



# Question of privilege relating to the exercise of the privilege of freedom of speech by members in the context of court orders

Report of the Privileges Committee

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Forty-ninth Parliament  
(Charles Chauvel, Chairperson)  
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*Presented to the House of Representatives*



## Contents

Summary of recommendations to the House	5
Summary of recommendations to the Government	6
<b>1 Introduction</b>	<b>8</b>
Referral of question of privilege	8
<b>2 The privilege of free speech</b>	<b>10</b>
Comity between the House and the courts	10
The sub judice rule	12
Clear statement of principle about comity rule needed	16
Knowing breach of court order prima facie a contempt	20
Breaching a court order at a select committee	20
Effective repetition	21
<b>3 Broadcasts of the House's proceedings</b>	<b>23</b>
Protections applying to publication and broadcasting	23
Extending the protection provided by the Legislature Act	25
Additional restraints	26
<b>4 Reporting on the proceedings of the House</b>	<b>27</b>
Reporting on the House's proceedings	27
<b>5 Conclusion</b>	<b>29</b>
<b>Appendices</b>	
A Committee process	30
B Speaker's ruling	31
C UK House of Commons' sub judice rule, adopted 15 November 2001	32



## Question of privilege relating to the exercise of the privilege of freedom of speech by members in the context of court orders

### Summary of recommendations to the House

The Privileges Committee recommends to the House that

- the sub judice rule in the Standing Orders be revised to recognise clearly that there are two strands to the rule: issues concerning prejudice to a matter awaiting or under adjudication in any New Zealand court, including one awaiting sentencing; and the principle of comity between Parliament and the courts (p. 19)
- the following revised rule be adopted as a sessional order (p. 19):

#### 111 Matters awaiting judicial decision

- (1) Matters awaiting or under adjudication in any New Zealand court may not be referred to in any motion, debate, or question, including a supplementary question, subject always to the discretion of the Speaker and to the right of the House to deal with legislation on any matter or to discuss delegated legislation.
- (2) Before referring to the matter in the House, a member must apply to the Speaker for the exercise of the Speaker's discretion under (1).
- (3) In exercising his or her discretion, the Speaker:
  - (a) balances the privilege of freedom of speech against the public interest in maintaining confidence in the judicial resolution of disputes; and
  - (b) takes into account the constitutional relationship of mutual respect that exists between the legislative and judicial branches of government, and the risk of prejudicing a matter awaiting or under adjudication in any New Zealand court, including one awaiting sentencing.
- (4) Paragraphs (1) to (3) apply to any matter awaiting or under adjudication in any appeal to the Privy Council in existing proceedings, provided for by law.

- the following definition of “New Zealand court” be adopted as a sessional order (p. 20):
 

**New Zealand court** means the Supreme Court, the Court of Appeal, the High Court, or a District Court; or any of the following specialist courts: a court-martial constituted under Part 6 of the Armed Forces Discipline Act 1971, the Courts Martial Appeal Court constituted by the Courts Martial Appeals Act 1953, the Employment Court, the Environment Court, the Maori Appellate Court, and the Maori Land Court.
- it adopt as a sessional order the following addition to Standing Order 401 (p. 20):
 

(x) as a member, in any motion, debate, or question (including a supplementary question), knowingly makes reference to a matter that is suppressed by an order of a New Zealand court, contrary to Standing Orders:
- it adopt as a sessional order the following additions to Standing Order 401 (p. 21):
 

(y) in any evidence or advice provided to a committee, either written or oral, knowingly makes reference to a matter that is suppressed by an order of a New Zealand court, contrary to Standing Orders:

(z) as a member, during a meeting of a select committee, knowingly makes reference to a matter that is suppressed by an order of a New Zealand court, contrary to Standing Orders:
- it adopt as a sessional order the following revised rule (p. 21):
 

**212 Return of evidence**

A select committee may return, or expunge from any transcript of proceedings, any evidence or statement that it considers to be irrelevant to its proceedings, offensive, possibly defamatory, or suppressed by an order of a New Zealand court.
- it make a sessional order authorising the delayed broadcasts or rebroadcasts of Parliament’s proceedings, including select committee hearings (p. 26)

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## Summary of recommendations to the Government

The Privileges Committee recommends to the Government that it introduce legislation to amend the Legislature Act 1908 to provide that

- the live broadcast of Parliament’s proceedings, including select committee hearings, is protected by absolute privilege (p. 25)
- delayed broadcasts or rebroadcasts of Parliament’s proceedings, including select committee hearings, that are made by order or under the authority of the House of Representatives are protected by absolute privilege (p. 26)
- a fair and accurate report of proceedings in the House, or summary using extracts of proceedings in the House, by any person is protected by qualified privilege (p. 27)

- the broadcast and other publication of extracts of Parliament's proceedings, including select committee hearings, that are not made by order or under the authority of the House of Representatives are protected by qualified privilege, in a manner consistent with the provisions of the Defamation Act 1992 (p. 28)
  - the criticisms made of the decision in *Buchanan v Jennings* be addressed so that a Member of Parliament, or any other person participating directly in or reporting on parliamentary proceedings, who makes an oral or written statement that affirms or adopts what he or she or another person has said in the House or its committees will not be liable to criminal or civil proceedings (p. 22)
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# 1 Introduction

The relationship between the three branches of government lies at the heart of New Zealand's democratic system. This report considers in particular the relationship between the legislative and judicial branches of government, and the principles that underpin that relationship. We have considered the relationship carefully, and believe the recommendations contained in this report will help ensure that the relationship continues to be respected appropriately.

## Referral of question of privilege

The Speaker received a letter from the Hon David Parker raising as a matter of privilege statements made in the House by Heather Roy MP on Thursday 26 June 2008, which might be in breach of a suppression order made in the High Court at Nelson on 4 December 2007. The Speaker ruled on 3 July 2008 that the immediate matter complained of could not be regarded as tending to impede or obstruct the House in the discharge of its functions. However, serious issues regarding the privilege of freedom of speech, one of the House's most fundamental privileges, had been raised and warranted the attention of the House. The Speaker therefore determined that "a general question of privilege does arise in terms of the exercise of the privilege of freedom of speech by members in the context of court orders, the implications for the relationship of mutual respect and restraint between the House and the courts, and the publishing of the House's proceedings." A copy of the Speaker's ruling is attached as Appendix B.

## Committee process

The previous Privileges Committee met in July 2008 and established terms of reference for its consideration of this matter. We readopted these terms of reference, which were as follows:

- the important constitutional relationship of mutual respect and restraint between the House of Representatives and the judiciary
- freedom of speech by members and the limits that apply in the context of court orders
- the privilege of the House to determine its own proceedings, including publishing or broadcasting those proceedings and any limits that could or should apply
- the effect of media such as television, webcasting, or podcasting and the ramifications of instantaneous and wide transmitting of proceedings beyond the House
- the responsibilities and legal ramifications for the House, the Speaker, members, the Clerk of the House, broadcasters, media, and others in respect of publishing or republishing proceedings that breach court orders through print, broadcasting, televising, and webcasting
- any other related matters.

