the New Zealand case [*Prebble v TVNZ* [1994] 3 NZLR 1, 9, Lord Browne-Wilkinson] said rightly, if I may say so, that Article IX was a privilege of Parliament and not of the individual members. It is a rule of law and not a personal right. Therefore the amendment is phrased not as a waiver of the right, but a waiver which, to a limited extent, disapplies the rule. [90]

46 The Lords agreed the third reading of s 13 (by 157 votes to 57) on 7 May 1996.[91] Lord Simon of Glaisdale spoke in the debate of "grave difficulties" with the amendment, saying that it misconceived of the privilege as belonging to individual members rather than to each House as a whole or to Parliament and that its constitutional importance "[c]ould not be exaggerated". Lord Lester of Herne Hill QC said in debate that "[t]he amendment is flawed and would infringe the fundamental principles of the unwritten constitution", that it would be unfortunate if it was sought for "political purposes", and that it extended Parliamentary privilege in a manner that would unnecessarily interfere with free speech generally. The House of Commons agreed s 13 finally (by 264 votes to 201) on 24 June 1996.[92] The Act received the Royal assent on 4 July 1996 and s 13 came into force on 4 September 1996.

47 Ironically Mr Hamilton, who lobbied Parliament to enact s 13 so that he could make *The Guardian* prove in court the truth of the allegations in its newspaper article, withdrew his libel proceedings on 30 September 1996. His capitulation and payment of £15 000 towards the defendant's costs was apparently made in view of facts *The Guardian* had discovered and would draw on to defend itself.[93] Asked about s 13 in view of Mr Hamilton having withdrawn his libel action Lord Hoffman said: "It looks as if we didn't do the guy a favour. I thought at the time and I said that if a chap wants to sue he should be able to sue."[94]

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89 571 HL Official Report (5th Series) cols 251, 251 (2 April 1996).

90 571 HL Official Report (5th Series) col 253 (2 April 1996).

91 572 HL Official Report (5th Series) cols 24 and following (7 May 1996). For newspaper reports see "Law Lord's 'Favour'", *The Guardian*, 2 October 1996, 2; "Defamation Day", *The Times*, 21 May 1996; "No Rights to Silence Others", *The Guardian*, 13 May 1996, 14; "Peers Vote to Overturn 300-Year-Old Libel Rule", *The Times*, 8 May 1996.

92 See 280 HC Official Report (6th Series) Col 101 (24 June 1996). For newspaper reports see, for example, "Privilege Change Frees MP to Sue", *The Financial Times*, 25 June 1996, 7; "Commons Loss Sparks Libel Fear Loss of 'Privilege'", *The Independent*, 25 June 1996, 5; "Commons Rejects Bid to Block MPs' Libel Move", *Press Association Newsfile*, 25 June 1996; "Bill Vote has Hidden Agenda", *The Independent*, 24 June 1996, 2.

93 See "MP had the Law Changed", *The Times*, 1 October 1996; "Law Lord's 'Favour'", *The Guardian*, 2 October 1996, 2; "How Neil Hamilton Could Get Away with It", *The Guardian*, 10 November 1996, 37; "'I will embarrass you now by saying that I always thought you should be Chancellor of the Exchequer'", *London Review of Books*, 17 October 1996, 10. See also note 142.

94 See "Law Lord's 'Favour'", *The Guardian*, 2 October 1996, 2.

48 On 24 October 1996 Lord Richard, Labour Party Leader of the Lords, told peers that "[t]he amendment to the Bill of Rights [Act 1688], passed in such a cavalier manner, should be repealed", and that a Labour Party government could reverse this "tinkering" under its programme for constitutional change.[95]

49 Returning to New Zealand, it remains necessary to gain the special leave of the House for shorthand writers and officers of the House to give evidence in court proceedings.[96] The Standing Orders Committee of the House recommended in 1990 that the House retain this practice.[97] Once again, this procedural requirement does not affect the substantive prohibition on the use of Parliamentary material in court proceedings under article 9 of the Bill of Rights 1688 (Eng), but failure to seek special leave may constitute contempt.

Publications by order or under authority of the House

50 Related to members' article 9 freedom of speech and debates is the statutory protection for publications by order or under the authority of the House.

51 DOCUMENTS: At common law it was no defence to liability for defamation that a publication the subject of complaint was published by order of the House.[98] The Parliamentary Privilege Act 1856 (NZ), by conferring legal protection on documents published by order of the House, followed in material respects the Parliamentary Papers Act 1840 (UK).[99] From 1 February 1993, the Legislature Amendment Act 1992 s 4 has provided protection against any legal liability (civil or criminal) wherever an "Authorised Parliamentary paper" is published.[100]

52 An official report of proceedings (*Hansard*) was published from 1867 by or under the authority of the House and is now carried out under statute.[101] The House, adopting different terminology to that in the Legislature Amendment Act 1992, also orders that "papers" tabled (presented to it) be published by order as "Parliamentary papers".[102]

53 The so-called "Wine box" of documents provides an unusual example of this.[103] Having gained the leave of the House to do so, on 16 March 1994 the Hon Winston Peters MP tabled (in a cardboard box designed to contain wine bottles) a number of documents subject to court injunctions prohibiting their disclosure.

54 The Speaker has ruled that members need give no warranty or disclaimer in respect of legal liability for publishing documents they table in the House. Tabling documents in the House gives rise to no liability at all, but mere tabling does not mean that the House had authorised or ordered their publication. Tabling is intended to convey the contents of the documents to members, but any publication outside the House is at the risk of the person who so published them. Usually publication gives rise to no legal liability at all, and the Clerk of the House of

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95 See "Peers seek Reversal of Libel Reform", *The Times*, 25 October 1996.

96 (1992) PSO 389; (1995) PSO 398.

97 (1987-1990) AJHR I.18B, para 23, 11.

98 *Stockdale v Hansard* (1839) 9 AD & E 1, 112 ER 1112 (QB).

99 This protection remained the law until 1 February 1993: see Defamation Act 1954 ss 18-20.

100 An "Authorised Parliamentary paper" means a "Parliamentary paper" ("any report, paper, votes or proceedings") published by order or under the authority of the House: Legislature Amendment Act 1992 s 2. McGee, 402, notes that a Minister, usually the Leader of the House, moves the necessary motion on which there can be no debate: (1992) PSO 97, (1995) PSO 361. Unfortunately the Parliamentary parlance (see, for example, the terminology used in the Standing Orders and *Parliamentary Bulletin*) is not the same, see note 102 below. Joseph, "Sampling the Wine Box: The Media, Parliamentary Papers and Contempt of Court" [1994] NZLJ 292-295, argues correctly that the Legislature Amendment Act 1992 s 4 protection for publication of extracts or abstracts of such papers is less than that formerly provided for by the Defamation Act 1954 s 20. The inconsistency in the terminology and the reduction in protection might be remedied in a residual legislative tidy-up; see note 204.

101 Legislature Act 1908 s 253, see also (1995) PSO 8.

102 See (1995) PSO 360-362. 237 "Parliamentary papers" were tabled in the House and printed by order of the House in the period 1 July 1994 to 30 June 1995. In the same period 576 "papers" were simply tabled with the House making no order that they be printed: *Report of the Office of the Clerk of the House of Representatives* (1995) AJHR A.8, 15-16. In the comparable period 1 July 1995 to 30 June 1996, 271 "Parliamentary papers" were tabled and ordered to be printed, and 719 "papers" simply tabled: (1996) AJHR A.8, 51.

103 See Joseph [1994] NZLJ 292-295; New Zealand House of Representatives, *Notes on Parliamentary Law and Procedure* (December 1993-March 1994, 94/1) para 48, (May-July 1994, 94/2) paras 109-112; McGee, 404-405, 483.

Representatives, into whose custody tabled documents are delivered, permits the news media representatives and others to have access to tabled documents. However, in the case of documents subject to a court order, the Clerk of the House of Representatives would not allow the Office of the Clerk to be used as a means to publish material contrary to a court order.

55 On 31 May 1994, the House referred to the Privileges Committee the question whether the "Wine box" documents tabled in the House should, contrary to the court order for their non-disclosure, be printed by order of the House, thereby giving protection to their dissemination. The Privileges Committee met on 2 and 8 June 1994 to consider the question, and resolved that the House could, and should, order the printing of the documents.[104]

56 The Committee accepted that the House, by ordering that the papers be printed, had power at common law to override the court order for their non-disclosure. The Committee found that the need to preserve comity with the courts was not prejudiced in this case, as the court had granted the permanent injunctions against disclosure with the consent of the parties and without addressing any public interest in disclosure. On balance, the Committee considered that the public interest in the documents justified the House in ordering that the documents be published and released under protection. The House acted on the Committee's recommendation on 8 June 1994.[105]

57 RADIO BROADCASTS: The proceedings of the House were broadcast on radio without an order of the House from 1935-1962, and by order of the House from 1962.[106] The 1935 broadcasts are said to have been the first broadcasts in the world of proceedings of a House of Representatives. Originally radio broadcasts of proceedings in the House were made because the 1935 Labour Cabinet decided that the New Zealand Broadcasting Corporation (NZBC) should make such a broadcast and the House acquiesced in this decision. The Radiocommunications Act 1989 s 177(2)(a) provided that Radio New Zealand Ltd[107] would make continuous sound broadcasts of proceedings on its AM network as a condition of holding the licence for the network. Section 177 also envisaged that the broadcasting be under an agreement between the Parliamentary Service Commission[108] and Radio New Zealand Ltd, but none was ever entered into. In 1994, the Radiocommunications Act 1989 was amended[109] to permit the Office of the Clerk of the House of Representatives to negotiate a new broadcasting agreement, and the first contract was signed.

58 Under the contract, between the Clerk and New Zealand Public Radio Ltd (a subsidiary of Radio New Zealand Ltd)[110] a regular series of programmes reporting on parliamentary events commenced on *National Radio* on 8 March 1994.[111] These consist of two 5-minute reports of events that day, *Today in Parliament* (one broadcast on *Checkpoint*, the other on *Late Edition*), and a 20-minute round-up of the week's events, *The Week in Parliament* (broadcast at 12.40pm on Saturday, with a repeat later in the weekend).

59 These programmes are presented by a single broadcaster, use excerpts from the Parliamentary broadcast and include background and explanations of business being transacted. They also report on Select Committee proceedings, reports and closing dates for submissions on Bills.

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104 *Report of the Privileges Committee on the Question concerning the Printing of the Documents Tabled by the Member for Tauranga on 16 March 1994* (1994) AJHR I.15A.

105 The documents are published in 3 volumes as (1994) AJHR A.6. Compare the 1800-page (five volumes plus an index) of the *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* (1995-1996) HC 115, Chaired by Sir Richard Scott, published as a House of Commons paper to obtain protection under the Parliamentary Papers Act 1840 (UK); Oliver, "The Scott Inquiry" [1996] PL 357, 359-360.

106 See (1992) PSO 54(1); (1995) PSO 46(1); McGee, 48-49, 483. For discussion of earlier radio broadcasting in the House in New Zealand see Davis, "Broadcasting of Parliament" (1959) NZLJ 328; Davis, "Parliamentary Broadcasting and the Law of Defamation" (1948) 7 Univ Toronto LJ 385. For discussion of broadcasting of the English House of Commons see Leopold, "Parliamentary Privilege and the Broadcasting of Parliament" [1989] 9 Legal Studies 53.

107 Made a State-Owned Enterprise in 1988 by the State-Owned Enterprise Amendment Act (No 4) 1988 s 2(1).

108 Established under the Parliamentary Service Act 1985.

109 See Radiocommunications Amendment Act 1994, amending s 177 of the 1989 Act.

110 See Radio New Zealand Act 1995.

111 *Report of the Office of the Clerk of the House of Representatives* (1994) AJHR A.8, 12-13.

They are not intended to contain comment or interviews with participants. The Standing Orders Committee noted recently that Radio New Zealand may obtain further frequencies to extend radio broadcasts to Hawke's Bay and Southland, and that the *National Radio* programmes may be extended to provide more extensive reports of proceedings before Select Committees.[112]

60 TELEVISION BROADCASTS AND PHOTOGRAPHY: An opening of Parliament was first televised in 1965; other special events followed from time to time. Regular question time and debates were televised first, experimentally, in 1986.[113] At present, under a 1990 Speaker's ruling, any *bona fide* broadcaster who complies with certain standards as to the form of filming may film debate in the House.[114] The Standing Orders Committee recently noted that the advent of cable and UHF channels may present further opportunities for continuously televising the House's proceedings in-house and more widely, either by a special Parliamentary broadcast unit and archive or by a unit and archive under contract.[115] The Committee also confirmed for the meantime the rule that still-photography is banned unless specifically authorised by the Speaker (see for example (1996) 553 NZPD 14339 27 August 1996) – because the flashes required for photographs of a high technical standard can disrupt proceedings.

