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PRIVILEGES COMMITTEE OF PARLIAMENT

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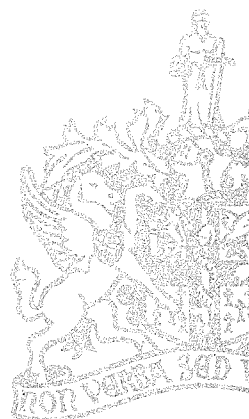
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Public Issues Committee
ADLS
Discussion Paper – Overview

**THE PRIVILEGES COMMITTEE OF PARLIAMENT AND THE
DISCIPLINE OF MEMBERS OF PARLIAMENT**

The Privileges Committee does not have an active role in punishing Members of Parliament for using parliamentary privilege improperly. Indeed, it does not inhibit their freedom of action within the Chamber. Rather than an expansion of the privileges of Members of Parliament it would be desirable to clarify that this privilege is limited to conduct within Parliament, and that even there it is qualified by a need to account to the Privileges Committee, which ought to be required to hear complaints from non-Members alleging that a Member has harmed their reputation.

It might not be desirable to allow class actions, or require the Privileges Committee to hear claims that parliamentary privilege had been misused for personal gain, or in breach of, inter alia, the Human Rights Act. This could expose Members of Parliament to malicious complaints that could inhibit free speech. But where an individual is named in Parliament the Privileges Committee should be required to hold the Member to account if the allegation made is shown, to the satisfaction of the Privileges Committee, to be inappropriate.

Commentators have often expressed the belief that professionals, especially lawyers, are concerned to protect themselves and that professional societies exist solely for the benefit of members of the profession. The professions themselves must be alert to this perception, and do all they can to respond to it, without harming their professional integrity. Members of Parliament must be careful that they are themselves subject to a similarly strict and objective disciplinary procedure as is now imposed on, for instance, the legal profession. This is especially so since the latter has been introduced by Parliament, in the Lawyers and Conveyancers Act 2006.

**Public Issues Committee
Auckland District Law Society
Discussion Paper**

**THE PRIVILEGES COMMITTEE OF PARLIAMENT AND THE
DISCIPLINE OF MEMBERS OF PARLIAMENT**

The behaviour of Members of Parliament is occasionally in the spotlight. Recent events have shown that it is necessary to provide a robust and politically accountable process for investigating allegations of wrongdoing, and punishing those responsible. This is not confined to illegality per se, for which independent processes exist, but also includes political impropriety and conduct unbecoming of a Member of Parliament.

Two years ago the Public Issues Committee issued a paper on parliamentary privilege.¹ In *Buchanan v Jennings*² the Judicial Committee of the Privy Council (unanimously) held that a Member of Parliament may be held liable in defamation if the Member makes a defamatory statement in the House and later affirms the statement (without repeating it) on an occasion which is not protected by parliamentary privilege. The statement in the House was covered by absolute privilege in the Defamation Act 1992 and the Bill of Rights 1688. The later statement was not.

The basis of the decision in the Privy Council was the notion of repetition by incorporation, or effective repetition. The response to this decision from the Privileges Committee was the report “Question of privilege referred 21st July 1998 concerning *Buchanan v Jennings*” (May 2005). This argued that the Privy Council – and by implication the lower courts also – had erred in the decision, and that the courts were in breach of Article 9 of the Bill of Rights 1688. This Article prevented proceedings of Parliament from being questioned, though the definition and precise scope of “proceedings” and “questioned” remains uncertain.

The Privileges Committee was concerned that the finding in the Privy Council would involve the courts assessing and adjudging parliamentary proceedings, thus breaking the principle of mutual restraint. They were also concerned that this would inhibit the free speech of Members of Parliament, and have a chilling effect on public debate.

They proposed the enactment of a Bill that would effectively overturn the decision in *Buchanan v Jennings*, and establish that a statement by a Member outside the House, in which he or she referred to a statement made in the chamber, could not be effective repetition.

¹ “Parliamentary Privilege and free speech: MPs’ privileges and citizens’ freedom from oppression” <<http://www.adls.org.nz/doclibrary/public/professional/ParliamentaryPrivilegeandFreeSpeech.pdf>> (9th March 2006).

² [2004] U.K.P.C. 36; [2005] 2 All E.R. 273 (New Zealand P.C.).

The judgements of the High Court, Court of Appeal and Judicial Committee of the Privy Council did not change the legal consequences of the current practice of Members of Parliament. The recommendation of the Privileges Committee would do that. It would give Members an expanded privilege, and one that attached to individual Members rather than to the House as a whole. There would be only two practical choices facing an MP challenged to repeat an apparently defamatory statement that they made in the chamber of Parliament. The first would be to decline to comment altogether, where the MP is not prepared to stand behind the truth of the alleged defamatory statement. This is the current position.