Submissions were sought from legal experts and those with an interest in publishing the proceedings of the House. We thank submitters who provided us with information, as it was of considerable assistance to us in our consideration of these matters.

### **Key issues addressed in this report**

From our consideration of the evidence before us, we have decided that we wish to draw the attention of the House to three key areas. These areas are addressed in turn in our report. The first issue relates to the comity between the House and the courts. We discuss the principles behind this relationship, and consider its implications for the House and its committees. We also address the sub judice rule, and recommend some amendments to the Standing Orders. Next we discuss the protections for publication of the official record of the House, through both Hansard and the live broadcasting of proceedings. The third issue is that of protection for the reporting of parliamentary proceedings.

In the course of our consideration of these matters, our attention was drawn once more to the issues discussed in the report of the previous committee on *Buchanan v Jennings*.<sup>1</sup> We emphasise the importance of that report's recommendation being acted on to ensure members' freedom of speech is protected.

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<sup>1</sup> *Report of the Privileges Committee on the question of privilege referred on 21 July 1998 concerning the action Buchanan v Jennings*, I.17G, May 2005.

## 2 The privilege of free speech

At the heart of the issue put before us lies the exercise of one of Parliament's fundamental privileges, that of free speech. This privilege ensures that the members of Parliament can undertake their role of representing their constituents without fear of action being taken against them for matters raised in the House. The House has recognised that this privilege must be exercised in a responsible way, however, and ensures that, for example, natural justice matters can be addressed where necessary.<sup>2</sup> This matter has raised the question of how the House's privilege of free speech should be balanced with respect for decisions of the judiciary to suppress certain information. This section of the report addresses this balance and proposes some specific actions the House could take.

### Comity between the House and the courts

General principles concerning the relationship between the House of Representatives and the judiciary are well established. The principle of "comity" was referred to by a number of submitters. This principle is that of mutual respect and forbearance between the legislative and judicial branches, and it has been recognised by the courts as one of the foundations for the privileges (including the privilege of free speech) enjoyed by the House. The principle has recently been described succinctly by the New Zealand Court of Appeal as follows:

Article 9 has been described as a manifestation of a wider principle, "that the Courts and Parliament are both astute to recognise their constitutional roles": *Prebble v Television New Zealand Ltd* [1994] 3 NZLR at 7 (PC).<sup>3</sup>

The relationship between the courts and Parliament is a matter of the highest constitutional significance.<sup>4</sup> It should be, and generally is, marked by mutual respect and restraint. The underlying assumption is that what is under discussion or determination by either the judiciary or the legislature should not be discussed or determined by the other. The judiciary and the legislature should respect their respective roles.

The issue referred to us required us to consider the exercise of the separation of powers and the boundaries it involves; that is, whether this a matter where the ordinary law of the land prevails which the courts can enforce, or whether this is an area where the courts must step back and the immunities of parliamentary privilege take precedence.

### Evidence regarding the comity rule

In his submission to us, the Solicitor-General described comity as the central value to be considered in determining the balance between the courts' role in making orders suppressing information and parliamentary privilege, particularly freedom of speech. The

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<sup>2</sup> See Standing Orders 155 to 158 and 228 to 234.

<sup>3</sup> *Boscawen and others v Attorney-General* [2009] NZCA 12.

<sup>4</sup> David McGee, *Parliamentary Practice in New Zealand*, Third edition, Dunmore, 2005, Chapter 46.

comity rule is reflected in Standing Orders 111 and 112 in a general way, recognising that it is inappropriate for members to act in ways that interfere with the judicial branch's constitutional functions. The Solicitor-General submitted that although the Standing Orders do not specifically address the instance of breach of permanent suppression orders, successive Speakers' rulings encourage members of Parliament to observe court orders.

It is well known that in the past there have been dangerous strains between the law courts and Parliament—dangerous because each institution has its own particular role to play in our constitution, and because collision between the two institutions is likely to impair their power to vouchsafe those constitutional rights for which citizens depend on them. So for many years Parliament and the courts have each been astute to respect the sphere of action and the privileges of the other—Parliament, for example, by its sub judice rule, the courts by taking care to exclude evidence which might amount to infringement of parliamentary privilege...

The Solicitor-General noted that the principle of comity had been affirmed in several New Zealand cases.

It has been said that the rule of comity establishes a “constitutional boundary”.<sup>5</sup> It emphasises the “undesirability of an unnecessary clash between the legislature and the judiciary”,<sup>6</sup> a prospect to be avoided by the exercise of “mutual restraint” by both organs of the state.<sup>7</sup> The “legislature and the Courts should not intrude into the spheres reserved to one another”.<sup>8</sup>

Associate Professor of Law Andrew Geddis suggested that where a member not only refers to a matter that is awaiting or under adjudication, but does so in defiance of a judicial order suppressing public discussion of the matter, then there is a clear and aggravated breach of the sub judice rule. Although such a breach cannot attract any direct judicial sanction, such a matter could be raised as a potential contempt of the House and sent to the Privileges Committee for consideration. Professor Geddis observed:

...the general constitutional position is that it is never desirable or proper for members of the House to take advantage of the free speech privilege and raise matters that are subject to a judicially issued suppression order. The reason for this position is relatively straightforward. Under our constitutional arrangements, the courts have responsibility for the application of justice in particular cases, according to the laws of New Zealand. This role includes deciding what matters should be suppressed from public knowledge (either temporarily or permanently), in order to safeguard the basic right of an accused to enjoy a fair trial and protect the privacy interests of others involved in the trial process. The House of Representatives is responsible for debating and voting on legislative proposals, as well as holding the current government to account. While it has a valid interest in ensuring the operation of our justice system

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<sup>5</sup> *Westro Lagan v Attorney-General* [2001] 1 NZLR 40, para [98].

<sup>6</sup> *Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451, 458 (HC).

<sup>7</sup> *Ibid*, at 459.

<sup>8</sup> *Jennings v Buchanan* [2005] 2 NZLR 577, at paragraph [18] (PC).

accords with the public's values and expectations, it simply is not equipped to stand in the courts' shoes when it comes to adjudicating on particular cases.

Professor Philip Joseph referred to the report of the House of Lords and House of Commons Joint Committee on Parliamentary Privilege, which specifically addressed the question of Parliament's freedom of speech and breach of court orders in proceedings protected by parliamentary privilege.<sup>9</sup> Having considered the matter, the joint committee recommended against either House limiting members' freedom of speech with the object of ensuring that judicial orders were respected. Professor Joseph raised the issue of whether the mischief is more prevalent in New Zealand than the United Kingdom, where the matter was referred to by the joint committee as "extremely rare", and it could cite only one instance.