Power to be sole judge of the lawfulness its own proceedings

61 This right, deriving from the wording of article 9 of the Bill of Rights 1688, has been recognised by the courts in several cases. In *Bradlaugh v Gossett* (1884) 12 QB 271, Stephen J said that "the House of Commons has the exclusive power of interpreting the statute, so far as the regulation of its own proceedings within its own walls is concerned; and . . . even if this interpretation should be erroneous, this Court has no power to interfere with it directly or indirectly". In *R v Graham-Campbell, ex parte Herbert* [1935] 1 KB 594, the King's Bench held that the sale of liquor in the precincts of the House without a licence, through the Kitchen Committee, and its employee, the manager of the Refreshment Department, fell within the internal affairs of the House. As such, it could not be prosecuted in the courts but was the House's privilege to regulate.[116] In *Dingle v Associated Newspapers Ltd* [1960] 2 QB 460, Pearson J held that an attempt to impugn a report of a Select Committee of the House of Commons on the ground of some defect of procedure was contrary to the Bill of Rights 1688 and could not properly be made outside Parliament.

62 More recently courts have refused to review the passing of legislation because a legislature has been induced by fraud or deceit to pass it (*British Railways Board v Pickin* [1974] AC 765) or because it does not otherwise comply with Standing Orders (*Namoi Shire Council v Attorney-General (New South Wales)* [1980] 2 NSWLR 639). Courts instead have left the House to interpret and apply its own rules of procedure.

63 The Clerk of the House suggests[117] that the correct reconciliation of the roles of the House and the courts here is for:

- the courts to determine whether or not a privilege exists (with Parliament acquiescing or, as with the Parliamentary Papers Act 1840 (UK), seeking a change by legislation); and

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112 See *Report of the Standing Orders Committee on its Review of the Operation of the Standing Orders* (1996) AJHR I.18B, 4-5.

113 McGee, 49; for discussion of the experimental period and a recommendation that proceedings be permanently televised see Palmer, *Unbridled Power* (2nd ed, OUP, Auckland, 1987), 127-129.

114 (1990) 507 NZPD 1828; (1995) PSO 46. On whether a ban on the televising of proceedings of a legislature breaches fundamental rights of freedom of expression and whether it is justiciable see *Donahoe (Speaker of Nova Scotia Legislative Assembly) v Canadian Broadcasting Corporation* [1993] 1 SCR 319, (1993) 100 DLR (4th) 212.

115 See *Report of the Standing Orders Committee on its Review of the Operation of the Standing Orders* (1996) AJHR I.18B, 4-5.

116 See *Erskine May*, 90; Joseph, 378; Wade and Bradley, *Constitutional and Administrative Law* (11th ed, Longman, London, 1993), 232-233.

117 See McGee, "The Legislative Process and the Courts" in Joseph (ed), *Essays on the Constitution* (Brooker's, Wellington, 1995), 85, 92, 109-110; citing *R v Richards, ex p Fitzpatrick and Browne* (1955) 92 CLR 157, where the High Court of Australia asserted the right to examine a warrant for committal to ensure that any ground specified in that warrant is sufficient in law to amount to a breach of privilege; McGee, 479-481, also citing *Donahoe (Speaker of Nova Scotia Legislative Assembly) v Canadian Broadcasting Corporation* [1993] 1 SCR 319, 350, 370, (1993) 100 DLR (4th) 212, 237, 273.

- the Parliament or House to determine when and in what form a recognised privilege will be exercised.

64 While the New Zealand Bill of Rights Act 1990 has strengthened the courts' approach to judicial review of Parliamentary actions which affect the rights and freedoms it affirms, it has been held not to authorise judicial review of actions falling within the ambit of "proceedings in Parliament".[118] In a recent paper the Hon Justice Sir Kenneth Keith said the following:

> One of the interesting aspects for New Zealand of the Pacific constitutional experience is the greater formality in some of the constitutions about the formation of governments, the recognition of the Prime Minister, changes in that office during the term of Parliament and the dissolution of Parliament. That constitutional prescription can (but need not) lead to the Courts being involved in matters such as
>
> - the calling of Parliament (as in Vanuatu recently: Willie Jimmy v Attorney-General, Civil Case No 126 of 1996; Attorney-General v Willie Jimmy, Appeal Case No 7 of 1996), and
> - the confirmation of the appointment of a Prime Minister (as in the Cook Islands in 1983; *Reference by the Queen's Representative (Cook Islands' Court of Appeal)* [1985] LRC (Const) 56).
>
> Whether the courts do become involved depends on a number of factors including
>
> - the detail of the [constitutional] drafting,
> - the clarity of the provisions,
> - their justiciability (some constitutions expressly exclude the courts),
> - the availability and use made of other methods of handling such issues, and
> - the culture of members of the profession and courts where they ordinarily sit);
>
> these issues have of course arisen in other jurisdictions as appears from the older cases and commentaries discussed in [Keith] "Courts and conventions of the constitution" (1967) 16 ICLQ 542.[119]

Power to regulate its own composition

65 It is doubtful how far, if at all, the historical privilege of the House of Commons to regulate its own composition applies to New Zealand's House of Representatives. There are no examples of expulsion in New Zealand.[120] The House refrained from proceeding with one motion to expel a member before the Parliamentary Privileges Act 1865 was enacted, on the ground that the House possessed no such power, and in 1877 the Speaker denied the House had such a power.[121] The Standing Orders Committee recommended in 1989 that this doubtful power be abolished.[122] Moreover the Electoral Act 1993 s 55(1), the latest of a series of provisions[123] providing exclusive lists of circumstances when a seat will become vacant, does not generally include expulsion by the House or a Committee. Since 1914 however these provisions have let House committees make a member's seat vacant by finding as fact that the member acted for reward as the agent of an owner of land in any Crown purchase or acquisition of that land.[124] As referred to already the House may also suspend members.[125]

66 Palmer discusses the American House of Representatives resolving to exclude Adam Clayton Powell as a qualifying and duly elected member of the 90th Congress, and the United States Supreme Court reviewing this resolution and declaring it unlawful: *Powell v McCormack* (1969)

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118 *Mangawero Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451; McGee, 480-481. Compare *Donahoe (Speaker of Nova Scotia Legislative Assembly) v Canadian Broadcasting Corporation* [1993] 1 SCR 319, (1993) 100 DLR (4th) 212, and see also note 194.

119 "Separation of Powers – Some Pacific Reflections" (Paper presented to 15th Pacific Island Law Officers' Meeting, Nadi, Fiji, 16-18 October 1996), 5-8.

120 Compare *Armstrong v Budd and Stevenson* (1969) 71 SR (NSW) 368, cited by McGee, 510, as a New South Wales holding that "the legislature has inherent power to expel a member, this being seen as a self-protective power rather than a punishment". McGee also states that "the Australian House of Representatives has also expelled a member, though this power has now been expressly abolished by legislation", citing Browning, *House of Representatives Practice* (2nd ed, AGPS, Canberra, 1989), 190-191. See Parliamentary Privileges Act 1987 (Aust Cwlth) s 8.

121 McGee, 509-510.

122 (1987-1990) AJHR I.18B, para 31.

123 See Electoral Act 1956 s 32; Electoral Act 1927 s 23; Legislature Act 1908 s 4.

124 See Electoral Act 1993 s 55(1)(j); Electoral Act 1956 s 32(k); Electoral Act 1927 s 23(k); Legislature Act 1908 s 4(k) (introduced by Legislature Amendment Act No 2 1914 s 3).

125 For an example, see Palmer, *Unbridled Power* (2nd ed, OUP, Auckland, 1987), 124-126.

395 US 486.[126] The Court interpreted provisions of the United States Constitution (article I, ss 2 and 5, on the House's powers to judge its members' qualifications and expel) by reference to its framers' likely views of old English cases. Palmer argues that not only was it institutionally improper for the Court to review the workings of a co-ordinate branch of government, the House, but also that the Court overlooked some English authorities and misinterpreted others.

67 Two English cases are especially germane. First, in 1769, the Commons passed a resolution expelling John Wilkes, qualified and elected MP for Middlesex, for admitting to writing a letter which the House considered a seditious libel.[127] In a reversal in 1782, the House resolved to expunge the 1769 resolution to expel Wilkes.[128]

68 In the second case, the Commons in 1882-1883 resolved several times to exclude Bradlaugh; MP for Northampton and an admitted atheist. The Commons had resolved first that Bradlaugh could, albeit perhaps in breach of the Oaths Act 1866, take a solemn affirmation. Later, to comply with the Act's requirements and take his seat in the House, Bradlaugh also went through the form of swearing an oath, prompting House resolutions to expel him.[129] The court of Queen's Bench denied jurisdiction to declare the House's resolutions unlawful.[130] Again, eventually, the House resolved to expunge its resolutions to exclude.[131]

69 Palmer argues that these and other English authorities amount to an established constitutional convention; that the House of Commons will expel members in only the most exceptional circumstances:

> The Resolution of 1891 expunging the original Bradlaugh exclusion can be interpreted as a declaration by the House that it would no longer exclude persons not legally disqualified. Subsequent acquiescence in that position could be said to establish a constitutional convention to that effect. One significant feature of the English experience is that eventually, after long and bitter struggles, the House of Commons in both the Wilkes and Bradlaugh cases came to positions compatible with advancing democratic ideas.[132]

70 It has been argued that such a convention would apply equally in New Zealand.[133] In any event, Palmer's most important point is that the Supreme Court in the *Powell* case failed to grasp this fundamental point of principle: that in a representative democracy the people should choose whom they please to govern them.[134]

Power to access the Sovereign and most favourable construction

71 Similarly the House's freedom of access to the Sovereign is a collective privilege. It is usually exercised through the Speaker. The House must address the Sovereign collectively.[135] The Executive today is usually not Her Majesty personally but the Sovereign's representative, the Governor-General. By convention, the Sovereign and the Governor-General almost always act

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126 Palmer (1971) 56 Iowa LR 725.

127 See 32 HC Journal 178 (3 February 1769).

128 See 38 HC Journal 977 (3 May 1782).

129 See, for example, 266 Parl Deb (3d ser) 1343 (22 February 1882).

130 *Bradlaugh v Gossett* (1882) 12 QBD 271. Compare *Harry Tong v Michael Takabwebwe, Attorney-General* (unreported, High Court of Kiribati, 18 November 1988), where the court rejected jurisdiction to consider challenge to Attorney-General taking part in proceedings of legislature following general election (challenge based on Attorney-General not taking proper oath required by constitution).

131 See 302 Parl Deb 1176 (27 January 1891). Eventually legislation was passed permitting members to take an affirmation rather than an oath: Oaths Act 1888 (Eng) 51 & 52 Vict c 46.

132 Palmer (1971) 56 Iowa LR 725, 768.

133 Parliamentary Privilege Bill 1994, Explanatory Note, 28.

134 Palmer (1971) 56 Iowa LR 725, 771; New Zealand Bill of Rights Act 1990 s 12; ICCPR art 25; *Report of the Royal Commission on the Electoral System: "Towards a Better Democracy"* (1986) AJHR H.3, para 9.3, 231-232. Compare *Kalauni v Jackson* (Court of Appeal of Niue, 23 January 1996), where the Court, applying electoral legislation and referring to *Powell v McCormack* (1969) 395 US 496, declared that members of the Niue House had, by virtue of not attending a meeting of a House Committee considering the budget, lost their seats.

135 See (1992) PSO 418-422; (1995) PSO 171. See, for example, (1996) 553 NZPD 14339 (27 August 1996, Speaker reports that address to Governor-General which House agreed to on altering the 1996-1997 financial year appropriation for the Parliamentary Commissioner for the Environment was presented the previous day).

by and with the advice and consent of Executive Councillors who must be members of Parliament.[136] The Governor-General cannot take notice of things said or done in the House, except by report of the House itself.

72 Traditionally in England the Sovereign may not, even as a spectator, attend debates in the Commons, though the Sovereign may freely attend the Lords, and Lords, as peers, have an individual right of access to the Sovereign.[137] Her Majesty Queen Elizabeth II on her November 1995 visit to New Zealand was permitted to visit the refurbished[138] debating chamber of the New Zealand House because the House was not sitting at the time. Previous private visits to the Chamber by the Governor-General have also been only while the House was adjourned.