The second option would be to be permitted to repeat in part or in full outside the House anything they said in the chamber. This latter option would amount to the creation of what could amount to a carte blanche warrant for MPs to say what they like. This might be justified, but it is not what Article 9 was designed to achieve.

The proposed amendment would not allow MPs to repeat defamatory statements outside the House with impunity, but would allow them to repeat the statements by incorporation or effective repetition – not by repeating the (potentially defamatory) statement, but by affirming that the Member stands by the statement that they had made in Parliament. In practice a media report is likely to publish the original statement in Parliament as well as the statement made outside the House, and thereby render the incorporation complete, albeit indirectly.

The effect of this change would be to transfer responsibility for regulating the behaviour from the courts – through defamation actions – and the Privileges Committee of the House of Representatives (for comments made in the House) to the Privileges Committee.

The Privileges Committee does not have an active role in punishing Members of Parliament for using parliamentary privilege improperly, or indeed for improper actions within the House or outside. It does not inhibit their freedom of action within the Chamber. The potential difficulty – and the public issue that motivates this paper – is that the Privileges Committee either does not provide an effective check on the behaviour of Members of Parliament, or at least is not seen as being an effective check upon behaviour. Given that Members of Parliament enjoy certain collective and personal privileges, and that the Speaker, through their inherent authority as presiding officer of the House of Representatives, and the Privileges Committee, are the sole regulators of the behaviour of Members of Parliament.

The Speaker has a role in regulating the conduct of Members of Parliament, but unlike in the United Kingdom, in practice is comparatively inactive. It may be that the fact they are members of political parties, and are not as politically neutral as in the United Kingdom – where they renounce party membership on election – hampers their independence. At the very least there may be an inference of bias.

The Privileges Committee investigates allegations of breach of parliamentary privilege or contempt, and recommends to the House whether a breach or contempt has been made out and, if so, the appropriate punishment.³

Parliament exercises several rights and privileges that protect its independence and facilitate its functions.⁴ Parliament's privileges fall into two categories: the first exists primarily to enforce Parliament's collective authority, the second exists primarily to protect and benefit the members themselves.⁵ Yet, all of Parliament's privileges are the corporate privileges of Parliament itself, even if members benefit individually under them.⁶ The House of Representatives depends for the performance of its functions on the unimpeded use and service of its members.⁷ The Legislature Act 1908 establishes the legal basis of parliamentary privilege in New Zealand, which secured by adoption the rights, immunities, and powers enjoyed by the House of Commons of the United Kingdom as at 1865.⁸ This Act also confirmed the jurisdiction of the Courts to take judicial notice of the rights, immunities, and powers adopted. Parliament's privileges are considered part of the "general and public law of New Zealand",⁹ although Parliament rather than the Courts exercises penal jurisdiction and power to enforce them.¹⁰

Upon being confirmed in office at the opening of a new Parliament, the Speaker lays claim to all the privileges of the House, particularly to members' freedom of speech in debates.¹¹

³ A member may raise with the Speaker a matter of privilege under Standing Orders (1999), No. 389.

⁴ The law and custom of Parliament is known by the Latin phrase "lex et consuetudo parliamenti". See Philip Joseph, *Constitutional and Administrative Law in New Zealand* 2nd ed. (Brookers, Wellington, 2001) p. 386. The privileges devolved from the struggle between the House of Commons, the Crown, and the Courts to assert independence and authority. See also Limon and McKay (eds.) *Erskine May's Parliamentary Practice* 22nd ed. (Butterworths, London, 1997).

⁵ Philip Joseph, *Constitutional and Administrative Law in New Zealand* 2nd ed. (Brookers, Wellington, 2001) p. 387.

⁶ *Prebble v Television New Zealand Ltd* [1994] 3 N.Z.L.R. 1 at 9 (P.C.) per Lord Browne-Wilkinson and *Church of Scientology of California v Johnson-Smith* [1972] 1 Q.B. 522 at 528 per Browne J.

⁷ See *Report of the Standing Orders Committee on the Law of Privilege and Related Matters* (New Zealand Parliament, House of Representatives, 1989 AJHR I.18B) p 7 (endorsing the description of parliamentary privilege in Limon and McKay (eds) *Erskine May's Parliamentary Practice* 22nd ed. (Butterworths, London, 1997), p. 65).