It would appear that in New Zealand the issue is more prevalent, although still uncommon. Between 1988 and 1999 there were four reported instances of breach of court orders in the New Zealand Parliament. Each was the subject of a Speaker's ruling:

- on 14 July 1988, when a member identified a person who had appeared before the courts on criminal charge, whose name was suppressed<sup>10</sup>
- on 20 July 1988, when a member revealed the names of persons charged with criminal offences where one of them had been granted name suppression<sup>11</sup>
- on 17 March 1994, when the House ordered publication of the "Winebox" documents tabled by a member, where some of the documents were subject to a court suppression order<sup>12</sup>
- on 29 April 1999, when a member raised a question about the identification of a pathologist who was the subject of court proceedings and had his name suppressed.<sup>13</sup>

### The sub judice rule

Standing Orders 111 and 112 set out the House's sub judice rule and give the Speaker a discretion in applying it. Parliamentary privilege is part of the general law of New Zealand. The sub judice rule needs to be considered in the context of common law cases involving parliamentary privilege, and Speakers' rulings on the application of the rule. Speakers' rulings provide guidance on the application of the sub judice rule and, in particular, refer to matters concerning prejudice to the trial of the case and comity between Parliament and the courts.

The Clerk of the House submitted that members had found the second strand very difficult to come to terms with, particularly in circumstances where a verdict had been reached but sentencing was still awaited, or an appeal or civil matter was before a judge alone. The Solicitor-General also pointed out that Standing Orders 111 and 112 do not explicitly address the situation where there is a permanent suppression order.

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<sup>9</sup> House of Lords and House of Commons, Joint Committee on Parliamentary Privilege, Report 1999.

<sup>10</sup> NZPD 1988, Vol. 489, p. 4309 and pp. 4315–6, 4322.

<sup>11</sup> NZPD 1988, Vol. 490, pp. 5209 and 5256.

<sup>12</sup> NZPD 1994, Vol. 539, p. 470 (SR 139/1).

<sup>13</sup> NZPD 1999, Vol. 576, pp. 16210–11.

The Clerk suggested that we consider whether

- the principle of comity between the courts and Parliament should be specifically referred to in SO 111 in setting out the Speaker's discretion, so as to make it clearer for members
- the discretion should be confined to judging prejudice to a trial
- the rule should be absolute, giving a discretion to the House only for the purpose of legislating.

We note that the components and application of the sub judice rule are complex and require examination of both the general law and Speakers' rulings. In the United Kingdom the House of Commons Procedure Committee spent several months hearing evidence and reviewing its rule (which is arguably stricter than the New Zealand rule). The committee considered there should be no change to the United Kingdom rule.

The Solicitor-General recommended extending Standing Orders to prohibit reference to information suppressed by court order, by providing that reference in a debate or otherwise in the course of proceedings, without the leave of the House, to matters that were subject to a suppression order was *prima facie* a contempt of Parliament. Leave could be sought to mention that the matter was subject to a court order but only if the matter was of such grave and immediate public importance that the members should be heard. An alternative option would be to legislate to give the courts jurisdiction to enforce suppression orders breached during debate. As conscious breaches of orders of the court are rare, only a clear and serious concern would justify interference in this way with the fundamental principle of comity.

Professor Joseph suggested following the same approach as the UK joint committee, that action be required only if instances of breaches of court orders became prevalent. If a member unknowingly contravened a court order, an apology would be sufficient to repair the damage to the relationship between the political and judicial branches. If a member knowingly flouted a court order the House would be justified in taking disciplinary action against the member for abusing the privilege of freedom of speech, which belongs to the House in its institutional capacity and not to a member personally. For example, the House might suspend a member found to be in contempt for abuse of its privilege.

In the report referred to by Professor Joseph, the joint committee also considered whether a member breaching a court injunction should be required to justify his or her action before the Privileges (or other) Committee after the event, or risk punishment for misconduct. This would not prevent a member determined to breach an injunction, but the existence of such a procedure might deter frivolous or ill-conceived breaches. The committee considered this procedure could work only if the criteria justifying, or not justifying, a breach of a no-publicity order were published in advance.<sup>14</sup>

Associate Professor Geddis recommended that we issue a statement reminding all members of their responsibilities to respect the decisions of the judiciary regarding suppression orders, along with an explanation of the constitutional necessity of this

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<sup>14</sup> House of Lords and House of Commons, Joint Committee on Parliamentary Privilege, Report 1999, para 206.

respect. Also, members and the Speaker should exercise greater vigilance regarding compliance with the sub judice rule in Standing Order 111.

### **Application of the sub judice rule explained in Speakers' rulings**

Speakers' rulings provide guidance on the application of the rule and refer in particular to two strands of the rule: matters concerning prejudice to the trial of the case, and comity between Parliament and the courts:

There are two strands to [Standing Order 111]. One is if a judge or jury would be influenced by parliamentary references. The other reflects a comity between Parliament and the courts. What is before one ought not to be discussed or adjudicated on in the other. Parliament often asks the courts to uphold its privileges. It must be equally vigilant in defending the courts' privileges.<sup>15</sup>

The sub judice rule is not intended to inhibit members discussing the law in general, but a particular case before the court may not be referred to. The House is not in the same position as the media when reporting cases. [Standing Order 111] seeks to ensure on the one hand that a judge or jury is not influenced by parliamentary discussion, and on the other hand it enshrines the special relationship between the courts and Parliament. It reflects a comity between Parliament and the courts. What is before one ought not to be discussed in the other.<sup>16</sup>

Standing Orders 111 and 112 address specifically the issue of prejudice to the trial of a case but the comity rule is not referred to specifically.

### **History of sub judice rule**

The sub judice rule has long been recognised as part of New Zealand's parliamentary procedure.<sup>17</sup> On 3 August 1928 the Speaker, the Hon Sir Charles Statham, ruled that

...an action had already begun in the Court. Consequently, the case is rather a difficult one for the House to deal with, because it is laid down as a principle—as a rule of this House, as it is in the House of Commons—that matters pending adjudication in the Courts shall not be debated in the House, neither shall any motion be made in regard to them.<sup>18</sup>

In December 1928 the House appointed a Standing Orders Committee with the mandate to consider amendments of the procedure and Standing Orders of the House. The committee's recommendations included the first sub judice rule in the Standing Orders.<sup>19</sup>

When the Standing Orders were brought into force on 7 August 1929, Standing Order 179 provided for a sub judice rule:

<sup>15</sup> NZPD 2001, Vol. 590, pp. 7802–3, Hunt.

<sup>16</sup> NZPD 2003, Vol. 609, p. 6551, Hunt; NZPD 2008, Vol. 649, p. 17971, Wilson.