73 The most favourable construction of the House's proceedings is another privilege. It helped to prevent Tudor and Stuart Sovereigns from interfering in the proceedings of the House. Traditionally the House of Commons asked the Sovereign to look favourably on its proceedings, "to ensure a hearing, and a fair hearing, for the Commons' views, and to prevent imprisonment of their Speaker or others who opposed royal policies".[139] This privilege remains today as a formal courtesy.[140] Both this privilege and that of access to the Governor-General emphasise the convention of a formally separate legislature and executive.

Contempt

74 As the privileges of the House are part of the general law, the House can expect that the courts, in applying the law, will take steps to protect the House's privileges. This may be either by way of denying jurisdiction, excluding evidence, or controlling pleadings or proceedings in court.

75 Some breaches of privilege will constitute offences which may be prosecuted in the courts under the general law. The House does not hold general jurisdiction over criminal offences committed in the House, but conduct amounting to a criminal offence may also be punishable as a contempt of the House.[141] Unless a Select Committee is expressly authorised by the House, that Committee cannot inquire into, or make findings in respect of, alleged criminal conduct by named or identifiable individuals or the private conduct of any member.[142]

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136 See Letters Patent constituting the Office of the Governor-General SR 1983/225; 1987 Amendment to the 1983 Letters SR 1987/8; Constitution Act 1986 ss 3, 6-7.

137 *Erskine May*, 79-80.

138 The debating chamber for the period of the refurbishment was in Bowen House. Use of the refurbished chamber resumed in February 1996.

139 Munro, 137.

140 Scott, 65, describes it as having been "an empty formula for three or four centuries".

141 McGee, 473, 508-509; Joseph, 378, 395; Wade and Bradley, 232-233. In *Bradlaugh v Gosset* (1884) 12 QBD 271, 284, Stephen J said that he "knew of no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice". *Erskine May*, 73, 84, 94, points out that Stephen J must be supposed to be referring to criminal conduct other than criminal speech in proceedings in Parliament (Bill of Rights 1688 art 9), and that the House of Lords in *Sir John Eliot's Case* (1629) 3 St Tr 294, deliberately left it an open question whether members' allegedly criminal conduct (assault on the Speaker and seditious libel) might have been properly heard and determined in the King's Bench.

142 (1995) PSO 204-205. The Privileges Committee, when considering a matter of contempt, has the required authorisation. This restriction was referred to by a Report of the Finance and Expenditure Committee (1994) AJHR I.3C, 15-16, and first introduced to Standing Orders in 1995. It may help to avoid the problems created by the "Marconi Scandal" 1913-1916, in which a Parliamentary committee produced three conflicting reports on the conduct of members of the Liberal government in the affairs of the Marconi Company: see, generally, Donaldson, *The Marconi Scandal* (Quality Book Club, London, 1962). The resulting discredit to Parliamentary committee inquiries into matters of public concern (like corruption) lead to the Tribunals of Inquiry (Evidence) Act 1921; see Keeton, *Trial by Tribunal* (1960). The 1921 Act was reviewed in the 1966 *Report of the Royal Commission on Tribunals of Inquiry* (HMSO, London, Cmnd 3121, Chairman the Rt Hon Lord Justice Salmon, 1966). In 1993, Bradley and Wade, 659, said that "barely 20" inquiries had been held under the 1921 Act into "matters of urgent public importance". Both Houses of Parliament must resolve that such an inquiry would be expedient before Her Majesty or a Secretary of State appoints a tribunal. Drewry, "Judicial inquiries and public reassurance" [1996] PL 368, 369, says that Lord Cullen's inquiry into the Dunblane shootings tragedy, set up in March 1996, is only the 21st instance of the use of the 1921 Act procedure, and that Sir Richard Scott's *Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* (1995-1996) HC 115 is merely one of the other, often less formalistic, kinds of judicial inquiry, both statutory and (as in the Scott inquiry) non-statutory. For discussion of fair procedures before the Scott inquiry and generally see Blom-Cooper [1996] PL 11; Howe [1996] PL 446-460; Scott (1995) 111 LQR 595-616. The November 1996 inquiry (November 1995: HC Official Report (6th series) cols 610-612, 681) of the new House of Commons Committee on Standards and Privileges into the conduct of Mr Neil Hamilton MP and the "Cash-for-Questions" affair has been criticised as lacking independence, rigour and public confidence, not least, it seems, by Professor Sir William Wade QC; see, for example, "How Neil Hamilton

76 The House itself also has a power to protect its proceedings by punishing a breach of its privileges as a contempt. The power to punish was analogous to the power of a court to summarily punish those who insulted or interfered with its proceedings.

77 While in each case the House must decide whether or not conduct constitutes a contempt,

> any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any member or officer in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as contempt even though there is no precedent of the offence.[143]

78 Contempts, therefore, include not only breaches of specific privileges of the House, but also unprecedented "constructive" contempts. This distinction, between "breach of [a specific] privilege" and other "contempts", can be important.[144]

79 The 1995 Standing Orders, using the contemporary (21st) edition of *Erskine May* as the model, attempt to set out the main heads of contempt in a more accessible form by using examples. While the Orders are "not intended to be exhaustive" in defining contempt, the Standing Orders Committee were "confident that this restatement will give members and others a fair indication of the types of conduct that are likely to give rise to contempt proceedings against them".[145] In 1996, the Standing Orders Committee expressed general satisfaction with the definition adopted.[146]

80 PUNITIVE POWERS: The punitive powers of the House, exercised on the recommendation of the Privileges Committee on making a finding of contempt,[147] include the following powers:

- *To imprison*: A power which has never been exercised in New Zealand. The House debated imprisoning the President of the Bank of New Zealand in 1896 for refusing to answer a question put to him by a Select Committee, but imposed a fine instead.[148] This power was last exercised by the House of Commons in the United Kingdom in 1880.[149] Arrest by order of the House would require the Speaker to issue a warrant.[150] The Crimes Act 1961 expressly preserves the power of the House at common law to commit a person for contempt.[151]

- *To fine*: Whether the House has this power, and whether it would exercise it, are doubtful. The House of Commons has not exercised the power since 1666 and it is not recognised as a current House of Commons power by *Erskine May*. Moreover, House of Commons Select Committees in 1967 and 1977 recommended that legislation restore this power, implying that it had been lost. In New Zealand the position must be taken as at 1865, when the contemporary edition of *Erskine May* described the power as extant. The Constitution Act 1852 s 52 restricted the General Assembly's powers to fine: only members could be fined. Section 52 might be seen as an express limitation of the House's

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Could Get Away With It", *The Guardian*, 10 November 1996, 37; "Insider Trade-off: Should Parliament Investigate Sleaze Internally?", *The Guardian*, 11 November 1996, 13; "A System on Trial: Parliament itself is Under Scrutiny", *The Guardian*, 11 November 1996, 12; see also Lindell, "Parliamentary Inquiries and Government Witnesses" (1995) 20 Melbourne ULR 383; note 197.

143 *Erskine May*, 115; McGee, 488.

144 The distinction is important because the House cannot by resolution enlarge the scope of its specific privileges, and also because the courts will query the existence and scope of a specific privilege but are less willing to query the causes of committal for other contempts: Munro, 145-146; Scott, 65-66.

145 (1995) AJHR I.18A, 78. For the definition, see (1995) PSO 392-396. Compare Parliamentary Privilege Bill 1994 cl 10. For matters adjudged a breach of privilege by the Privileges Committee of the New Zealand House 1982-1994 see Parliamentary Privilege Bill 1994, Explanatory Note, 13-14, 46-57.

146 See *Report of the Standing Orders Committee on its Review of the Operation of the Standing Orders* (1996) AJHR I.18B, 11, where the only suggested amendment is the addition as a further illustration of contempt of improper reflections on the character or conduct of members or the House.

147 For the Privileges Committee constitution and procedure, see: (1992) PSO 423-429; (1995) PSO 384-391. For discussion see Parliamentary Privilege Bill 1994, Explanatory Note, 24-27, citing McLay, "The Privileges Committee in New Zealand: Recent Procedural Developments" (1984) 65 *The Parliamentarian* 179; Northey, "Parliamentary Privilege" [1976] *Recent Law* 317.

148 (1896) 93 NZPD 327-334.

149 134 Commons Journals 381, 385; 135 Commons Journals 241.

150 Crimes Act 1961 s 315(1).

151 Crimes Act 1961 s 9(a).

pre-existing power at common law to impose fines. Standing Orders in force until 1951 provided for fines to be imposed only for members' breaches of discipline. Members were fined under these provisions in 1877 and 1881.[152] Following the repeal of the Constitution Act 1852 s 52 in 1865, the House regarded itself as empowered to fine strangers as well. Strangers have been fined on four occasions: in 1896,[153] 1901 and twice in 1903. New Zealand Standing Orders Committees in 1929 and 1989 recommended that legislation clarify that the House has this power.[154]

- *To prosecute in the courts*: Most disturbances in the public galleries are dealt with in this way (by prosecutions for trespass, assault or breach of the peace). The House is not prevented from initiating its own privilege proceedings in addition to prosecuting in the courts, though questions of double jeopardy might arise.[155] The prosecution may be undertaken by the Attorney-General or regular prosecuting authorities. However, an 1877 libel prosecution brought by the Attorney-General failed.[156]
- *To suspend members*: The House, at the motion of the Speaker, has powers to suspend by resolution under Standing Orders;[157] the Privileges Committee may then suspend a member for a further period, or merely take into account any suspension the House ordered. A third suspension or subsequent suspension in the same session is for 28 days, excluding the day of suspension.[158]
- *To exclude* from the precincts of the House (including the news media or "press" gallery or offices), *censure*, *expel*[159] and *require an apology*.

IMMUNITIES (AND A DISQUALIFICATION) FROM LEGAL PROCESSES

81 The immunities from legal process operate mainly in respect of individuals (even if they are conferred for the benefit of Parliament as a whole); usually members of the House, but also witnesses before Select Committees, officials and others involved in the proceedings of the House. They include freedom from civil arrest and immunity from court summons.

Immunity from civil arrest

82 Since 1 January 1865, members have enjoyed immunity from arrest in civil process from 40 days before the start of each Parliamentary session until 40 days after its termination. The 40-day (or "quarantine") period continues to run even though Parliament is dissolved and even though the member was a member of the old Parliament and is not a member of the new one.[160] The practical significance of this immunity is limited. Arrest in a civil cause is very limited. For example, arrest for failure to pay debts owed was practically abolished in 1874.[161] Nevertheless, this immunity exists and also applies to witnesses summoned to attend before the House or a Committee, to witnesses in attendance upon the House or a Committee, persons coming to or going from the House on Parliamentary business, and to officers in personal attendance on the House.[162]

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152 McGee, 507-508; Joseph, 393-394; Littlejohn, "Privilege in the New Zealand Parliament" (1972) 53(3) *The Parliamentarian* 190, 191-192.

153 Scott, 66, said that the House, as it was not a court of record, had no power to impose a fine on this occasion and that it was "probably illegal".

154 (1989-1990) AJHR I.18B para 30, 13; (1929) AJHR I.18.

155 New Zealand Bill of Rights Act 1990 s 26(2); ICCPR art 14(7); Joseph, 395.

156 (1877) JHR 63-66; McGee, 508-509.

157 (1992) PSO 197-202; (1995) PSO 89-94.

158 (1992) PSO 198; (1995) PSO 91.

159 On expelling members, see the discussion above on the House's power to regulate its own composition.

160 McGee, 483, citing *Goudy v Duncombe* (1847) 1 Exch 430, 154 ER 183; *Barnard v Mordaunt* (1754) 1 Keny 125, 96 ER 939 and *In re Anglo-French Co-operative Society* (1880) 14 Ch D 533.

161 See Imprisonment for Debt Limitation Act 1908 s 3. Consistent with the ICCPR art 11, his power was even further narrowed as from 1 January 1990 by the Imprisonment for Debt Limitation Amendment Act 1989.

162 *Erskine May*, 102.