⁸ See the Legislature Act 1908, s. 242(1), which confers on the House of Representatives the rights, immunities, and powers held, enjoyed, or exercised by the House of Commons as on 1st January 1865.

⁹ *Ibid.*, s. 242 (2).

¹⁰ See *Prebble v Television New Zealand Ltd* [1994] 3 N.Z.L.R. 1 at 6 and 7 (P.C.) and *Kielley v Carson* (1842) 4 Moo. P.C.C. 63; 13 E.R. 225. The House of Representatives may punish anyone whom it considers to be guilty of a breach of privilege or contempt of the House.

¹¹ Standing Orders of the House of Representatives (1999), No. 22.

It might not be desirable to allow class actions, or require the Privileges Committee to hear claims that parliamentary privilege had been misused for personal gain, or in breach of, inter alia, the Human Rights Act. This could expose Members of Parliament to malicious complaints that could inhibit free speech. But where an individual is named in Parliament the Privileges Committee should be required to hold the Member to account if the allegation made is shown, to the satisfaction of the Privileges Committee, to be inappropriate.

Parliament has exclusive right to control its own proceedings. The House of Representatives can choose what matters to discuss and in what order, regardless of the priority the Crown attaches to particular items in the Speech from the Throne.¹² This privilege includes the powers of the House to punish members for misconduct in the House or its committees, to interpret and apply statutes that regulate or affect its own internal procedures, and to determine the content and application of its Standing Orders.¹³ The Courts retain residual jurisdiction only to enforce statutory rights that can be exercised outside Parliament, such as where rights under an Act affect third parties.¹⁴ The House does not have general jurisdiction over crimes committed within its precincts.¹⁵

The House of Representatives has power to punish for breach of privilege and contempt of the House.¹⁶ The Crimes Act 1961 preserves the power and authority of the House to punish for contempt.¹⁷ Procedures for adjudicating breaches of privilege or contempt are prescribed in the Standing Orders, as supplemented by parliamentary practice and Speakers' rulings.¹⁸ The Privileges Committee of the House investigates allegations of breach or contempt and reports to the House with findings and recommendations.¹⁹ The House almost always adopts the committee's findings and recommendations.

¹² Philip Joseph, *Constitutional and Administrative Law in New Zealand* 2nd ed. (Brookers, Wellington, 2001) p. 417. The government determines its legislative priorities and programme that will be set out in the Speech from the Throne.

¹³ See *Bradlaugh v Gossett* (1884) 12 Q.B.D. 271 at 284 per Stephen J.

¹⁴ *Bradlaugh v Gossett* (1884) 12 Q.B.D. 271 at 282 per Stephen J. The Courts may also enforce statutory "manner and form" provisions that prescribe the requirements of legislation: see *Shaw v Commissioner of Inland Revenue* [1999] 3 N.Z.L.R. 154 at 157 (C.A.) and *Westco Lagan Ltd v Attorney-General* [2001] 1 N.Z.L.R. 40 at 61 and 62 per McGechan J. The House, as a legally constituted body exercising public powers, is bound by statutory provisions that prescribe the procedures for passing bills.

¹⁵ *Bradlaugh v Gossett* (1884) 12 Q.B.D. 271. However, such crimes may also be punishable by the House as contempt of the House.

¹⁶ See Crimes Act 1961, s. 9.

¹⁷ *Ibid*, s. 9.

¹⁸ Parliament claims to be the sole judge of the extent and existence of its privilege: *Parliament's Case* (1609) 13 Co. Rep. 63; 77 E.R. 1473.

¹⁹ See, for example, the *Report of the Privileges Committee on the Question of Privilege Referred on 22 July 1997 relating to the Status of Manu Alamein Kopu as a Member of Parliament* (New Zealand Parliament, House of Representatives, 1997 A.J.H.R. I.15B). The Committee discharges a judicial function.

The Standing Orders provide basic procedural protections for persons brought before the Privileges Committee. These protections include the right to be informed of the precise nature of the charge,²⁰ the opportunity to respond to allegations,²¹ the right to be informed of and/or given a copy of any incriminating evidence held by the committee,²² the right to consult legal counsel,²³ and the right to be informed of the right to make a written submission on the charge.²⁴ The rule against bias does not constrain the House from acting as both prosecutor and judge in relation to its privileges – as a judge in its own cause.²⁵ The New Zealand Bill of Rights Act 1990 (which guarantees the right to natural justice)²⁶ has not deprived Parliament of its penal jurisdiction. The right not to be arbitrarily arrested or detained under the New Zealand Bill of Rights Act 1990 is binding on the House when it enforces its privileges.²⁷ However, the rights on arrest or detention are not binding as these are confined to arrest or detention “under any enactment”. Nor do the rights of persons charged with any offence avail persons charged with breach of privilege or contempt. The term “offence” is limited by statute to offences created “under any enactment”.²⁸ Similarly, the minimum standards of criminal procedure guaranteed under the New Zealand Bill of Rights Act 1990 apply only to persons who are charged with an “offence”.²⁹ Persons who are summoned before the Privileges Committee must rely on the minimum rights to natural justice provided under the Standing Orders, and the good sense and forbearance of the committee.