<sup>17</sup> The rule is referred to in *Steward's Parliamentary Procedure 1904*, compiled by the Hon Sir WJ Steward, Speaker of the House of Representatives 1891–1893.

<sup>18</sup> NZPD, Vol. 217, p. 1090.

<sup>19</sup> NZPD, Vol. 221, p. 897.

**Where judicial decision pending**

179. No member shall refer to any matter on which a judicial decision is pending.<sup>20</sup>

The first Speaker's ruling on Standing Order 179 appears to have been made almost 20 years later, on 26 August 1949:

Standing Order 179 precludes members of this House from discussing any matter pending adjudication in the Courts. That rule, based on House of Commons principles, was laid down by this House itself to ensure that nothing said in the course of debate should prejudice, however slightly, the decision of any Court before which such matters might be pending.<sup>21</sup>

Standing Order 179 was reproduced verbatim in Standing Order 176 when a new edition of the Standing Orders was published in 1951 following the abolition of the Legislative Council.<sup>22</sup>

In 1962 the 1951 edition of the Standing Orders was amended, and Standing Order 176 was reproduced verbatim in Standing Order 183.

Following a comprehensive review of the Standing Orders in 1966–8, the Standing Orders Committee recommended that the House adopt the rule recommended by the UK House of Commons in 1963:

[Standing Order 183] which precludes a member from referring to a matter on which a judicial decision is pending, had its origin in the practice established by the House of Commons in 1844. It was not until 1961 that this rule, which had been applied almost exclusively to criminal cases, was applied to a civil case where a writ of libel had been issued. The rulings of New Zealand Speakers have greatly widened the interpretation of this Standing Order.

In 1963 the House of Commons, on the recommendations of its Select Committee on Procedure, decided to establish rules for the guidance of its Speaker in such cases and your committee feels that the resolution of the House of Commons committee can, with minor amendment, be adopted with advantage here, and it recommends accordingly. It is emphasised that the object of the new Standing Order is merely to provide a more intelligible and consistent rule for the guidance of the person in the Chair, whose discretion in the last resort must be absolute.<sup>23</sup>

Minor amendments were made to the rule in 1996 and in 2003. The current Standing Orders 111 and 112 still largely reflect the sub judice rule of the House of Commons in 1963, as adopted by the New Zealand House of Representatives in 1966.

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<sup>20</sup> NZPD, Vol. 221, p. 897.

<sup>21</sup> NZPD, Vol. 287, p. 1638, McKeen.

<sup>22</sup> NZPD, Vol. 293, p. 4837; Vol. 294, p. 3; and AJHR, 1968, I.14, p. 12.

<sup>23</sup> Report of the Standing Orders Committee, AJHR, 1968, I.14, p. 12.

**United Kingdom sub judice rule**

While the New Zealand sub judice rule has remained largely unchanged since 1966, the sub judice rule in the House of Commons has been updated on a number of occasions, particularly in 1972 and 2001. Virtually identical rules were adopted by the House of Lords in 2000 and House of Commons in 2001. In 2004 the House of Commons Procedure Committee reviewed its rule and recommended there should be no change to the United Kingdom rule.<sup>24</sup>

The UK House of Commons sub judice rule no longer specifically refers to the danger of prejudice to the trial of the case. The UK rule prevents reference being made in proceedings in the Chamber or in committees to cases that are active in the courts (as defined in the resolution).<sup>25</sup> The rule does not apply when the House is considering primary or delegated legislation, and the Chair has discretion to disapply it on other occasions. Two reasons are put forward for the rule: the need not to prejudice court proceedings (which applies also outside Parliament, where it is enforced by the contempt of court rules), and the principle of comity, whereby it is considered undesirable for Parliament to act as an alternative forum to decide court cases.<sup>26</sup>

The Speaker can exercise his or her discretion to disapply the rule if a member refers a case to the Speaker. The House of Commons Procedure Committee encouraged members to do this whenever they considered that the rule was unreasonably impeding the work of Parliament. Although the rule delays Parliamentary activity rather than prohibiting it altogether, the delay can run for several years, and can be particularly marked in coroner's court proceedings.<sup>27</sup>

The committee concluded that, with appropriate use of the Speaker's discretion, no changes were necessary to the sub judice rule (except in respect of coroner's courts) but indicated that it might wish to return to the matter in the light of experience. The committee reminded members of the responsibility not to say anything that would influence the outcome of a court case.

**Clear statement of principle about comity rule needed**

We consider that the current sub judice rule in Standing Orders 111 and 112 does not reflect adequately the interpretation given to it over the years in various Speakers' rulings. In particular, the wording of the rule, on the face of it, deals only with the issue of prejudice to the trial of the case. The second strand of the rule, the principle of "comity" between Parliament and the courts, is not referred to specifically, yet this principle is recognised as being of the highest constitutional importance. We agree with the submission of the Clerk of the House that the Standing Orders should be amended to recognise the principle of comity in the sub judice rule.

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<sup>24</sup> House of Commons Procedure Committee, *The Sub Judice Rule of the House of Commons*, First Report of Session 2004–05, March 2005.

<sup>25</sup> Appendix C contains the House of Commons' sub judice resolution, passed in November 2001.

<sup>26</sup> House of Commons Procedure Committee, *The Sub Judice Rule of the House of Commons*, First Report of Session 2004–05, p. 3.

<sup>27</sup> In New Zealand, coroner's courts are not subject to the rule.

We consider that Standing Orders should be revised to include a sub judice rule that

- retains the principle that matters currently before the courts should not be referred to in a motion, debate, or question
- provides for the right of the House to legislate in any circumstance
- gives the Speaker a discretion to waive the rule.

Rather than leaving guidance on how the Speaker's discretion should be exercised to Speakers' rulings, we consider that the principles to be taken into account when exercising the discretion should be set out in the rule itself. The rule should establish that the Speaker balances the undoubted privilege of freedom of speech that members enjoy against the public interest in maintaining confidence in the judicial system and allowing judicial proceedings to progress without interference.

We consider that the Standing Orders should make specific reference to both the strands that the Speaker has to take into account in deciding whether to waive the rule:

- the principle of comity between Parliament and the courts
- the importance of members not saying anything that would influence the outcome of a court case.

This should make it clear for members that the Speaker is not concerned solely with the danger of prejudice to the trial of a case. It is clear from the judicial authorities referred to us that the comity rule runs both ways. The House, in restraining itself from interference in judicial proceedings, can expect in return that the courts will respect the privileges of Parliament.