83 Members or others involved in the proceedings of the House have no immunity from criminal arrest. Members and others involved in proceedings in the House may also be arrested for contempt of court, whether civil or criminal.[163]

Immunity from court summons

84 MEMBERS AND OFFICERS *NOT* ATTENDING ON PARLIAMENT: When members on leave of absence from the House[164] and officers[165] not in attendance on the House are required by the process of the Court of Appeal, High Court or any District Court to attend on these courts as parties or witnesses in civil proceedings, or as witnesses in criminal proceedings, during or within 10 days before a session of Parliament, they may apply to the court to be exempted from attendance.[166] The court concerned must order that the member or officer be discharged from the requirement to attend until 10 days after the end of the Parliamentary session unless

> it appears to the satisfaction of the court or judge that the ends of public justice would be defeated or injuriously delayed or irreparable injury would be caused to any party to the proceedings by the non-attendance [of the member or officer].[167]

85 MEMBERS AND OFFICERS ATTENDING ON PARLIAMENT: Members and officers in attendance on Parliament who are required by the process of any court to attend as parties or witnesses in civil proceedings, or as witnesses in criminal proceedings, may apply to the Speaker or Acting Speaker of the House to be exempted from attendance at court.[168] Unless it appears to the satisfaction of the Speaker or Acting Speaker that "the ends of public justice would be defeated or injuriously delayed or irreparable injury would be caused to any party to the proceedings by the non-attendance" of the member or officer, the Speaker or Acting Speaker shall grant a certificate to the effect that the member or officer is required during the session.[169] On presentation of the certificate to the court the member or officer must be exempted from attending court until 10 days after the termination of the Parliamentary session, and no civil or criminal proceedings shall be taken against the member or officer for his or her non-attendance.[170] The court must direct postponement of the trial or other proceedings and make such order as it deems convenient and just having regard to the member's or officer's exemption.[171]

86 THE SPEAKER: When the Speaker personally is required to attend any court as a witness or party to a civil proceeding, or a witness in a criminal proceeding, he or she shall submit the matter to the House. If it is sitting, the House may resolve that the Speaker be exempt from the requirement to attend, the resolution exempting the Speaker from attendance until 10 days after the end of the Parliamentary session.[172] If the House is under adjournment, the Speaker may sign his or her own exemption, which has the same effect as a resolution of the House until the matter is submitted by the Speaker, at the first convenient opportunity, to the House and the House makes an order.[173]

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163 McGee, 484; Parliamentary Privilege Bill 1994, Explanatory Note, 12; *Laws NZ*, Parliament, para 233.

164 See (1992) PSO 62-63; (1995) PSO 36-38. Members must attend each sitting of the House unless the Speaker or a member authorised by the Speaker grants leave (with or without conditions and subject to withdrawal at any time) on the grounds only of (1) illness; (2) a family cause of a personal nature; or (3) the need for the member to attend public business in New Zealand or overseas.

165 "Officers" means the Clerk of the House, the Deputy Clerk, the Clerk-Assistant and the Sergeant-at-Arms: Legislature Act 1908 s 257(2) and Sixth Schedule.

166 Legislature Act 1908 s 257(2).

167 Legislature Act 1908 s 259.

168 Legislature Act 1908 s 261.

169 Legislature Act 1908 s 263.

170 Legislature Act 1908 s 264.

171 Legislature Act 1908 s 264.

172 Legislature Act 1908 s 260.

173 Legislature Act 1908 s 260.

87 HOUSE MAY GRANT LEAVE: The House may grant leave for members or officers to attend court if this appears desirable to the House.[174]

88 OTHER PEOPLE REQUIRED TO ATTEND: The House,[175] or a Committee,[176] may summon other people to attend and give evidence before it. The Legislature Act 1908 does not expressly grant an immunity from court or tribunal summons to people (other than the Speaker, members and officers) who are summoned by the House or a Committee. Nevertheless, section 242 of the Act defines and gives statutory force to the House's privileges as those of the United Kingdom House of Commons on 1 January 1865. This section may, by implication, provide an immunity from court or tribunal summons for other people the House or a Committee summon – the immunity operating for periods during which the House or Committee requires that these people attend before it.[177]

89 DEFENDANT IN CRIMINAL PROCEEDING: By contrast no person is, or can be, exempted from a requirement to attend court as a defendant in a criminal proceeding.[178]

Service of court process

90 While members and officers enjoy no immunity from service of process from the Court of Appeal, the High Court or District Courts within 10 days of the beginning and end of each session, the issue of court documents by any other court during this period is invalid and of no effect.[179] The service of process upon a member or an officer during a session may still be considered a contempt by the House.[180]

Adjournment of civil proceedings and disqualification from jury service

91 Members and officers may also have civil proceedings against them adjourned by the court until 30 days after the termination of a sitting of the House if this will not cause irreparable injury to any party to the proceedings.[181] If civil proceedings against a member or officer will be heard or tried within the period extending from 10 days before a session of Parliament to 30 days after the session and a member or officer is not attending Parliament, he or she must apply to the court for an adjournment. Their affidavit should state: that they have been summoned to attend Parliament; that they should be afforded an opportunity of being personally present at the trial or hearing; and that attendance on Parliament will prevent him or her from being present.[182] The court must then make an inquiry and may adjourn the case. If the member or officer is attending Parliament, he or she must apply to the Speaker of the House, who may issue a conclusive certificate entitling the member or officer to an adjournment of the trial or hearing.[183]

92 Originally merely immune from requirements to serve on juries, now members of the House of Representatives are disqualified from serving on a jury.[184]

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174 Legislature Act 1908 s 269.

175 (1992) PSO 379; (1995) PSO 160.

176 (1992) PSO 383; (1995) PSO 201-202.

177 *Erskine May*, 102; Parliamentary Privilege Bill 1994, Explanatory Note, 63.

178 Consistent with members or others involved in the proceedings of the House remaining subject to criminal arrest, as described above.

179 Sections 257(1) and 267 (formerly Privileges Act 1865 s 11). "Court of Record" means "the Court of Appeal, the High Court, and every District Court": s 257(1). This definition was introduced on 11 June 1985 by the Legislature Amendment Act 1985 s 2(1) following difficulties with the previous definition identified in *Anderton v Kirk and others* [1985] LRC (Const) 1117 (Holland J remarked (1122-1123) that by allowing the present state of the law to continue, Parliament could only give greater weight to those pressing for New Zealand to adopt some form of written constitution).

180 See, for example, (1990) AJHR I.15.

181 Legislature Act 1908 ss 263-266.

182 Legislature Act 1908 s 265(a).

183 Legislature Act 1908 ss 263-264, 265(b).

184 Juries Act 1981 s 8; McGee, 486. Compare Munro, 142, pointing out that the Juries Act 1974 (UK) entitles members and officers of both Houses of Parliament to excusal from jury service as of right.

4
Reform

THE STANDING ORDERS COMMITTEE REPORT AND THE DRAFT LEGISLATURE BILL 1989

93 The Standing Orders Committee made a start at reform of Parliamentary privilege in 1988-1989.[185] The Committee's report contained a draft Legislature Bill comprising a major overhaul of the existing law. The draft Bill would have repealed the Legislature Act 1908.

94 The Bill did not proceed. The Department of Justice suggested that aspects of the law of Parliamentary privilege were incompatible with the New Zealand Bill of Rights Act 1990, which in 1989 was a Bill before the House. Of particular concern was the requirement that the House and Committees observe the principles of natural justice in accordance with the New Zealand Bill of Rights Act 1990 s 27(1).

95 The Legislation Advisory Committee (LAC) also objected to the existing law because fair procedures did not necessarily apply, and because it was inaccessible and unclear. The LAC advised a more comprehensive reform of the law.

96 The Government took no further formal action at that time, although some changes relating to absolute privilege for the publication of authorised Parliamentary papers were included in the Defamation Act 1992 s 13 and the Legislature Amendment Act 1992 ss 4-5.[186]

PARLIAMENTARY PRIVILEGE BILL 1994

97 The Hon David Caygill, then Deputy Leader of the Opposition, introduced this private measure on 7 December 1994.[187] The Bill was eventually referred to a Committee established to consider it.[188]

98 Like article 9 of the Bill of Rights 1688 (Eng), which it would replace, the Bill would affirm freedom of speech and debate in Parliament. It would also qualify free speech and debate by introducing the following procedural safeguards for persons outside Parliament:

- a requirement that members give prior notice to, and satisfy, the Speaker that assertions adversely affecting reputations are well-grounded (cl 8), and

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185 *Report of the Standing Orders Committee on the Law of Privilege and Related Matters*, 2nd Report (1989) AJHR I.18B. For discussion of the Report, see Parliamentary Privilege Bill 1994, Explanatory Note, paras 11-16, 3-4.

186 The changes brought about by the Defamation Act 1992 and related legislation arise from a much earlier review of defamation law: *Report of the Committee on Defamation* (Chaired by Mr I L McKay, 1977). See also notes 90, 193.

187 See (1994) 543 NZPD 4457-4487; "Parliamentary Privilege Rules under Review", *Dominion*, 8 December 1994, 3; [1994] 17 TCL 47/14; [1994] NZLJ 314. Another proponent of review, Best (1994) 24 VUWLR 91, 99, quotes the Hon David Caygill MP in 1992 as thinking that "[t]he whole area of privilege is out of date and in need of comprehensive review," and as being "reluctant to embark on a piecemeal reform": *Evening Post*, Wellington, 6 October 1992, 3. For the Rt Hon Sir Geoffrey Palmer's views on reform see *Unbridled Power* (2nd ed, OUP, Auckland, 1987), 126; *New Zealand's Constitution in Crisis* (OUP, Auckland, 1992, 117; [1994] NZLJ 325. Four papers by the Public Issues Committee of the Auckland District Law Society also stress the need for reform: *Parliamentary Privilege* (1979); "Speaking Out: Members of Parliament and the Judicial Process" [1988] NZLJ 300; *Parliamentary Privilege: The Call for Reform* (1994); *Parliamentary Privilege: Progress or Regress?* (1995). For an earlier call for reform of Privileges Committee procedures see Finlay, "A Former Minister Looks at Parliament" in Marshall (ed), *The Reform of Parliament* (NZ Institute of Public Administration, Wellington, 1978), 75.

188 On 7 December 1994, the House ordered that the Bill be referred to the Privileges Committee. On 9 March 1995 a motion to have the Bill considered by the Standing Orders Committee (then reviewing the Standing Orders) was withdrawn after a brief debate. Finally, on 31 May 1995, the House ordered that the Bill be referred to and considered by a special committee comprising: the Hon David Caygill, Jim Gerard, Peter Hilt, the Rt Hon Jonathan Hunt and Alec Neill: (1995) 547 NZPD 6985; New Zealand House of Representatives, *Notes on Parliamentary Law and Procedure* (February-April 1995, 95/1) para 51, (May-August 1995, 95/2), para 135.

- a procedure for persons adversely affected by assertions made in the House to submit written replies which the Speaker may table and read in the House (cl 9).[189]

99 The Bill would also require the House and its Committees to observe the principles of natural justice. Witnesses summoned or requested to attend before the House or a Committee to answer questions, give evidence or produce papers, would have a right to counsel and could claim the privilege against self-incrimination (cls 13-15). Concerns about the House's obligations to afford natural justice, amongst other things, led to the "Wine box" allegations being considered by a Commission of Inquiry and not a Select Committee.[190]

100 The Bill would also define a "contempt of Parliament" (cl 10), and abolish Parliament's ability to fine or imprison in contempt cases. (Any cases requiring fines or imprisonment would, when the House made a resolution to do so, be prosecuted as criminal offences by the Solicitor-General before the High Court (cls 11-12).) The limited freedom from arrest enjoyed by members of Parliament, and any ability the House might have to expel a member from membership the House, would be abolished (cl 5). The Bill would modify members' and officers' immunity from attendance at court when the House or a Committee (in respect of which their services would be required) was sitting (cl 6). The Bill would make members and officers[191] subject to court or tribunal summons to attend any proceedings outside two days before and after a day on which the House or a Committee is sitting. This makes members, where not required for Select Committee sittings, subject to court and tribunal summons when the House adjourns for a week or more. The Bill would state expressly that persons (not members or officers) required by an order of the House or a Committee to attend before the House or a Committee on any day shall not be required to attend before a court or a tribunal on that day (cl 6(3)). Finally, the Bill would also provide for the appointment and recognition of an Acting Speaker (cls 21-24).

LEGISLATION ADVISORY COMMITTEE SUBMISSION ON THE 1994 BILL AND DEVELOPMENTS

101 On 7 August 1995 the Committee on the Parliamentary Privileges Bill heard the Legislation Advisory Committee (LAC) in support of a written submission on the Bill.[192] The LAC raised a number of concerns about the changes the Bill would introduce. Like the 1989 Standing Orders Committee report, the LAC doubted the practical workability of the notice and reply procedures in debate in the House. The LAC suggested that if they were to be retained, they might well be better provided for in Standing Orders rather than in legislation (this is also the Australian Senate practice).[193] There was particular concern at the potential effects of judicial review on the working of the House should these procedures be provided for in legislation.[194]

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189 Former Chief Parliamentary Counsel, Denzil Ward, CMG, submitted a similar proposal for reform to the Standing Orders Committee in 1986. Mr Ward proposed that Standing Orders be amended to give a person claiming to have been defamed in the House a restricted right to have a brief statement in rebuttal read and tabled in the House, based on the principle that the person should have the same avenues open to him or her as were open to the member when the defamatory words were used. The New Zealand Law Society in 1986 submitted a similar proposal. The Committee rejected these proposals, also rejecting the then recently adopted Australian Senate procedure, in its 1989 report: Parliamentary Privilege Bill 1994, Explanatory Note, 20-22. For a discussion of the three main reforms in the 1994 Bill, see Harris (1996) 8 Auckland ULR 45, 57-63.

