CHAPTER 44
Parliamentary Privilege

THE NATURE AND PURPOSE OF PARLIAMENTARY PRIVILEGE

All legislative bodies enjoy certain legal privileges, powers and immunities known as “parliamentary privilege”. The Parliamentary Privilege Act 2014 reaffirms and clarifies the nature, scope and extent of the privileges enjoyed by the House. It does so by reference to the privileges exercised by the House of Commons as at 1865 (when privilege legislation was first enacted in New Zealand), rather than by providing a comprehensive codification.

Parliamentary privilege is designed to remove any impediments or restraints to the legislature going about its work, and to enable it to deal with challenges to its authority. Parliamentary privilege has been justified in law on the grounds that a legislature must enjoy freedom from control by the Crown and the courts (an aspect of the constitutional separation of powers); that it must possess certain powers to facilitate the carrying out of its functions; and that it, its members and others participating in its proceedings must enjoy certain immunities for the legislature to discharge its functions effectively. The privileges that a legislature enjoys are not an end in themselves; they form part of a constitutional expression of parliamentary autonomy and are a means to achieving an end—an effectively functioning legislature able to operate in the public interest. Parliamentary privilege may override other generally accepted legal rights in certain circumstances, which can at times lead to tensions. However, Parliament’s exception to the general application of the law has, over time, become a fundamental constitutional principle, which is itself part of the general law.

The privileges, powers and immunities constituting parliamentary privilege impose corresponding duties, liabilities and disabilities on other persons who are subject to the exercise of the privileges or powers, or who have the immunities invoked against them. The public interest in an effectively functioning parliamentary system of government and the maintenance of the separation of powers legitimates derogation from any standards of legality that this may entail. Nevertheless, the existence of other interests that may be infringed or abridged

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1 Parliamentary Privilege Act 2014, ss 3 and 8.
2 Parliamentary Privileges Act 1865.
5 Prebble v Television New Zealand Ltd [1994] 3 NZLR 1 (PC); A v United Kingdom (2003) 36 EHRR 51 (Section II, ECHR).
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by the operation of parliamentary privilege justifies restricting the privileges to activities with a real connection to the operation of the legislature, and confining their scope so as not to trespass on other rights unnecessarily. Parliamentary privilege does not, for instance, confer any general legal immunity on members of Parliament (as distinct from particular immunities operating when they are functioning as parliamentarians), and the exercise of the House’s powers outside the parliamentary environment must itself comply with general legal standards.

Necessity

Part of the rationale for parliamentary privilege is that certain powers and immunities are “necessary” for the transaction of parliamentary functions. This means that the privileges, powers and immunities are adapted to the needs or purposes of the legislature, not that the legislature could not function without them. Parliamentary privilege consists of privileges, powers and immunities that are compatible with the purposes of the House and support its operations. The privileges, powers and immunities that the House possesses are important factors in the way the House’s functions have evolved. Parliamentary privilege helps to define the type of legislature New Zealand enjoys.

Necessity helps to elucidate the existence and extent of particular privileges, and remains the legal justification for the privileges of some legislatures. However, it is not the legal foundation of parliamentary privilege in New Zealand. That foundation has, since 1865, been firmly rooted in New Zealand’s own statute law. Whether or not a privilege exists, and the definition of its scope, are questions of law to be determined by a court by reference to statute law, rather than to any ground of necessity (although necessity may help to elucidate the statute). The judicial role is confined to the question of law, whether or not a claimed privilege exists. Once the existence of a privilege is established, it is for the House to judge whether it should be exercised in a particular case. The exercise of an established privilege does not have to be justified on the ground of necessity.

The Parliamentary Privilege Act 2014 now expressly excludes use of the necessity test when determining the scope of Parliament’s privilege of freedom of speech. This Act was enacted to nullify the Supreme Court’s rulings in Attorney-General v Leigh, and clarify the law for the future. Leigh involved a defamation action against an official who provided information to a Minister to help the Minister answer an oral question in the House. The Supreme Court held that necessity rather than New Zealand statute law was the legal basis of parliamentary privilege, and ruled that it was not necessary to grant the official the protection of Parliament’s freedom of speech. This prompted an extensive Privileges Committee inquiry, which culminated in the enactment of the