#### **Discretion to waive the rule**

We are aware that the UK House of Commons' sub judice rule has developed considerably since New Zealand adopted the House of Commons' rule of 1963. We consider appropriate the UK House of Commons' requirement that members make an application to the Speaker to waive the rule where members consider the rule is unreasonably impeding the business of the House. This principle has been recognised in New Zealand under Speakers' rulings:

The sub judice rule is set out in the Standing Orders and the Speaker determines its application. It is not for individual members to waive the application of the rule.<sup>28</sup>

Standing Orders 111 and 112 do not specifically require members to approach the Speaker to waive the rule and members are not always aware that they should do so. We encourage members to understand that the rule underpins an important constitutional principle and should not be set aside lightly and without due consideration. We consider that to require a member to consider the issues and make an application to the Speaker to waive the rule is not unreasonable. Such an application should be made before referring to the matter in the House, either in advance in writing, or raised by point of order in the House.

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<sup>28</sup> NZPD 1997, Vol. 564, p. 5239, Kidd.

We consider that the key to the successful operation of the sub judice rule is the discretion of the Speaker to waive the rule in appropriate cases. While it is for the Speaker to determine how to exercise his or her discretion in a particular case, it is clear that the rule should be waived only in the most compelling of circumstances. Such circumstances might include situations where the House's role in holding the Government to account might be compromised by the application of the rule, such as those specified by the UK House of Commons; for example, where a ministerial decision is in question or a case concerns issues of national importance such as the economy, public order, or essential services.

### **Application of the rule**

Standing Order 112 is clear about when the sub judice rule applies. We consider that the rule should be applied tightly in terms of questions and motions of which notice is given. In these contexts there should be no reference to a case before the courts. This strict application is not designed to prevent discussion of the law in general, but is necessary to prevent supplementary questions and debate leading to references to the particulars of a case that is before the courts.

In debate members might be permitted to make reference to the fact that there is a case before the courts. But it would not be in order to discuss the particulars of the case, matters that might arise in evidence, the possible outcome of the case, or the circumstances of the parties of the action.<sup>29</sup>

We also consider that it would be useful for the Standing Orders to define what is meant by a "court". Standing Order 111 refers to any "court of record" without defining this term. The legislative scheme is not particularly clear. Section 257 of the Legislature Act 1908 defines "courts of record", for the purposes of that Act only, as the Court of Appeal, High Court, and District Courts. Separate enactments, however, define various other courts as courts of record.<sup>30</sup> We are concerned that it is unhelpful to have to refer to numerous pieces of legislation to determine whether the rule affects matters before a particular court.<sup>31</sup>

We consider the rule should apply to any "New Zealand court" meaning the Supreme Court, the Court of Appeal, the High Court, or a District Court; or any of the following specialist courts: a court-martial constituted under Part 6 of the Armed Forces Discipline Act 1971, the Courts Martial Appeal Court constituted by the Courts Martial Appeals Act 1953, the Employment Court, the Environment Court, the Maori Appellate Court, and the Maori Land Court.<sup>32</sup>

Our recommended definition encompasses those courts that are covered by the existing sub judice rule. In addition, we propose that the rule should cover the remaining cases that are awaiting or under adjudication in any appeal to the Privy Council. We also considered whether to widen the sub judice rule further to encompass other matters that are awaiting

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<sup>29</sup> NZPD 2008, Vol. 649, p. 18005, Robertson.

<sup>30</sup> For example, the Employment Court is established as a court of record under the Employment Relations Act 2000, section 186(1).

<sup>31</sup> See McGee, *Parliamentary Practice in New Zealand*, p. 193, for a list of the courts affected by the rule.

<sup>32</sup> "New Zealand court" as defined in the Supreme Court Act 2003, section 4.

or under adjudication before certain tribunals or matters suppressed directly by Act of Parliament. Examples include matters before the Employment Relations Authority and certain matters relating to applications for refugee status under the Immigration Act 1987.

We expect that members will act in such a way as to respect the laws enacted by the Parliament. A wilful breach of the law could bring the House into disrepute and lead directly or indirectly to the House being impeded in carrying out its business. In a serious case, such a breach of the law could in itself be considered a contempt of the House. However, some of us are concerned that including such matters explicitly might constitute a lessening of the privileges asserted by the House, and believe further consideration should be given to how such matters could be addressed appropriately. We suggest that the Standing Orders Committee may wish to consider this matter when it next reviews the Standing Orders.

### **Delegated legislation**

Finally, we consider there is a need to include a reference to delegated legislation in the exception for legislating. The House may be required to consider disallowance motions under the Regulations (Disallowance) Act 1989 and has adopted procedures for dealing with affirmative and negative resolution procedures.<sup>33</sup> It is also possible that if the rule were too restrictive, the Regulations Review Committee could be impeded in its consideration of delegated legislation, although it has the option of hearing evidence in private. The UK House of Commons procedures also expressly recognise the right of the House to discuss delegated legislation.

## **Recommendations**

1 We recommend to the House that the sub judice rule in the Standing Orders be revised to recognise clearly that there are two strands to the rule: issues concerning prejudice to a matter awaiting or under adjudication in any New Zealand court, including one awaiting sentencing; and the principle of comity between Parliament and the courts.

2 We recommend to the House that the following revised rule be adopted as a sessional order:

### **111 Matters awaiting judicial decision**

- (1) Matters awaiting or under adjudication in any New Zealand court may not be referred to in any motion, debate, or question, including a supplementary question, subject always to the discretion of the Speaker and to the right of the House to deal with legislation on any matter or to discuss delegated legislation.
- (2) Before referring to the matter in the House, a member must apply to the Speaker for the exercise of the Speaker's discretion under (1).
- (3) In exercising his or her discretion, the Speaker:

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<sup>33</sup> Standing Orders 313 and 314.

- (a) balances the privilege of freedom of speech against the public interest in maintaining confidence in the judicial resolution of disputes; and
  - (b) takes into account the constitutional relationship of mutual respect that exists between the legislative and judicial branches of government, and the risk of prejudicing a matter awaiting or under adjudication in any New Zealand court, including one awaiting sentencing.
- (4) Paragraphs (1) to (3) apply to any matter awaiting or under adjudication in any appeal to the Privy Council in existing proceedings, provided for by law.

3 We recommend to the House that the following definition of “New Zealand court” be adopted as a sessional order:

**New Zealand court** means the Supreme Court, the Court of Appeal, the High Court, or a District Court; or any of the following specialist courts: a court-martial constituted under Part 6 of the Armed Forces Discipline Act 1971, the Courts Martial Appeal Court constituted by the Courts Martial Appeals Act 1953, the Employment Court, the Environment Court, the Maori Appellate Court, and the Maori Land Court.

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### **Knowing breach of court order prima facie a contempt**

We consider that a member who knowingly breaches a court order should be required to justify his or her actions before the Privileges Committee after the event. It should be included in the list of matters that might be considered a contempt (Standing Order 401), because it could have a tendency to bring the House into disrepute. The high constitutional principle would therefore be recognised specifically as a matter for protection by the House. It would encourage members to seek the waiver of the sub judice rule by the Speaker in compelling cases, and would help Speakers in their efforts to be vigilant in upholding the rule. It would also discourage members from disregarding the rule lightly.