190 See, for example, Rt Hon Sir Geoffrey Palmer [1994] NZLJ 325, 326; Response of the Hon Winston Peters MP [1994] NZLJ 329-330; Finance and Expenditure Select Committee, *Interim Report on the Income Tax Amendment Bill* (1994) AJHR I.3C.

191 "Officer" means any person who is not a member but who, in accordance with his or her duties, is participating in proceedings in the House or in any Committee; but does not include any person presenting a submission or petition or appearing by order of the House or a Committee: cl 2.

192 "Big Division on Bill to curb Parliamentary Privilege", *The Dominion*, 8 August 1995, summarised other submissions as follows: Rt Hon Sir Geoffrey Palmer and Sir Michael Fay (supported Bill as introduced); Hon Doug Graham as MP for Remuera, former Speaker Sir Richard Harrison and Clerk of the House David McGee (opposed Bill as introduced). For other instances of opposition see Harris (1996) 8 Auckland ULR 45, 62; Huscroft and Rishworth, 192 (opposing strongly cls 8-9); Attorney-General the Hon Paul East QC, (1994) 544 NZPD 4872.

193 See "Parliamentary Privilege: Senate provides right of reply for aggrieved citizens" (1988) 7(4) *The House* Magazine 5-7, 10-11. *Defamation* (1995, Report 75), paras 11.25-11.27 records the New South Wales Law Reform Commission's view that the State Parliament should give careful consideration to whether it should afford a reply procedure. The Commission's report notes that the federal Senate reply procedure has, from its inception in 1988 until September 1995, resulted in 20 replies being included in the Senate's official record, and that the procedure has met with approval from Senators and those affected by statements in the Senate. It also notes that a similar procedure has been adopted by the Australian Capital Territory Legislative Assembly.

194 While the natural justice guarantee in the New Zealand Bill of Rights Act 1990 s 27(1) clearly applies to the House and its

102 While commending the Bill as progress towards defining the offence of contempt, the LAC was concerned about the broad wording of the definition, and lamented the fact that this expressly reforming measure did not clarify the essential content of privilege. The LAC also submitted that the Committee should consider a further statutory exception to freedom of speech in debates or proceedings: a bar on naming plaintiffs/informants and defendants in breach of court orders that the names of these people remain suppressed.[195] The LAC also submitted that witnesses before the House or a committee should have the all evidentiary privileges and immunities usually available to witnesses before courts and tribunals.

103 At the hearing, the Committee asked the LAC to comment on the Finance and Expenditure Select Committee's Recommended Select Committee Procedures for the Observance of the Principles of Natural Justice.[196] The LAC made a further submission to the Committee on the Bill on these recommended procedures.[197] Submissions on the Bill closed on 14 July 1995. On the last sitting day of the 44th Parliament, 27 August 1996, the Parliamentary Privilege Bill 1994, still before the Committee on the Bill, was included in the carry-over motion for further consideration by the 45th Parliament.[198]

STANDING ORDERS COMMITTEE REPORT 1995

104 In the week ending 15 December 1995 the Standing Orders Committee tabled its report in the House on amendments to procedures of the House and its committees for the first House elected under the Mixed-Member Proportional (MMP) electoral system (adopted in the Electoral Act 1993).[199] The Committee conducted an extensive review of Standing Orders. The Committee recommended new Standing Orders which were adopted by the House (with some amendments) on 20 December 1995. Almost all Orders were brought into force on 20 February 1996. Some Standing Orders could not come into force immediately because they presupposed a House elected under the MMP electoral system (which would have at least 120 members). Only after the first election under the MMP electoral system would the House have the further members required to make these Orders work as intended.

105 A number of the 1995 Orders concern matters which clauses of the Parliamentary Privilege Bill 1994 would make legislative provision for:

- inclusive definition of contempt of the House: (1995) PSO 392-293;
- reference to Parliamentary Proceedings before a court: (1995) PSO 397;
- an official report of the House known as *Hansard* to be recorded and published: (1995) PSO 8;

Select Committees, by analogy with *Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451, the Bill of Rights 1688 article 9 may preclude judicial review of statutory procedures to secure natural justice for witnesses and members, even though an international remedy may be available through the United Nations Human Rights Committee under the First Optional Protocol to the ICCPR. The Georgetown Conclusions on the Effective Protection of Human Rights Through Law (from a seventh judicial colloquium on applying international human rights norms within national legal systems, Georgetown, Guyana, 3-5 September 1996) emphasises that "it is essential for each branch of government to introduce and maintain appropriate rules and procedures to promote compliance, in discharging their functions, with the international human rights instruments with which they are bound". For discussions see: Taylor, *Judicial Review* (Wellington, Butterworths, 1991), para 1.40, 28-29; Illingworth and Rishworth, *Ironing out the Creases in the Bill of Rights Act* (Auckland District Law Society Seminar, 1993) para 9.3; Joseph, 390; Huscroft and Rishworth, *Rights and Freedoms* (Brooker's, Wellington, 1995), 146-147; McGee, "The Legislative Process and the Courts" in Joseph (ed), *Essays on the Constitution* (1995, Brooker's, Wellington), 110; Standing Orders Committee, *Report on Review of the Standing Orders* (1995) AJHR I.18A, 80 and Appendix F: Joseph, "Report to the Standing Orders Committee on Natural Justice", para 9.15, 240-241; Harris (1996) 8 Auckland ULR 45, 62. See also note 118. See Lindell (1996) 20 Melbourne ULR 383, 413-422; Joseph, "The New Zealand Bill of Rights" (1996) 7 PLR 162, 172-173, 175-176.

195 See Best (1994) 24 VUWLR 91, 99; New Zealand Law Society (1988) 291 *Lawtalk* 1.

196 *Interim Report on the Income Tax Amendment Bill* (1994) AJHR I.3C, 9-13 and Appendix I.

197 Compare with Australian Senate procedure (see Commonwealth of Australia, Parliamentary Debates, Senate, Volume S125, 621-623, 25 February 1988) (on which see Lindell (1996) 20 Melbourne ULR 383, 394-413) and the protections recommended by the Ontario Law Reform Commission for adoption by the Committees of the Ontario Legislative Assembly: *Report on Witnesses before Legislative Committees* (1981).

198 See the Motion of the Rt Hon Don McKinnon (1996) 553 NZPD 14361, 27 August 1996.

199 *Report on the Review of Standing Orders* (1995) AJHR I.18A. For a summary of the New Zealand Law Society's submission to the Committee, including proposed checks on abuses of the privilege of free Parliamentary speech, see (1994) *Lawtalk* 423, 11-14. For a general description of changes introduced by the new Orders see Hodder, "Parliament: New Rules" [1995] 18 TCL 48-1. For a discussion, see Harris (1996) 8 Auckland ULR 45, 63-66.

- select committee proceedings affording natural justice: (1995) PSO 208-236;
- applications by outsiders to have Speaker incorporate (by tabling or reading out) qualifying responses to members' references to them in the House: (1995) PSO 163-166;[200]
- appointment of assistant and temporary Speakers: (1995) PSO 27 and 32.

106 The Standing Orders Committee Report apparently rejected the following proposals:

- That members must notify the Speaker and satisfy him or her that there are good grounds for assertions adversely affecting reputations (cl 8).[201]
- That at the direction of the House the Solicitor-General prosecute contempt as a statutory offence like contempt of court before the High Court and Court of Appeal when the House seeks to have the penalties of imprisonment or fine imposed (cls 10-12).[202]

107 If the Bill were now to proceed, provisions on only the following matters could sensibly remain:

- More detailed statutory restatement of privileges generally and provisions further clarifying the admissibility of Parliamentary material which would replace the present law: the Legislature Act 1908 s 242 and Bill of Rights 1688 (Eng) article 9 as read in the *Prebble* case: [1994] 3 NZLR 1, 11 (cls 4 and 7).
- Abolition of members', officers' and witnesses' freedom from arrest in a civil cause (cl 5).
- Modification and clarification of members', officers' and witnesses' immunity from attendance before a court or tribunal (cl 6).

108 Clearly the new Standing Orders provide for almost all the matters the 1994 Bill would provide for. The outstanding matters are relatively minor reforms. The Standing Orders Committee concluded that its report

> answers the outstanding policy questions in respect of Parliamentary privilege with a procedure for responding to allegations, natural justice provisions and a list of contempts. The other matters concerning privilege are of a machinery nature which can be quite easily tidied up.[203]

109 These outstanding matters might be enacted with provisions repealing the Legislature Act 1908 s 253a, which relates to Hansard, now provided for in Standing Orders. Indeed, the

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200 See "Privilege Changes Allow Responses", *The Dominion*, 2 January 1996. As at the time of writing this procedure had not been used. Allan, "Parliamentary Privilege in New Zealand" (forthcoming) [1996] 6 Canterbury LR, argues that "a more full-blooded right of reply, one which afforded protection to those who impugned the motives of accusing MPs, might be a further step worth considering". Harris (1996) 8 Auckland ULR 45, 73, describes this procedure as "less than satisfactory" but says that of all the most recent reform proposals it "has the most merit". *The Report of the Privacy Commissioner to the Minister of Justice on the Parliamentary Privilege Bill* (13 February 1995) acknowledges that the Privacy Act 1993 does not bind the House or members in their official capacity but viewed the reply procedure proposed in the 1994 Bill as a useful step towards adequately addressing the privacy interests of citizens about whom personal information comes to the attention and use of the House and members. It says that there are "some parallels" between the proposed reply procedure and Privacy Act 1993 information privacy principle 7 (the right to seek correction of personal information held by an agency). The analogy also suggests a refinement of the Standing Orders procedure which would mirror privacy principle 7(3) (that a correction notice should always be available to be read with the original statement); original *Hansard* entries (or if this is not possible, indexes to them) could be annotated with reference to any notice in reply that is published.

201 (1995) AJHR I.18A, 81: "The Committee rejects this proposal in principle." An alternative reform, permitting waiver of the privilege of free speech, was either not considered, or rejected as potentially too uncertain or strict. This option would require that article 9 of the Bill of Rights 1688 (UK) and the Ombudsmen Act 1975 be amended to permit Ombudsmen (rather than the Speaker or the Privileges Committee) to waive absolute privilege in relation to the statements of persistent abusers of the privilege of free speech and debates, thereby allowing defamation proceedings to be brought unhindered by those allegedly defamed. Best (1994) 24 VUWLR 91, 100-101, credits Peter Hilt MP with a similar idea: *New Zealand Herald*, 8 October 1992, 3. Leopold [1989] 9 *Legal Studies* 53, 58, points out that the Singaporean Parliament may impose this sanction under the Parliament (Privileges, Immunities and Powers) Act 1986 (Singapore). In the *Prebble* case Cooke P acknowledged that the privilege was said to be that of the House rather than individual members but remarked that "[i]t would be odd and unacceptable in a democracy if the House could resolve against an individual member's wishes that he or she be deprived of his or her defence of absolute privilege": [1993] 3 NZLR 513, 521. See also the discussion above of 'waiver' of the article 9 privilege.

202 (1995) AJHR I.18A, Appendix F, paras 7.4-7.11, 230-232. In a 4 November 1996 letter to the Law Commission the Hon Mr Caygill acknowledged that the Standing Orders Committee did not favour the House directing the Solicitor-General to bring a prosecution for contempt before the High Court or Court of Appeal. Mr Caygill also said, however, that the Committee on the 1994 Bill had to-date not reported back to the House and that he regarded the proposal to abolish the House's power to imprison or fine for contempt as severable and "unfinished" business.

203 (1995) AJHR I.18A, 87.

1995 Report suggests that the overhaul of the 1908 Legislature Act as envisaged by the Standing Orders Committee's 1989 Bill is now timely.[204] Other new legislation affecting the House might also provide a vehicle for outstanding changes.[205] The Standing Orders Committee recently confirmed the House's general satisfaction with the new Standing Orders relating to privilege, its review after the Orders' first year of operation suggesting only minor amendments.[206] If the view of the Standing Orders Committee is shared by the Committee on the 1994 Bill, or by the House, then significant legislative changes to the substantive law of Parliamentary privilege must be considered unlikely.[207]

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204 Two matters which might be included in this residual legislative tidy-up are discussed in note 100.