The House has power to imprison for breaches of privilege or contempt, as the ultimate deterrent against acts that would subvert its authority.³⁰ No person can be summarily arrested by order of the House without a warrant issued by the Speaker.³¹

²⁰ Standing Orders of the House of Representatives (1999), No. 390.

²¹ Ibid, No. 390.

²² Ibid, No. 221(2). This Standing Order adopts the duty of disclosure on a decision-maker at common law: see Philip Joseph, *Constitutional and Administrative Law in New Zealand* 2nd ed. (Brookers, Wellington, 2001) p. 432.

²³ Ibid, No. 227.

²⁴ Ibid, No. 222.

²⁵ Philip Joseph, *Constitutional and Administrative Law in New Zealand* 2nd ed. (Brookers, Wellington, 2001) p. 433. Rules of natural justice form part of the rule of law.

²⁶ New Zealand Bill of Rights Act 1990, s. 27.

²⁷ Ibid, ss. 22, 23, and 25.

²⁸ Ibid, s. 23. It appears that the penal powers of the House originated at common law and are not conferred “under any enactment”, notwithstanding the statutory adoption under the Legislature Act 1908, s. 242(1) of the privileges and powers of the House of Commons as at 1865.

²⁹ New Zealand Bill of Rights Act 1990, s. 25.

³⁰ Philip Joseph, *Constitutional and Administrative Law in New Zealand* 2nd ed. (Brookers, Wellington, 2001) p. 436. This power was inherited from the House of Commons under the Legislature Act 1908, s. 242(1).

³¹ Crimes Act 1961, s. 315(1). No person can be summarily arrested without warrant, except as authorised by the Crimes Act 1961 or some other enactment. No statute authorises summary arrest by order of the Speaker or of the House. The Speaker or Serjeant-at-Arms may order removal (but not committal) of people who misbehave or interrupt proceedings: see Standing Orders (1999), No. 41.

Although the power to imprison has never been used in New Zealand, the Standing Orders Committee has recommended that the power be abolished.¹⁸ It is doubtful whether the House has power to impose a fine for breach of privilege, as it is believed this power had been lost through desuetude when New Zealand adopted the powers and privileges of the Commons.³² The House may censure offenders, suspend members from sitting in the House, exclude members from the precincts, exact apologies, or prosecute under the criminal law.³³ In New Zealand, the practice is to reprimand by resolution of the House rather than by the Speaker. The House reserves the right to summon strangers to the bar of the House for formal reprimand.³⁴ The Courts will not interfere with the interpretation the House places on its own proceedings, and will not inquire into the reasons why it adjudges a person guilty of contempt.³⁵

The danger is that Parliament may not be seen as able to properly discipline its own membership. It is now established practice for professions to include lay members in their disciplinary tribunals. Members of Parliament, although not “professionals” in a strict sense, occupy an analogous position, and thus should maintain similarly high standards and be subject to similar disciplinary mechanisms.

Membership of a profession connotes a sense of public service. For this reason Roscoe Pound viewed a profession as composing a common calling in the spirit of public service.³⁶ It logically follows that the goodwill of a profession largely depends on the people it serves, that is, members of the public.

Consequently, to perform the said functions in the spirit of public service, a high ethical and professional standard must be maintained within the rank and file of the profession. Members of Parliament must exhibit a great sense of integrity, and, must give proper professional service.

For a profession to justify any powers or privileges which it may receive, it must be able to show that it is not selfishly concerned for its own interest but has regard for that of the public. It must show itself worthy of the power of domestic discipline which is conferred upon it. For this reason lay members should generally be appointed to the governing bodies of all self-governing professions and occupations. Professional bodies have a long tradition of lay members.³⁷ For the bodies to be

³² Philip Joseph, *Constitutional and Administrative Law in New Zealand* 2nd ed. (Brookers, Wellington, 2001) pp. 437-439. In *R v Pitt and Mead* (1762) 3 Burr. 1335; 97 E.R. 861, Lord Mansfield held that the power to fine belonged to the Court of Star Chamber rather than to the House of Commons.