### **Recommendation**

4 We recommend to the House that it adopt as a sessional order the following addition to Standing Order 401:

- (x) as a member, in any motion, debate, or question (including a supplementary question), knowingly makes reference to a matter that is suppressed by an order of a New Zealand court, contrary to Standing Orders:
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### **Breaching a court order at a select committee**

While most of our consideration of this matter has focused on statements made by members in the House, we are aware that material submitted to select committees, and statements made at committee meetings, also become part of the proceedings of the House. We believe that if those who provide evidence or advice to a committee knowingly breach a court order, or a member does so in the course of a committee meeting, this should also be considered a contempt.

We consider that Standing Order 212 should be expanded to allow committees to return evidence in such circumstances, to prevent the contempt from occurring. We suggest that the guidance material produced to assist members of the public in making submissions be updated to reflect these changes.

We also note that the revised Standing Order 111 will apply to committees, by virtue of Standing Order 200.

## Recommendations

5 We recommend to the House that it adopt as a sessional order the following additions to Standing Order 401:

(y) in any evidence or advice provided to a committee, either written or oral, knowingly makes reference to a matter that is suppressed by an order of a New Zealand court, contrary to Standing Orders:

(z) as a member, during a meeting of a select committee, knowingly makes reference to a matter that is suppressed by an order of a New Zealand court, contrary to Standing Orders:

6 We recommend to the House that it adopt as a sessional order the following revised rule:

### **212 Return of evidence**

A select committee may return, or expunge from any transcript of proceedings, any evidence or statement that it considers to be irrelevant to its proceedings, offensive, possibly defamatory, or suppressed by an order of a New Zealand court.

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## Effective repetition

The issue before us has highlighted the tension between freedom of speech and the public interest in judicial resolution of conflicts. It also reminds us of the importance of resolving outstanding issues concerning freedom of speech, to ensure that the House is not impeded in carrying out its functions.

In 2005 the Privileges Committee recommended abolishing “effective repetition”, in order to overturn the decision in *Buchanan v Jennings*.<sup>34</sup> The principal issue in this case concerned the extent to which something said by a member inside Parliament could be used in a defamation claim on the basis of an effective (as opposed to actual) repetition of the parliamentary statement outside the House.

The Privy Council considered that such effective repetition was subject to the established principle that re-publication outside Parliament of a statement previously made in

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<sup>34</sup> *Report of the Privileges Committee on the question of privilege referred on 21 July 1998 concerning the action Buchanan v Jennings*, I.17G, May 2005.

<sup>18</sup> House of Commons Procedure Committee, *The Sub Judice Rule of the House of Commons, First Report of Session 2004–5*, March 2005.

Parliament is not protected by absolute privilege. This legal finding raised issues of the courts assessing and adjudging parliamentary proceedings, the potential for a chilling effect on free speech in the House and in public debate, and the possibility of the effect spreading beyond defamation.

The Privileges Committee of the 47th Parliament recommended that the Legislature Act be amended to “provide that no person may incur criminal or civil liability for making any oral or written statement that affirms, adopts or endorses words written or spoken in proceedings in Parliament where the oral or written statement would not, but for the proceedings in Parliament, give rise to criminal or civil liability.” We believe that such an amendment should be enacted as soon as possible, and are disappointed that it has not yet occurred. We expect action to be taken on this point as soon as possible and therefore endorse the previous committee’s recommendation, the effect of which we have summarised in our recommendation below.

### **Recommendation**

7 We recommend to the Government that the Legislature Act 1908 be amended to provide that the criticisms made of the decision in *Buchanan v Jennings* be addressed so that a Member of Parliament, or any other person participating directly in or reporting on parliamentary proceedings, who makes an oral or written statement that affirms or adopts what he or she or another person has said in the House or its committees will not be liable to criminal or civil proceedings.

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### 3 Broadcasts of the House's proceedings

Members have absolute freedom of speech for any statements they may make in the House. However, parliamentary privilege does not extend to protecting the publication of records of the proceedings of the House. Some protections are provided in law in respect of defamation and the publication of parliamentary papers. In this section we consider what protections exist for the authorised broadcasting of the House's proceedings. We also consider whether the existing protections for the publication of parliamentary proceedings cover publication using newer forms of technology, such as the internet. In the next section we consider publication in circumstances other than those authorised directly by the House.

#### Protections applying to publication and broadcasting

Broadcasts of Parliament's proceedings are not an official record of the House. *Hansard* is the "official report" of the "proceedings" of the House.<sup>35</sup> However, broadcasts and *Hansard* are similar in that they provide a verbatim record of what is said in the House, including statements which may be defamatory or may be in breach of court orders.<sup>36</sup> By means of both types of records of proceedings, such statements are republished to a wider audience outside of the House.

The protections of Article 9 of the Bill of Rights 1689 do not extend to the publication of reports of proceedings outside Parliament. Further reporting is considered a fresh publication and falls beyond "proceedings in Parliament". Statutory measures such as those provided in the Defamation Act 1992 and the Legislature Amendment Act 1992 provide some protection in respect of defamation and publication of parliamentary papers. These statutory measures override the decision in *Stockdale v Hansard*,<sup>37</sup> which established that it was no defence in common law that a report of parliamentary proceedings was published by order of the House.

Gaps in the legal framework were described in some detail in the submissions of the Clerk of the House and Professor Philip Joseph.

Professor Joseph told us that the repeal of the former Defamation Act 1954 and the enactment of the Defamation Act 1992 and the Legislature Amendment Act 1990 narrowed the range of defences available. Under the present law, there is probably no protection against civil or criminal liability (beyond liability in defamation) for

- live or delayed broadcasts of the proceedings of the House of Representatives
- published reports of the proceedings of the House in the print media

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<sup>35</sup> Standing Order 9(1).

<sup>36</sup> It is worth noting that *Hansard* is subject to minor amendment from time to time.

<sup>37</sup> *Stockdale v Hansard* (1839) 9 Ad & E1.

- published extracts from, or summaries of, papers published by or under the authority of the House.

We consider there are deficiencies in the legal protection for the publication and broadcasting of parliamentary proceedings. The impact of technology such as televising and web-streaming, and the ability to archive and retrieve such material, also means that any breach of a court order has a potential impact much more lasting than an instantaneous expression in the House.

### **Legislature Amendment Act 1992**

The Legislature Amendment Act provides protection for a “parliamentary paper” that is published by or under the authority of Parliament. The term “parliamentary paper” is defined as “any report, paper, votes or proceedings”.