205 There are now at least two apparent reasons for other new legislation affecting the House:

First, the 1995 Standing Orders also introduced a Crown financial veto procedure inconsistent with the statutory requirement that the Crown *positively* recommend appropriations of public money. Immediate compliance was secured by an interim sessional order requiring the Crown, if *not* exercising its power of veto, to *also* positively recommend a public appropriation. But in the longer term amending legislation would appear to be needed: see (1995) PSO 311-315; Constitution Act 1986 s 21; (1995) AJHR I.18A, 64-65; "Dying a death of a thousand fiscal nibbles", *The Dominion*, 21 November 1996, 6. In a 4 November 1996 letter to the Law Commission the Hon Mr Caygill said: "[g]iven that section 21 of the Constitution Act [1986] is a fairly fundamental rule it is somewhat surprising that the Government has not yet proposed amending legislation. If and when it does, I see no reason why the outstanding issues of Parliamentary privilege could not readily be tagged on. It was precisely with that in mind that I sought to delay further action on my Bill [the Parliamentary Privilege Bill 1994]."

The second reason is the recommendation by the Clerk of the House that Parliament enact legislation providing that the Government not ratify an international treaty (except an urgent treaty) without Parliamentary approval, and providing that Parliamentary approval included a resolution of the House as well as legislation. The Clerk also recommended that the process by which the approval be obtained be provided for in Standing Orders: (1996) AJHR I.18B, Annex E, 34-35. See also "Too many laws slip through the democratic process", *New Plymouth Daily News*, 30 October 1996, (editorial).

206 See *Report of the Standing Orders Committee on its Review of the Operation of the Standing Orders* (1996) AJHR I.18B, 11-12 (tabled on 21 August 1996: *Parliamentary Bulletin* 96.18, 26 August 1996, 12).

207 The Bill's sponsor, the Hon Mr Caygill MP, was reported in June 1996 to be still hopeful that the clauses of the 1994 Bill clarifying the law might be enacted: "Caygill tackles Privilege", *Evening Post*, 20 June 1996, 3, though Harris (1996) 8 Auckland ULR 45, 64 reports the Hon Mr Caygill as having indicated in February 1996 that there was "now virtually no support in Parliament" for the prior notice procedure in cl 8 of the 1994 Bill. In a 4 November 1996 letter to the Law Commission the Hon Mr Caygill said that "[s]o far as I am concerned that particular proposal [cl 8] is dead".

Appendix
Legislation and Standing Orders

Legislation and Standing Orders are presented in this appendix in a format like that recommended in *The Format of Legislation* (NZLC R27 1993).

BILL OF RIGHTS 1688 (ENG)

1 William and Mary (1688), Session 2, Chapter 2
(See Volume 30 of the Reprinted Statutes: RS 30)

An Act declaring the Rights and Liberties of the Subject,
and Settling the Succession of the Crowne

1 . . .

Freedom of speech—That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament.

. . .

In force in New Zealand: Imperial Laws Application Act 1988 s 3(1) and First Schedule.

THE LEGISLATURE ACT 1908

Public Act 101 of 1908
Royal assent: 4 August 1908
Comes into force: 4 August 1908

An Act to consolidate certain enactments of the General Assembly relating to the Legislature of New Zealand

DIVISION 3
PRIVILEGES OF PARLIAMENT

Privileges Generally

242 Privileges of House of Representatives. Journals as evidence

(1) The House of Representatives and the Committees and members thereof shall hold, enjoy, and exercise such and the like privileges, immunities, and powers as on the 1st day of January 1865 were held, enjoyed, and exercised by the Commons House of Parliament of Great Britain and Ireland, and by the Committees and members thereof, so far as the same are not inconsistent with or repugnant to such of the provisions of the Constitution Act as on the 26th day of September 1865 (being the date of the coming into operation of the Parliamentary Privileges Act 1865) were unrepealed, whether such privileges, immunities, or powers were so held, possessed, or enjoyed by custom, statute, or otherwise.

(2) Such privileges, immunities, and powers shall be deemed to be part of the general and public law of New Zealand, and it shall not be necessary to plead the same, and the same shall be judicially taken notice of in all Courts and by and before all Judges.

(3) Upon any inquiry touching the privileges, immunities, and powers of the said House of Representatives, or of any Committee or member thereof, a copy of the Journals of the said Commons House of Parliament, printed or purporting to be printed by order of the said Commons House of Parliament by the printer to the said Commons House, shall be admitted as evidence of such Journals by all Courts, Judges, Justices, and others without any proof being given that such copies were so printed.

Origins: Parliamentary Privileges Act 1865 ss 4-5.

Parliamentary Witnesses

252 Right to administer oaths

The House of Representatives and any Committee of such House may respectively administer an oath to any witness examined before such House or Committee; and any person examined as aforesaid who wilfully gives false evidence is liable to the penalties of perjury.

Origins: Parliamentary Privileges Act 1865 s 6. For perjury see Crimes Act 1961 ss 108-109.

253 Indemnity to witness. Immunities and privileges

(1) Where any person sworn and examined as a witness by or before any Select Committee of the House of Representatives on any matter which is a subject of inquiry before such Committee, claims, upon such examination, excuse from answering any question put to him by any such Committee on the ground that the answer to such question may criminate or tend to criminate him, and the Committee is of opinion that full answers are required in order to enable it to deal satisfactorily with the matter under inquiry, it shall make a report thereof to the House, and if such House passes a resolution that the witness shall give full evidence, then such witness shall answer accordingly.

(2) Every such witness who thereupon answers fully and faithfully any question put to him by the Committee to the satisfaction of such Committee shall be entitled to receive a certificate under the hand of the Chairman of the Committee stating that such witness was, upon his examination, so required to answer and had answered all such questions.

(3) On production and proof in any Court of law of such certificate, the Court shall stay the proceedings in any action or prosecution against such witness for any act or thing done by him before that time and revealed by the evidence of such witness, and may at its discretion award to such witness such costs as he may have been put to.

(4) No statement made by any person in answer to any question put by or before any Committee as aforesaid shall, except in cases of indictment for perjury, be admissible as evidence in any proceeding, civil or criminal.

(5) Every witness sworn and examined under this or the last preceding section shall have, in respect of the testimony given by him when so sworn, the like privileges, immunities, and indemnities in all respects as are possessed by or belong to any witness sworn and examined in the High Court.

Origins: Parliamentary Privileges Act 1865 Amendment Act 1875 s 2; Parliamentary Witness Indemnity Act 1883 ss 2-5.

Hansard

253A Hansard

(1) An official report (to be known as Hansard) shall be made of such portions of the proceedings of the House of Representatives and its committees as may be determined by the House of Representatives or by the Speaker of the House of Representatives.

(2) The report shall be made in such form and subject to the rules as may be from time to time approved by the House of Representatives itself or by the Speaker of the House of Representatives.

Origins: Parliamentary Service Amendment Act 1991 s 11; See now too (1995) PSO 8.

Other Privileges

257 Interpretation. Exemption of members and officers from attendance as witnesses

(1) In this and the succeeding sections of this Division of this Act

Court of record means the Court of Appeal, the High Court, and every District Court;

Process includes every writ, summons, and subpoena;

Speaker includes the person for the time being acting in that capacity.

(2) Where any member of Parliament or any of the officers specified in the Sixth Schedule hereto, not being in attendance on Parliament, is required by the process of any Court of record to attend thereat personally, either during any session of the General Assembly or within 10 days before the commencement thereof, as a party or witness in any civil proceeding, or as a witness in any criminal proceeding, such member or officer may apply to such Court to be exempted from attendance on such Court.

Definition: **officer**, Sixth Schedule.

Origins: Privileges Act 1866 ss 2-3; **Court of record**; Legislature Amendment Act 1985 s 2 (1).

259 **Court to make inquiry and grant exemption**

On any such application for an exemption from attendance being made to any such Court as aforesaid, or to any Judge thereof, unless it appears to the satisfaction of the Court or Judge that the ends of public justice would be defeated or injuriously delayed or irreparable injury would be caused to any party to the proceedings by the non-attendance of such member or officer in obedience to such process or in pursuance of such process, the Court or Judge shall order that such member or officer shall be discharged from attendance in obedience to such process until the expiration of 10 days after the termination of the session of the General Assembly in respect of which such exemption is claimed, and may make order for the attendance of such member or officer at the sitting of such Court at such future date after the expiration of such 10 days as such Court or Judge thinks fit.

Origins: Privileges Act 1866 s 5.

260 **Exemption of Speaker from attendance on courts**

Where the Speaker of the House of Representatives, being in attendance on Parliament, is required by the process of any Court to attend thereat personally either as a party or a witness in any civil proceeding, or as a witness in any criminal proceeding, he shall submit the matter to the House of Representatives and such order may be made thereon as the House thinks fit; and if it is resolved that the Speaker shall be exempted from attendance, such resolution shall be presented in like manner and shall have the same effect as the certificate mentioned in section 263 hereof in respect of any other member not being a Speaker:

Provided that if the House is under adjournment, and it is necessary to act without delay, the Speaker whose attendance is required may sign a certificate to the like effect as is hereinafter provided in the said section in respect of any other member not being a Speaker, but such certificate shall remain in force only until the matter is submitted by the Speaker at the first convenient opportunity to the House, and order is made thereon.

Origins: Privileges Act 1866 s 6.

261 **Application to Speaker for exemption from attendance in civil courts**

Where any member of Parliament (other than the Speaker thereof) or any such officer as aforesaid, being in attendance on Parliament, is required by the process of any Court to attend thereat personally as a party or witness in any civil proceeding, or as a witness in any criminal proceeding, such member or officer may apply to the Speaker or Acting Speaker of the House to be exempted from such attendance on such Court.

Origins: Privileges Act 1866 s 7; Privileges Act 1866 Amendment Act 1878 s 3.

263 **Speaker to make inquiry and grant certificate**

On any such application to a Speaker or Acting Speaker as aforesaid, unless it appears to his satisfaction, on such inquiry as he thinks fit to make into the circumstances of the case, that the ends of public justice would be defeated or injuriously delayed, or that irreparable injury would be caused to any party to the proceedings by the non-attendance of such member or officer in obedience to such process, such Speaker or Acting Speaker shall grant a certificate under his hand to the effect that the attendance in the General Assembly of the member or officer therein named is required during the session.

Origins: Privileges Act 1866 s 9; Privileges Act 1866 Amendment Act 1878 s 3.

264 **Effect of certificate**

On such certificate being presented to the Court in which the attendance of such member or officer is required he shall be thereby exempted from attending therein until 10 days after the termination of the session then being held; and no proceedings, civil or criminal, shall be taken against such member or officer in respect of his non-attendance in obedience to such proces, and the Court shall direct such postponement of trial or other proceedings, and make such order as it deems convenient and just, regard being had to such exemption as aforesaid.

Origins: Privileges Act 1866 s 10.

265 **Adjournment of civil proceedings against members and officers**

Where any civil proceedings are pending in any Court of record against any such member or officer as aforesaid, and such proceedings are set down for trial or hearing, or are likely in the ordinary course to come on for trial or hearing, at a sitting of any such Court to be held within the period extending from 10 days before the holding of any session of the General Assembly, to 30 days after the termination of the said session, such member or officer may obtain an adjournment or appointment of such trial or hearing to some day later than the period of 30 days last mentioned, upon the conditions following:

(a) Where such member or officer is not in attendance on Parliament, and the proceedings are likely to come on or are set down for trial or hearing at a sitting of any such Court to be held within 10 days before the commencement of the session or during such session, such member or officer shall make application to the Court in which such proceedings are pending for an adjournment or appointment of such trial or hearing to some day beyond the period of 30 days after the end of such session, accompanying such application with an affidavit made by such member or officer that he has been summoned to attend in his place in Parliament, and that it is necessary that opportunity should be afforded him of being personally present at the trial or hearing of such proceedings, and that his attendance on Parliament will prevent his being able so to be present on such trial or hearing:

(b) Where such member or officer is in attendance on Parliament, and such proceedings are likely to come on or are set down for trial or hearing at a sitting of such Court to be held at any time during a session of Parliament or within 30 days thereafter, then such member or officer shall apply to the Speaker of The House for a certificate entitling him to an adjournment of such trial or hearing, whereupon the following provisions shall apply:

(i) Such application shall be supported by an affidavit made by such member or officer, and delivered to the Speaker, that such proceedings are likely to come on or are set down for trial or hearing at a sitting of such Court to be held during such session or within 30 days thereafter, and that the personal attendance of such member or officer at such trial or hearing is necessary for his interest:

(ii) The Speaker shall, after making inquiry in manner provided by section 263 hereof, and unless satisfied that irreparable injury would be caused to any party to such proceedings if the trial or hearing thereof was postponed, forward such affidavit, together with a certificate in terms of the said section, to the Court in which such proceedings are pending.