³³ See Standing Orders (1999), Nos. 86–92.

³⁴ Philip Joseph, *Constitutional and Administrative Law in New Zealand* 2nd ed. (Brookers, Wellington, 2001) p. 439.

³⁵ See *Bradlaugh v Gossett* (1884) 12 Q.B.D. 271, *R v Graham-Campbell* [1935] 1 K.B. 594; [1934] All E.R. Rep. 681, *British Railways Board v Pickin* [1974] A.C. 765; [1974] 1 All E.R. 609, *Burdett v Abbot* (1811) 14 East at 150; 104 E.R. 501, and *Ex parte Van Sandau* (1846) 1 Ph. 605; 41 E.R. 763.

³⁶ Roscoe Pound, *The Lawyer from Antiquity to Modern Times* (St. Paul, Minn: West Publishing Co., 1953)

³⁷ Brian Abel-Smith and Robert Stevens, *Lawyers and the Courts* (Harvard University Press, Cambridge, 1967) 192.

dominated by lay members however would be a perversion of the reason for including non-professionals.

Public involvement in the proceedings of disciplinary bodies is based on the purpose of enabling the public interest to be represented, and will help to assure the public that its interests are in fact being represented. It has the further effect of making the profession more responsive to the public. Without lay observers being present the public can only trust that the organised profession will be sensitive to its needs, and sufficiently responsible to endeavour to meet those needs.³⁸

Recently, in some jurisdictions, the number of lay members almost equals the numbers of lawyers on the legal profession's disciplinary bodies. This is perhaps going a little too far in this direction, as it threatens to undervalue the principle that members of a profession are best qualified to ensure that proper standards of competence and ethics are set and maintained. Members of Parliament must be more independent than other "professionals", because the independence of Parliament is vital to the proper functioning of democracy. But this means that, if there are no lay members of the relevant disciplinary body (the Privileges Committee), then the body must be especially pro-active and vigilant.

Commentators have often expressed the belief that professionals, especially lawyers, are concerned to protect themselves and that professional societies exist solely for the benefit of members of the profession.³⁹ The professions themselves must be alert to this perception, and do all they can to respond to it, without harming their professional integrity. Members of Parliament must be careful that they are themselves subject to a similarly strict and objective disciplinary procedure as is now imposed on, for instance, the legal profession. This is especially so since the latter has been introduced by Parliament, in the Lawyers and Conveyancers Act 2006.

Other means of controlling the behaviour of MPs include the (soon to be abolished) Serious Fraud Office, the Ombudsman, and other non-judicial or quasi-judicial investigatory bodies. However, these present the same constitutional difficulties presented by involving the courts – Parliament is supposed to be non-reviewable by any external body. To allow any body to interfere would be inconsistent with this.

Politically, the introduction of the Mixed-Member Proportional (MMP) voting system may effect the position of the Privileges Committee, and also of Members of Parliament. A variety of commentators predicted that the advent of Mixed-Member Proportional (MMP) voting for the House of Representatives in 1996 would result in a more activist Governor-General,⁴⁰ faced with the need to oversee the formation of a

³⁸ Brian Abel-Smith and Robert Stevens, *Lawyers and the Courts* (Harvard University Press, Cambridge, 1967) 6.

³⁹ Public and Administrative Law Reform Committee, *Working Paper relating to the disciplinary and complaints procedure of the legal profession* (1977) 7.

⁴⁰ Governors-General have published their own views of these matters; Dame Catherine Tizard, *The Governor-General, MMP and what we want NZ to be*, Press, 7th July 1993; Sir Michael Hardie Boys, *The Role of the Governor-General under MMP* (1996) 2 NZ International Review 21.

coalition or minority government.⁴¹ Though this doesn't appear to have eventuated, MMP may also have affected the relationship between MPs and the House of Representatives. The advent of MMP, through the strengthening of political parties, may weaken the effectiveness, such as it is, of the Privileges Committee.

We may be left only with the court of public opinion as a check upon the behaviour of Members of Parliament.

⁴¹ This, and other viewpoints, have been covered in Bernard Robertson, *Governor-General issue ignored in MMP debate*, Otago Daily Times, 6th August 1993 and *MMP threatens Governor-General's powers*, Dominion, 3th August 1993; Sir Geoffrey Palmer & Matthew Palmer, *Bridled Power – New Zealand Government under MMP* (1997); Keith Jackson & Alan McRobie, *New Zealand adopts proportional representation* (1998).