Since the late 1980s the New Zealand courts have given a wide interpretation to the word “document”. By analogy, a “paper” or “report” (being words used in the definition of the term “parliamentary paper”) may include information in the form of

- electronic versions of documents created and stored on computers
- a videotape with a soundtrack
- a tape recording
- a computer disk and a computer program
- a television film.

The courts have shown a readiness to take a liberal approach to interpretation so as to catch technological developments, where this is consistent with the purpose of particular legislation. One apparent purpose of the Legislature Amendment Act is to protect the publication of parliamentary records and documents published under the authority of the House.

Televised and radio broadcasts occur under the authority of the House.<sup>38</sup> Interpreting “parliamentary paper” to include these broadcasts would be consistent with this purpose. However, despite the liberal approach to interpretation in this area, the inclusion of broadcasts in the term “parliamentary paper” would require an interpretation of this term beyond what has occurred in the courts to date.

It is noteworthy that in the United Kingdom protections for parliamentary papers were extended by statute in 1952 and 1990 to cover radio and television broadcasts.<sup>39</sup> In Australia there are statutory protections for publishing and broadcasting radio and television proceedings of both Houses of the Commonwealth Parliament.<sup>40</sup>

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<sup>38</sup> Standing Order 44.

<sup>39</sup> House of Lords and House of Commons, Joint Committee on Parliamentary Privilege, Report 1999, para 360.

<sup>40</sup> Parliamentary Proceedings Broadcasting Act 1946 (Cth) and *Conditions for granting access to proceedings of the Senate and the House of Representatives for the purpose of recording and broadcasting excerpts*  
<http://www.aph.gov.au/House/committee/jcbpp/excerpts.htm>.

Alternatively, broadcasts of the proceedings of Parliament are arguably covered by the term “proceedings” in the definition of “parliamentary paper”. However, the detail regarding broadcasts in the Defamation Act and the omission of any mention of them in the Legislature Amendment Act, where both were enacted together in 1992, may indicate a deliberate choice to deal with printed materials only in the Legislature Amendment Act.

Taking a cautious approach, it appears that broadcasts of Parliament’s proceedings are probably not covered by the Legislature Amendment Act. The gaps in legal protection mean that publishers and broadcasters (including the Clerk of the House, who is the broadcaster of television) could face civil or criminal liability for publishing or broadcasting, even inadvertently, in breach of a court order.

### **Defamation Act 1992**

The Defamation Act provides legislative protection for broadcasts in relation to defamation proceedings only. Different levels of protection apply depending upon whether a broadcast is live or delayed.

Live broadcasts of proceedings of the House are expressly protected by absolute privilege.<sup>41</sup> Absolute privilege also applies to the publication of an “authorised record” of the proceedings of the House, and to copies of such a record.<sup>42</sup>

More limited protection applies to “delayed” broadcasts (which probably includes rebroadcasts) of Parliament’s proceedings. These are protected by qualified privilege.<sup>43</sup> The distinction between the levels of privilege for live and delayed broadcasts rests on the ability of the broadcaster of delayed coverage to vet the material before rebroadcasting it; and there is a possibility a rebroadcast might be motivated by ill will, for example, in its timing or repetition. However, unedited delayed coverage will almost always qualify for the qualified privilege defence, particularly where it is part of a regular schedule, as the broadcasting of Question Time is.

### **Extending the protection provided by the Legislature Act**

We consider it unsatisfactory that the broadcasting of Parliament’s proceedings under the direct authority of the House may leave the Clerk of the House, or any person later authorised by the House, open to legal action. We therefore consider that the Legislature Act needs amendment to ensure that live broadcasts of the proceedings in Parliament are protected, consistent with the existing protection for the publication of parliamentary papers.

## **Recommendation**

8 We recommend to the Government that it introduce legislation to amend the Legislature Act 1908 to provide that the live broadcast of Parliament’s proceedings, including select committee hearings, is protected by absolute privilege.

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<sup>41</sup> Section 13(2) of the Defamation Act.

<sup>42</sup> Section 13(3)(c) and section 13(3)(d) of the Defamation Act.

<sup>43</sup> Section 16(1) and First Schedule, Part 1, clause 1 of the Defamation Act.

**Delayed broadcasts and rebroadcasts**

In addition to providing protection for live broadcasts, we consider the Legislature Act should be amended to provide protection for delayed broadcasts or rebroadcasts of proceedings in Parliament, made by order of or under the authority of the House of Representatives, consistent with the existing protection for the publication of parliamentary papers and correct copies of them.

This would have the effect that delayed broadcasts or rebroadcasts of portions of Parliament's proceedings by any broadcaster (whether by television, radio, or web) that had been specifically authorised by the House could not be the subject of court proceedings.

**Recommendation**

9 We recommend to the Government that it introduce legislation to amend the Legislature Act 1908 to provide that delayed broadcasts or rebroadcasts of Parliament's proceedings, including select committee hearings, that are made by order or under the authority of the House of Representatives are protected by absolute privilege.

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**Authorising rebroadcasts and delayed broadcasts**

To ensure that, for example, repeat screenings of Question Time or of select committee hearings were made under the authority of the House, a sessional order could be used in the short term, followed later by an amendment to the Standing Orders.

**Recommendation**

10 We recommend to the House that it make a sessional order authorising the delayed broadcasts or rebroadcasts of Parliament's proceedings, including select committee hearings.

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**Additional restraints**

In his submission to us, Professor Joseph also suggested the possibility of introducing a delay in broadcasting or televising to allow the Speaker to mute the words in which a member knowingly flouted a court order. He suggested that radio and televised sound clips could be overridden or made inaudible and *Hansard* could be edited to remove reference to the offending words.

Associate Professor Andrew Geddis recommended that the House allow the Speaker to order that a member's words that breach a suppression order not be included in *Hansard*. In addition, he suggested that a five-minute delay on the broadcast feed of Parliament should be introduced, with the Speaker empowered to order "beeping out" of any member's words that breached a suppression order.

We considered these suggestions, but do not recommend that any of these practices be adopted by the House. It would be difficult for the Speaker to be aware of matters that were the subject of court orders in order to be in a position to mute words in the House, and we consider it undesirable to take such an approach. Further, we do not support any action that is contrary to the principle of the freedom of speech.

## 4 Reporting on the proceedings of the House

In the previous section we discussed the protections applying to the official publication and broadcasting of the House's proceedings. In this section we consider the broadcasting and publication of extracts from a broadcast of proceedings or from parliamentary papers, along with the publication of fair and accurate reports or summaries of proceedings in the House.

### Reporting on the House's proceedings

The media play an important role in providing the public with information about the business of the House. In recognition of this role, some protections are provided in the Defamation Act to allow fair and accurate reports or summaries of the proceedings of the House to be covered by qualified privilege.<sup>44</sup> The defence of qualified privilege applies to

- delayed broadcasts of proceedings
- the publication of a fair and accurate report of proceedings
- the publication of a fair and accurate extract or summary of a report of proceedings.