Definition: **Court of record**, s 257.

Origins: Privileges Act 1866 Amendment Act 1872 s 3.

266 **Court may make inquiry and adjourn case**

The Court in which such civil proceedings are pending shall, in either of the cases referred to in the last preceding section, cause the trial or hearing of such proceedings to be adjourned without cost to such member or officer, from time to time, to some sitting of the Court to be held after the expiration of 30 days after the termination of the session:

Provided that in the case referred to in paragraph (a) of the said last preceding section, the Court may make the same inquiries as the Speaker of the House of Representatives is required to make under the said section 263, and shall not be bound to adjourn or postpone the trial or hearing if it is satisfied that irreparable injury would be caused to any party to such proceedings by such adjournment or postponement.

Origins: Privileges Act 1866 Amendment Act 1872 s 4.

267 **Service of process of courts not of record**

If any person serves or causes to be served any summons or process issued out of any Court not of record (other than a summons or warrant on a charge of any offence), upon or for any such member or officer as aforesaid by sending, leaving, or delivering the same in any way which would otherwise be good service by law, during any session of the General Assembly, or within 10 days before the commencement or 10 days after the termination of such session, such service shall be invalid and of no effect.

Definition: **Court of record**, s 257.

Origins: Privileges Act 1866 s 11.

268 **Court to take judicial notice of signature of Speaker**
It shall be the duty of all Courts, Judges, and Justices, and all other persons, to take judicial notice of the signatures of the Speaker or Acting Speaker of The House of Representatives when affixed to any such certificate as aforesaid.

Origins: Privileges Act 1866 s 12; Privileges Act 1866 Amendment Act 1878 s 3.

269 **Leave to members and officers to attend court**
Nothing in this Act shall be construed to limit or abridge in any respect the power of the House of Representatives to give leave to any of the members or officers of the House to attend any Court in respect of which it appears desirable to the House that such leave should be granted:

Provided that any member of the House having obtained leave of absence without any reference to the process of any Court shall, so far as regards any Court not being a Court of record, but not as regards a Court of record, be considered as in attendance upon his duties in Parliament.

Origins: Privileges Act 1866 s 13.

SIXTH SCHEDULE

Section 257
Officers of the House of Representatives

The Clerk of the House of Representatives.
The Deputy Clerk of the House of Representatives.
The Sergeant-at-Arms.
The Clerk Assistant of the House of Representatives.

Origins: Legislature Amendment Act 1975 s 2 (The Deputy Clerk of the House of Representatives).

LEGISLATURE AMENDMENT ACT 1992

Public Act 106 of 1992
Royal assent: 26 November 1992
Comes into force: 1 February 1993

An Act to amend the Legislature Act 1908

2 Interpretation

In this Act, unless the context otherwise requires,

Authorised Parliamentary paper means a Parliamentary paper published by order or under the authority of the House of Representatives:

Parliamentary paper means any report, paper, votes, or proceedings.

. . .

4 Stay of proceedings where publication made by order of House of Representatives

(1) Where any proceedings (whether civil or criminal) are commenced against any person in respect of the publication, by that person or that person's employee, by order or under the authority of the House of Representatives, of any Parliamentary paper, that person may, subject to subsections (2) and (3) of this section, produce to the Court a certificate signed by the Speaker of the House of Representatives stating that the Parliamentary paper in respect of which the proceedings are commenced was published, by that person or that person's employee, by order or under the authority of the House of Representatives.

(2) No certificate may be produced to any Court under subsection (1) of this section unless the person seeking to produce it has given to the plaintiff or prosecutor in the proceedings, or to the plaintiff's or prosecutor's solicitor, at least 24 hours' notice of that person's intention to do so.

(3) Every certificate produced under subsection (1) of this section shall be accompanied by an affidavit verifying the certificate.

(4) Where a certificate is produced to any Court in accordance with subsections (1) to (3) of this section, the Court shall immediately stay the proceedings, and the proceedings shall be deemed to be finally determined by virtue of this section.

Definition: **Parliamentary paper**, s 2.
Origins: Defamation Act 1954 s 18; Compare Parliamentary Papers Act 1840 (UK) s 1.

5 Stay of proceedings in respect of copy of Parliamentary paper

(1) Where any proceedings (whether civil or criminal) are commenced in respect of the publication of a copy of an authorised Parliamentary paper, the defendant in those proceedings may, at any stage of the proceedings, produce to the Court the authorised Parliamentary paper and the copy, together with an affidavit verifying the authorised Parliamentary paper and the correctness of the copy

(2) Where, in any proceedings, the defendant produces the documents required by subsection (1) of this section, the Court shall immediately stay the proceedings, and the proceedings shall be deemed to be finally determined by virtue of this section.

Definition: **Authorised Parliamentary paper**, s 2.
Origins: Defamation Act 1954 s 19; Parliamentary Papers Act 1840 (UK) s 1.

NEW ZEALAND BILL OF RIGHTS ACT 1990

Public Act 109 of 1990
Royal assent: 28 August 1990
Comes into force: 25 September 1990

An Act

(a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and

(b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

PART I
GENERAL PROVISIONS

2 Rights affirmed

The rights and freedoms contained in this Bill of Rights are affirmed.

3 Application

This Bill of Rights applies only to acts done

(a) By the legislative, executive, or judicial branches of the Government of New Zealand; or

(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

7 Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights

Where any Bill is introduced into the House of Representatives, the Attorney-General shall,

(a) In the case of a Government Bill, on the introduction of that Bill; or

(b) In any other case, as soon as practicable after the introduction of the Bill,

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

PART II
CIVIL AND POLITICAL RIGHTS

12 Electoral rights

Every New Zealand citizen who is of or over the age of 18 years

(a) Has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and

(b) Is qualified for membership of the House of Representatives.

27 Right to justice

(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

PARLIAMENTARY PRIVILEGE BILL 1994

Introduced: 7 December 1994 (543 NZPD 4457-4487)
Referred to Special Committee: 31 May 1995 (547 NZPD 6985)
Carried-over to 45th Parliament: 27 August 1996 (553 NZPD 14361)

A BILL INTITULED

An Act to reform the law relating to parliamentary privilege

2 Interpretation

(1) In this Act, unless the context otherwise requires,

Authorised Parliamentary paper means any report, paper, votes, or proceedings published pursuant to an order or under the authority of the House or pursuant to a resolution of a Committee; and includes a copy of an authorised Parliamentary paper;

Committee means a Select Committee; and includes a subcommittee of a Select Committee;

Court means the Court of Appeal, The High Court and any District Court;

House means the House of Representatives and includes a committee of the whole House;

Member means a member of Parliament;

Officer means any person who is not a Member but who, in accordance with his or her duties, is participating in proceedings in the House or in any Committee; but does not include any person presenting a submission or petition or appearing by order of the House or a Committee;

Person includes a company, and also a body of persons, whether corporate or unincorporate;

Proceedings in Parliament means

(a) All things said, done, or written in or in the presence of the House or a Committee and in the course of a sitting of the House or of a Committee, for the purposes of or incidental to, the transacting of business of the House or of the Committee and, without limiting the generality of the foregoing, includes
  (i) The giving of evidence before the House or a Committee, and the evidence so given:
  (ii) The presentation or submission of a document to the House or a Committee and the document so presented or submitted; and
(b) All things spoken or written between Members or between Members and officers, for the purpose of enabling any Member or officer to carry out his or her functions as such; and
(c) The formulation or publication of an authorised Parliamentary paper and the paper so formulated or published; and
(d) Any response submitted to the Speaker under **section 9** of this Act, whether or not it is read and tabled in the house:

Origin: Parliamentary Privileges Act 1987 (Aust) s 16(2).

4 Privileges Generally

Subject to the provisions if this Act, the House of Representatives shall hold, enjoy and exercise the privileges, immunities and powers possessed by the House of Commons in the United Kingdom on 1 January 1865 as applied by the New Zealand House of Representatives since that date.

Origin: Legislature Act 1908 s 242(1).

5 Freedom from arrest abolished

The immunity of Members, officers, and witnesses from arrest in a civil cause is abolished.

6 **Immunity from attendance before Court or tribunal**

(1) A Member shall not be required to attend before a court or a tribunal on any day
   (a) On which the House sits;
   (b) On which a Committee of which that Member is a member sits; or
   (c) Which is within two days before or two days after a day referred to in paragraphs (a) and (b) of this subsection.

(2) An officer shall not be required to attend before a court of a tribunal on any day
   (a) On which the House sits, or
   (b) On which a Committee upon which that officer is required to attend sits; or
   (c) Which is within two days before or two days after a day referred to in paragraphs (a) and (b) of this sub-section.

(3) A person who is required to attend before the House or a Committee on any day shall not be required to attend before a court or a tribunal on that day.

(4) Except as provided by this section, a Member or an officer or person required to attend before the House or a Committee has no immunity from attendance before a court or a tribunal by reason of being a Member, officer or person required to so attend.

(5) Nothing in this section shall be construed so as to prevent any Member, officer, or other person from attending before a court or a tribunal if that person so wishes.

Origin: Legislature Act 1908 ss 257-260; Parliamentary Privileges Act 1987 (Aust) s 14.

7 **Freedom of speech and debate**

(1) Subject to this Act, the freedom of speech and debates or proceedings in Parliament may not be questioned in any court of place out of Parliament.

(2) Without limiting the generality of subsection (1) of this section, and subject to subsections (3) and (4) of this section, evidence may not be tendered or received, questions asked, or statements, submissions or comments made in any court or tribunal concerning proceedings in Parliament, by way of, or for the purpose of,
   (a) Questioning or relying on the truth, motive, intention, or good faith of anything forming part of those proceedings in Parliament; or
   (b) Otherwise questioning or establishing the credibility, motive, intention, or good faith of any person; or
   (c) Drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

(3) Nothing in this Act shall affect the law in relation to the admission of evidence of an unauthorised Parliamentary paper or the making of statements, submissions or comments based on that paper in any proceedings in any court or tribunal for the purpose of assisting in the interpretation of the Act.

(4) In relation to a prosecution for an offence against this Act or a prosecution for an offence against sections 102, 103 or 108 of the Crimes Act 1961, nothing in this Act shall be taken to prevent or restrict the admission of evidence, the asking of questions, or the making of statements, submissions, or comments in relation to any proceedings in Parliament to which the offence relates.

(5) The Bill of Rights Act 1688 (UK), as applied by common law and section 3 of the Imperial Laws Application Act 1988, is hereby amended in respect of New Zealand by repealing Article 9.

Origin: Bill of Rights 1688 (UK) Article 9; Legislature Act 1908 s 253(4); Parliamentary Privileges Act 1987 (Aust) s 16(3)-(6).

8 **Prior Notice of assertion in the House**

(1) No Member shall make an assertion in the House of impropriety, breach of duty, dishonesty, or criminal conduct on the part of a person who is not a Member, unless the Member has given written notice to the Speaker of the proposed assertion.

(2) The Member shall not make the assertion in the House unless the Speaker has notified the Member that he or she is satisfied that grounds exist for making it.

(3) It shall be a breach of privilege to make an assertion in breach of this section.

(4) Where a matter of privilege under this section is referred to the Privileges Committee, the person in respect of whom the assertion was made shall be entitled to make submissions to the Committee.

9 **Right of reply**

(1) Where an assertion has been made in the House in respect of a person who is not a Member, that person may
- (a) Submit to the Speaker that that person has been adversely affected by the assertion or has suffered damage to his, her or its reputation as a result of the assertion; and
- (b) Submit to the Speaker a response to any such assertion; and
- (c) Request that the Speaker read and table the response in the House.

(2) Any response submitted pursuant to subsection (1) of this section shall be brief and shall not contain
- (a) Any offensive or irrelevant statements; or
- (b) Any assertion of impropriety, dishonesty, breach of duty or criminal conduct on the part of any person other than the Member who made the assertion.

(3) Where the speaker receives a submission pursuant to subsection (1) of this section, the Speaker shall consider whether in all the circumstances of the case the response should be read and tabled in the House.

(4)
- (a) The extent to which the assertion is capable of adversely affecting, or damaging the reputation of, the person making the submission;
- (b) The extent to which the response complies with subsection (2) of this section;
- (c) The time that has elapsed since the making of the assertion;
- (d) The extent to which the response is critical of the House or any Member.

(5) The Speaker shall not consider or judge the truth of the assertion made in the House or of the response.

