



# Parliament Brief



## PARLIAMENTARY PRIVILEGE

The concept of parliamentary privilege is often misunderstood to mean that politicians acquire personal privileges simply by being elected to Parliament. In fact parliamentary privilege applies to Parliament as a whole rather than the individual members. It enables the House of Representatives, as the democratically elected House of the people, to go about its business, such as law making, without interference from outside. Over several centuries of the development of Westminster-style democracy in Britain, this has involved certain exemptions from general law. These were considered essential for parliamentary supremacy over the Crown. They were hard won in times when elected representatives might suffer severe consequences for what they said in the House or be prevented from attending the House.<sup>1</sup> The removal of those privileges, even today, could result in Parliament being prevented from carrying out its functions without impediment on behalf of those it represents.

### LEGAL BASIS OF PARLIAMENTARY PRIVILEGE

The Legislature Act 1908 (section 242) provides the legal basis for parliamentary privilege. It deems the privileges held by the British House of Commons in 1865 to be applicable in New Zealand.<sup>2</sup> This includes Article 9 of the Bill of Rights 1688, which provides for freedom of speech in Parliament. The Bill of Rights 1688 also forms part of New Zealand law by virtue of the Imperial Laws Application Act 1988.<sup>3</sup>

Some of the immunities and powers collectively known as parliamentary privilege are set out below.

#### **Absolute freedom of speech in Parliament**

While freedom of speech is largely taken for granted in a democracy, our laws place limits on that freedom, such as those in the Human Rights Act 1993 and the Defamation Act 1992. Words spoken as part of parliamentary proceedings are subject to absolute freedom of speech. Article 9 of the Bill of Rights

1688 provides 'That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.' This protects not only members of Parliament, but also witnesses and advisers at select committee meetings, from being sued for defamation or otherwise being held legally liable for what they say in a parliamentary proceeding.

If the words said in parliamentary proceedings (the House and its committees) are repeated elsewhere, the protection of parliamentary privilege does not apply.

Procedures are in place for both the House and select committees to ensure natural justice (fairness of process) is observed. These allow right of reply to those who consider their reputation has been damaged by statements made under privilege. Arguments continue about whether there are enough protections against unfair allegations. This must be weighed against the need for the House and committees to be free to hear of any matters that may affect the business under consideration. Elected representatives make important decisions and they are better able to do this where information and opinions can be disclosed without fear of legal consequences. It has been said that if the protection of free speech were removed 'parliaments probably would degenerate into polite but ineffectual debating societies'.<sup>4</sup>

The privilege of free speech in Parliament carries an obligation to use it responsibly. The House has the ability to punish for contempt and an example of contempt would be to mislead the House or a committee deliberately (see below).

#### **Court proceedings not to hinder parliamentary proceedings**

To enable the House to go about its business effectively, its members must be free to attend its meetings without being detained by court processes. These include civil arrest, summonses to appear as a witness or juror, and serving papers of a civil process in the parliamentary precincts upon members or

officers of the House. These immunities do not protect anyone from being arrested or charged with a criminal offence. Neither do they place members of Parliament outside the law. For instance, members can be served with civil process outside the parliamentary precincts and would still be expected to appear in court as a witness when the House is not sitting.

### **Attendance of witnesses and the production of records**

The power to ‘send for persons, papers and records’ can be exercised in relation to select committee proceedings. Committees would be unable to carry out their functions effectively if attendance to give evidence were purely optional. Likewise, as a legislature, the House cannot be expected to pass quality legislation if full disclosure of information and attendance of witnesses were not available. The power is rarely used because people invited to appear or produce documents generally comply or negotiate an agreed process, knowing that the powers can be exercised if necessary.

The power to send for persons, papers and records is exercised by the Speaker once the committee concerned requests a summons. Because this is a coercive power the House has built due deliberation into the process. In most cases the Speaker is required to consider first whether the summons is necessary and if the committee has taken reasonable steps to obtain the evidence without recourse to a summons.

### **Power to punish for contempt**

Sometimes people use the term ‘breach of privilege’ when they actually mean ‘contempt of the House’. The link between contempt and parliamentary privilege is that one of the privileges of the House is the power to punish for contempt. An example of contempt might be the failure of a person to attend, having received a summons (see above). Others might be the deliberate misleading of the House or a committee, or obstructing a witness appearing before a committee. These are not breaches of privilege because they do not breach any particular privilege established in law. Nevertheless, they impede and obstruct the House in carrying out its functions and can be punished accordingly, in much the same way as contempt of court.

While the House has the ability to imprison, this has not been exercised in New Zealand. Punishments today can be expected to take account of the New Zealand Bill of Rights Act 1990 and are more likely to involve a fine, a censure, a requirement to apologise, or perhaps restrictions on access to the parliamentary precincts. In the case of members of Parliament being found in contempt, punishment could be as severe as suspension or even expulsion from the House. The latter has not occurred in New Zealand to date.

## **MATTERS OF PRIVILEGE REFERRED TO THE PRIVILEGES COMMITTEE**

A matter of privilege, including an alleged contempt, is raised by a member of Parliament making a complaint to the Speaker at the earliest opportunity. The Speaker makes an assessment of whether a question of privilege is involved. If so, the Speaker rules on the matter in the House and it is referred to the Privileges Committee, which is a select committee of the House. That committee investigates the matter and makes a recommendation to the House, which then decides whether to adopt the recommendation.

### **FURTHER READING**

These pages have given a brief overview of a complex subject that is often misunderstood. Here are some sources for further reading that cover the subject more fully:

Joseph, Philip A., *Constitutional and Administrative Law in New Zealand*, 2nd edition, Wellington, 2001.

McGee, David, *Parliamentary Practice in New Zealand*, 3rd edition, Wellington, 2005.

May, Erskine, *Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 23rd edition, editor, Sir William McKay, London, 2004.

### **Endnotes**

- <sup>1</sup> For instance, in 1642 King Charles I entered the House of Commons in an attempt to arrest five members on treason charges for their part in opposing him.
- <sup>2</sup> The Legislature Act 1908 re-enacted the Parliamentary Privileges Act 1865. Therefore, it is the privileges held by the House of Commons in 1865, not 1908, which form the basis of parliamentary privilege in New Zealand.
- <sup>3</sup> The Bill of Rights 1688 is reproduced in Appendix A of Joseph (see ‘further reading’).
- <sup>4</sup> Campbell, Enid, *Parliamentary Privilege in Australia*, Melbourne, 1966, p. 28.