The evidence from the Media Freedom Committee of the Commonwealth Press Union (New Zealand Section) suggested that the media incorrectly believed that it had protection from actions such as contempt of court or breach of statutory no-publication provisions when it reported anything said in the House, provided the report was fair and accurate. This is not the current legal position. We consider that qualified privilege could be extended to cover fair and accurate reports of all proceedings, by analogy with qualified privilege under the law of defamation.

### Recommendation

11 We recommend to the Government that it introduce legislation to amend the Legislature Act 1908 to provide that a fair and accurate report of proceedings in the House, or summary using extracts of proceedings in the House, by any person is protected by qualified privilege.

### Broadcast and other publication of extracts of proceedings

Particular issues arise from the use of extracts. They can be taken out of context, and timing or repetition can be manipulated or motivated by ill will. Extracts can be packaged in a form that is unfair or even misleading, and commentary can be added.

In recognition of these issues, we suggest that the lesser protection of qualified privilege apply to the broadcasting and other publication of extracts (except where this is done in a form or category that has been authorised by the House, as discussed earlier).

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<sup>44</sup> Section 16(1) and First Schedule, Part 1, clause 2 of the Defamation Act.

Use of this particular protection for the publication of extracts of parliamentary reports is not a new idea. Under the Defamation Act 1954 this defence was not limited to defamation but was available to any person in any civil or criminal proceeding for the publication of extracts from parliamentary reports.<sup>45</sup> Qualified privilege applies to the use of excerpts by broadcasters in Australia.

We consider that the form of qualified privilege that should apply in these circumstances is that which is currently provided for in section 19 of the Defamation Act. Under section 19 a plaintiff can rebut qualified privilege by proving that in publishing a defendant was motivated predominantly by ill will towards the plaintiff or otherwise took improper advantage.

To ensure consistency with the current qualified privilege provisions in the Defamation Act, the publication of reports or summaries of Parliament's proceedings, including extracts from broadcasts or parliamentary papers, should be subject to the additional requirement that they be fair and accurate.

### **Recommendation**

12 We recommend to the Government that it introduce legislation to amend the Legislature Act 1908 to provide that the broadcasting and other publication of extracts of Parliament's proceedings, including select committee hearings, that are not made by order or under the authority of the House of Representatives are protected by qualified privilege, in a manner consistent with the provisions of the Defamation Act 1992.

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<sup>45</sup> Section 20 of the Defamation Act 1954, although reports were not protected if the publication was otherwise prohibited by law or lawful order which may have restricted the defence to defamation proceedings (sections 17(1) and (3)(a)).

## 5 Conclusion

The questions raised by this referral are complex and interesting ones, which go to the heart of parliamentary privilege. We have considered these matters carefully, and believe that the recommendations contained in our report strike the appropriate balance between freedom of speech in the nation's Parliament and the protection of individuals in society.

We consider that our recommended amendments to the Standing Orders would provide more clarity for members regarding the sub judice rule, and that our proposed amendments to the Legislature Act 1908 would ensure that privilege was extended appropriately to matters that touch on the House's proceedings. We look forward to the Government taking swift action on our recommendations.

## Appendix A

### Committee procedure

We met during March, April, and May 2009 to consider the question of privilege. We heard evidence from Dr David Collins QC, Solicitor-General; Professor Philip Joseph; Associate Professor Andrew Geddis; Tim Murphy and Tim Pankhurst, Media Freedom Committee of the Commonwealth Press Union (New Zealand Section); and Mary Harris, Clerk of the House of Representatives.

### Committee members

Charles Chauvel (Chairperson from 13 May 2009)  
Hon Dr Michael Cullen (Chairperson until 30 April 2009)  
Hon Gerry Brownlee  
Hon Lianne Dalziel  
Te Ururoa Flavell  
David Garrett  
Dr Kennedy Graham  
Hon Dr Wayne Mapp  
Hon Murray McCully  
Hon David Parker (from 6 May 2009)  
Hon Simon Power

### Committee staff

Debra Angus, Deputy Clerk of the House  
Catherine Parkin, Clerk of the Committee

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## Appendix B

### Speaker's ruling

I have received a letter from Hon David Parker raising as a matter of privilege statements in the House by Heather Roy on Thursday 26 June 2008 that may be in breach of a Suppression Order made in the High Court at Nelson on 4 December 2007.

Such actions can bring the House into disrepute and may indirectly impede the House in the performance of its functions, and thus constitute a contempt. But, I am not convinced that the immediate matter complained of can genuinely be regarded as tending to impede or obstruct the House in the discharge of its functions.

However, serious issues regarding the privilege of freedom of speech, one of the House's most fundamental privileges, have been raised that I consider do warrant the attention of the House.

Consequently, I have determined that a general question of privilege does arise in terms of the exercise of the privilege of freedom of speech by members in the context of court orders, the implications for the relationship of mutual respect and restraint between the House and the courts, and the publishing of the House's proceedings.

The question therefore stands referred to the Privileges Committee.

## Appendix C

### UK House of Commons' sub judice rule, adopted 15 November 2001

*Resolved*, That, subject to the discretion of the Chair, and to the right of the House to legislate on any matter or to discuss any delegated legislation, the House in all its proceedings (including proceedings of committees of the House) shall apply the following rules on matters sub judice:

(1) Cases in which proceedings are active in United Kingdom courts shall not be referred to in any motion, debate or question.

- (a) (i) Criminal proceedings are active when a charge has been made or a summons to appear has been issued, or, in Scotland, a warrant to cite has been granted.  
  
(ii) Criminal proceedings cease to be active when they are concluded by verdict and sentence or discontinuance, or, in cases dealt with by courts martial, after the conclusion of the mandatory post-trial review.
- (b) (i) Civil proceedings are active when arrangements for the hearing, such as setting down a case for trial, have been made, until the proceedings are ended by judgment or discontinuance.  
  
(ii) Any application made in or for the purposes of any civil proceedings shall be treated as a distinct proceeding.
- (c) Appellate proceedings, whether criminal or civil, are active from the time when they are commenced by application for leave to appeal or by notice of appeal until ended by judgment or discontinuance.

But where a ministerial decision is in question, or in the opinion of the Chair a case concerns issues of national importance such as the economy, public order or the essential services, reference to the issues or the case may be made in motions, debates or questions.

(2) Specific matters which the House has expressly referred to any judicial body for decision and report shall not be referred to in any motion, debate or question, from the time when the Resolution of the House is passed until the report is laid before the House.

(3) For the purposes of this Resolution—

- (a) Matters before Coroners Courts or Fatal Accident Inquiries shall be treated as matters within paragraph (1)(a);
- (b) 'Motion' includes a motion for leave to bring in a bill; and
- (c) 'Question' includes a supplementary question.