(6) If the Speaker determines that a submission should not be read and tabled in the House, the Speaker shall inform the person making the submission that not further action will be taken on the submission.

(7) If the Speaker determines that, having regard to the considerations in subsection (4) of this section, the response should not be read or tabled in the form submitted, the Speaker may invite the person making the submission to amend the response in an appropriate manner.

(8) If the Speaker determines that a response should be read and tabled in the House, the Speaker shall
- (a) Give a copy of the response to the Member who made the assertion; and
- (b) Ensure that the response is read and tabled at the first available opportunity.

(9) If, at the time the Speaker determines that a response should be read and tabled in the House, the House is adjourned or prorogued, the Speaker may issue the response to the public and shall ensure that the response is read and tabled when the House next meets.

10 Contempt of Parliament

(1) Every person commits an offence of contempt of Parliament who intentionally obstructs or impedes the House in the performance of its functions, or who intentionally obstructs or impedes any member or officer in the discharge of his or her duty, or who acts in a way which he or she knows would tend directly or indirectly to do so.

(2) Without limiting the generality of subsection (1) of this section, it is a contempt of Parliament if any person
- (a) Acts inconsistently with the privilege set out in section 7 of this Act;
- (b) Intentionally and without lawful excuse disobeys any order of the House or summons of a Committee to attend or to produce papers, records or other documents before the House or Committee.
- (c) Intentionally and without lawful excuse refuses to answer any question put to that person by the House or a Committee;
- (d) Assaults, threatens, intimidates, or intentionally obstructs a Member or officer in the discharge of his or her duty during the sitting of the house or of a Committee;
- (e) Intentionally interrupts, obstructs, or creates a disturbance in the House or a Committee during the sitting of the House or Committee;
- (f) Intentionally misleads the House or a Committee;
- (g) Gives, offers, or agrees to give or offer any bribe, inducement, or advantage to any person with intent to influence any member in his or her capacity as a Member;
- (h) Serves or causes to be served any summons or process out of any court or tribunal on any Member or officer, within the precincts of Parliament or in a place where a Committee is sitting, on any day on which the House or the committee sits or meets, without the authority of the House or the Speaker;
- (i) Publishes or discloses without the authority of the House evidence given to the House or a Committee which the House or Committee has declared to be secret evidence.

(3) Words or acts that are defamatory or critical of the House or of a Member are not a contempt of Parliament unless the words are spoken or the acts are done in the House or in or before a Committee, in petitions to the House, or in submissions to a Committee.

(4) Every person who commits an offence of contempt of Parliament is liable on conviction
- (a) In the case of a natural person, to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 3 months; and
- (b) In any other case, to a fine not exceeding $50,000.

Origin: Parliamentary Privileges Act 1987 (Aust) ss 6, 12-13.

11 Proceedings for Offences

(1) No prosecution for any offence under Section 10 of this Act shall be brought except by the Solicitor-General pursuant to a direction of the House under subsection (2) of this section.

(2) The Hose of Representatives may, by resolution, direct the Solicitor-General to bring a prosecution for any offence under section 10 of this Act or any other offence arising out of a contempt of Parliament.

(3) Proceedings for an offence under this Act shall be brought by way of originating application to the High Court and the Court shall be constituted, and the offence shall be tried as if the proceedings involved a prosecution for criminal contempt of court, not being a contempt committed in the face of the court.

(4) Where any person is convicted of an offence under this Act, that person may appeal to the Court of Appeal against the finding or against any sentence imposed in respect thereof, or against both the finding and the sentence as if he or she had been convicted on indictment, and the provisions of Part XIII of the Crimes Act 1961 shall apply accordingly.

Origin: Crimes Act 1961 s 384.

12 **Power of the House to punish**

(1) Nothing in this Act shall affect

(a) The Power of the House of Representatives to punish for contempt of Parliament by way of censure, suspension, exclusion from precincts or the House, or the requiring of an apology; of

(b) The power of the Serjeant-at-Arms to take into custody strangers who intrude into the House or otherwise misconduct themselves within the precincts of Parliament while the House or a Committee is sitting.

(2) The power of the House of Representatives to imprison or fine is abolished.

(3) The House of Representatives may not expel a member from membership of the House.

13 **Natural justice**

(1) Where an assertion of impropriety, breach of duty, dishonesty or criminal conduct is made or will be made against any person in any Committee, or any evidence of such conduct is presented to the Committee, the Committee shall observe the principles of natural justice.

(2) Subsection (1) of this section shall not apply in circumstances where the Committee forthwith and without debate resolves not to receive the assertion or evidence.

14 **Right to counsel**

Any person summoned or requested to attend either at the bar of the House or before a Committee to be examined and give evidence or produce papers and records shall be entitled to be represented by counsel.

15 **Immunity of witnesses**

Any person summoned or requested to attend either at the bar of the House or before any Committee to be examined or give evidence may refuse to answer any question on the grounds that the answer would or could tend to incriminate him or her.

Origin: Legislature Act 1908 s 253.

16 **Right to administer oaths**

The House and any Committee may administer an oath to any witness examined before the House or Committee.

Origin: Legislature Act 1908 s 253.

17 ***Hansard***

(1) An official report (to be known as *Hansard*) shall be made of such portions of the proceedings of the House and its Committees as may be determined by the House or by the Speaker.

(2) The report shall be made in such form and subject to such rules as may be from time to time approved by the House itself or by the Speaker.

Origin: Legislature Act 1908 s 253A.

18 **Stay of proceedings in respect of authorised Parliamentary paper**

Where a certificate under section 19(a) of this Act is produced to the Court in any proceedings in respect of the publication of an authorised Parliamentary paper, the Court shall stay the proceedings.

Origins: Legislature Amendment Act 1992 ss 4-5; Defamation Act 1954 ss 18-19; Parliamentary Papers Act 1840 (UK) s 1.

STANDING ORDERS OF THE HOUSE OF REPRESENTATIVES 1995

Chapter 8: Parliamentary Privilege (Orders 384-398)

384 Privileges Committee

(1) The House appoints a Privileges Committee at the commencement of each Parliament.

(2) The committee considers and reports on any matters referred to it by the House relating to or concerning parliamentary privilege.

Origin: (1992) PSO 423.

385 Raising a matter of privilege

(1) A member may raise a matter of privilege with the Speaker in writing at the earliest opportunity.

(2) In any case a matter of privilege must be raised before the next sitting of the House.

(3) A matter of privilege relating to the conduct of strangers present may be raised forthwith in the House and dealt with in such way as the Speaker determines.

Origin: (1992) PSO 424(1).

386 Allegation of breach of privilege or contempt

An allegation of breach of privilege or of contempt must be formulated as precisely as possible so as to give any person against whom it is made a full opportunity to respond to it.

387 Consideration by Speaker

(1) The Speaker considers a matter of privilege and determines if a question of privilege is involved.

(2) In considering if a question of privilege is involved, the Speaker takes account of the degree of importance of the matter which has been raised.

(3) No question of privilege is involved if the matter is technical or trivial and does not warrant the further attention of the House.

Origin: (1992) PSO 424(2).

388 Members to be informed of allegations against them

Any member raising a matter of privilege which involves another member of the House must as soon as reasonably practicable after raising the matter forward to that other member a copy of the matter that has been raised with the Speaker.

Origin: (1992) PSO 426(1).

389 Speaker's ruling

(1) If the Speaker considers that a matter involves a question of privilege, this is reported to the House at the first opportunity.

(2) The Speaker will not report to the House that a matter involving another member involves a question of privilege without first informing that member that it is intended to do so.

Origin: (1992) PSO 426(2), 427(1).

390 Question of privilege stands referred to Privileges Committee

Any matter reported to the House by the Speaker as involving a question of privilege stands referred to the Privileges Committee.

Origin: (1992) PSO 427(2).

391 Maker of allegation not to serve on inquiry

A member who makes an allegation of breach of privilege or of contempt may not serve on an inquiry into that allegation.

392 Contempt of House

The House may treat as a contempt any act or omission which

(a) obstructs or impedes the House in the performance of its functions, or

(b) obstructs or impedes any member or officer of the House in the discharge of the member's or officer's duty, or

(c) has a tendency, directly or indirectly, to produce such a result.

393 Examples of contempts

Without limiting the generality of Standing Order 392, the House may treat as a contempt any of the following

(a) the breach of one of the privileges of the House:

(b) deliberately attempting to mislead the House or a committee (by way of statement, evidence or petition):

(c) serving legal process or causing legal process to be served within the precincts of Parliament, without the authority of the House or the Speaker, on any day on which the House sits or a committee meets;

(d) removing, without authority, any papers or records belonging to the House:

(e) falsifying or altering any papers or records belonging to the House:

(f) as a member, receiving or soliciting a bribe to influence the member's conduct in respect of proceedings in the House or at a committee:

(g) as a member, accepting fees for processional services rendered by a ember in connection with proceedings in the House or at a committee:

(h) offering or attempting to bribe a member to influence the member's conduct in respect of proceedings in the House or at a committee:

(i) assaulting, threatening or intimidating a member or an officer of the House acting in the discharge of the member's or the officer's duty:

(j) obstructing or molesting a member or an officer of the House in the discharge of the member's or the officer's duty:

(k) misconducting oneself in the presence of the House or a committee:

(l) divulging the proceedings or the report of a select committee or a subcommittee contrary to Standing Orders:

(m) publishing a false or misleading account of proceedings before the House or a committee:

(n) failing to attend before the House or a committee after being summoned to do so by the House or the committee:

(o) intimidating, preventing or hindering a witness form giving evidence or giving evidence in full to the House or a committee:

(p) refusing to answer a question or provide information required by the House or a committee:

(q) assaulting, threatening or disadvantaging a member on account of the member's conduct in Parliament:

(r) assaulting, threatening or disadvantaging a person on account of evidence given by that person to the House or a committee.

Origins: (1992) PSO 366, 384, 436.

394 Member absent without leave

A member absent from the House on more than seven consecutive sitting days without obtaining leave of absence commits a contempt of the House.

Origin: (1992) PSO 62.

395 **Disobedience to order of House**
A person who disobeys an order of the House directed to that person commits a contempt of the House.

396 **Failure to disclose pecuniary interest**
A member who, before participating in the consideration of any item of business, fails to declare a pecuniary interest which the member has in that business, commits a contempt of the House.

397 **Reference to parliamentary proceedings before court**
(1) Subject to this Standing Order, permission of the House is not required for reference to be made to proceedings in Parliament in any proceedings before a court.

(2) Reference to proceedings in Parliament is subject always to Article IX of the Bill of Rights 1688 which prohibits the impeaching or calling into question in a court of such proceedings. Nothing in paragraph (1) is intended to derogate from the operation of Article IX.

(3) Paragraph (1) does not authorise reference to proceedings in Parliament contrary to any standing Order relating to the disclosure of proceedings of the House or of a committee of the House.

398 **Evidence of proceedings not to be given**
The Clerk and other officers of the House and any other person employed to make a transcript of proceedings of the House or of a committee may not give evidence of proceedings in Parliament without the authority of the House.

Origin: (1992) PSO 389.

Chapter 31 of 1996
Royal assent: 4 July 1996
Comes into force: 4 September 1996

An Act to amend the law of defamation and to amend the law of limitation with respect to actions for defamation or malicious falsehood

13 Evidence concerning proceedings in Parliament

(1) Where the conduct of a person in or in relation to proceedings in Parliament is in issue in defamation proceedings, he may waive for the purposes of those proceedings, so far as concerns him, the protection of any enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament.

(2) Where a person waives that protection
- (a) any such enactment or rule of law shall not apply to prevent evidence being given, questions being asked or statements, submissions, comments, or findings being made about his conduct, and
- (b) none of those things shall be regarded as infringing the privilege of either House of Parliament.

(3) The waiver by one person of that protection does not affect its operation in relation to another person who has not waived it.

(4) Nothing in this section affects any enactment or rule of law so far as it protects a person (including a person who has waived the protection referred to above) from legal liability for words spoken or things done in the course of, or for the purposes of or incidental to, any proceedings in Parliament.

(5) Without prejudice to the generality of subsection (4), that subsection applies to
- (a) the giving of evidence before either House or a committee;
- (b) the presentation or submission of a document to either House or a committee;
- (c) the preparation of a document for the purposes of or incidental to the transacting of any such business;
- (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of either House or a committee; and
- (e) any communication with the Parliamentary Commissioner for Standards or any person having functions in connection with the registration of members' interests.

In this subsection **a committee** means a committee of either House or a joint committee of both Houses of Parliament.

Not in force in New Zealand: Constitution Act 1986 s 15(2).

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