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6 Re Ouellet (No 1) (1976) 67 DLR (3d) 73 (GS) (privilege did not apply to a press conference given by a member); Canada (House of Commons) v Vaid 2005 SCC 30, [2005] 1 SCR 667 (no privilege of “management of staff”); R v Chaytor [2010] UKSC 52 (submission of claim forms for parliamentary allowances and expenses did not qualify for protection of privilege); Slipper v Magistrates Court of the ACT and Turner and Commonwealth Director of Public Prosecutions [2014] ACTSC 85 (not every aspect of “parliamentary business” would fall within the ambit of parliamentary privilege).
8 Egan v Willis (1996) 40 NSWLR 650 (CA) at 676 per Mahoney P; Canada (House of Commons) v Vaid 2005 SCC 30, [2005] 1 SCR 667.
12 Privileges Committee Question of privilege concerning the defamation action Attorney-General and Gao v Leigh (11 June 2013) [2011–2014] AJHR 17A.
Parliamentary Privilege Act 2014. This Act declares that no necessity test may be used to determine whether or not a matter is a proceeding in Parliament and covered by parliamentary privilege.13

The Privileges Committee14 resolved that a test as to whether an asserted privilege was necessary for the proper and efficient functioning of the House was too narrow. Rather, the proper test was whether an occasion was directly or formally connected with the business of the House. An approach based on necessity runs counter to the historical development of parliamentary privilege in New Zealand, which moved very early on from a common law position of necessity to a statutory basis. In considering the privilege of freedom of speech, the issue is one of statutory interpretation, in particular of the meaning of the phrase “proceedings in Parliament”.15

United Kingdom and Canadian Courts have applied a necessity test when considering the scope of the House’s exclusive power to control its own proceedings (its right of exclusive cognisance). The leading cases have involved an allegation of constructive dismissal on the part of the Speaker,16 and police allegations of members submitting false parliamentary expenses claims.17 To determine whether or not these actions were protected by Parliament’s exclusive cognisance, it was permissible for the court to apply a common law test of necessity as the right of exclusive cognisance is a privilege sourced in the common law. In contrast, the privilege of freedom of speech in New Zealand has a clear statutory basis in article 9 of the Bill of Rights 1688, which is affirmed as part of the laws of New Zealand under the Imperial Laws Application Act 1988.18 The question is solely one of statutory interpretation of the words “proceedings in Parliament” and “impeached or questioned”, as those words appear in article 9.19 The Parliamentary Privilege Act 2014 reinforces this approach by enacting an extended definition of the words “proceedings in Parliament” and elucidating the meaning of “impeached or questioned”.20 For the avoidance of doubt, section 10 explicitly rules out the use of any necessity test.21 The law now positively discourages something that commentators earlier observed, “a disturbing trend of substituting common law reasoning for ordinary processes of statutory interpretation in applying art 9”.22

The Parliamentary Privilege Act 2014 was a much-needed remedial measure. This Act declared the purpose of parliamentary privilege23 and defined the phrases “proceedings in Parliament” and “impeached or questioned”.24 This purpose statement and these definitions will become the basis for determining the scope and extent of Parliament’s privilege of freedom of speech. The Act emphasises the core functions of Parliament, the imperative to uphold its independence, and the need to protect activities reasonably incidental to the transaction of parliamentary business. Considerations of necessity have no part to play.

13 Parliamentary Privilege Act 2014, s 10(4), (5).
15 Bill of Rights 1688 (Eng), art 9.
18 Imperial Laws Application Act 1988, s 3 and sch 1.
21 Parliamentary Privilege Act 2014, s 10(2)(4)(5). See also ss 3, 4(1)(c) and 7.
24 Parliamentary Privilege Act 2014, s 10–11.
ESTABLISHMENT OF PARLIAMENTARY PRIVILEGE IN NEW ZEALAND

By the time that the New Zealand Constitution Act 1852 (UK) established representative government in New Zealand, the United Kingdom House of Commons had evolved its privileges over some six centuries. Its pre-eminent privilege of freedom of speech was designed to permit members to speak freely in the House without fear of legal consequences or other repercussions. Under its privilege of freedom from arrest, the House laid claim to the service and attendance of its members over the legal rights of creditors or others to have members arrested or detained in civil (but not criminal) cases. A further privilege was the power of the House to punish for contempt anyone who committed a breach of any of its privileges or interfered with it or its members in the execution of their duties. This privilege was analogous to the power of a court of record summarily to punish persons who commit a contempt in the face of the court (for example, through insulting behaviour or improper interference with the court’s proceedings). The House of Commons claimed justification for the contempt power on the ground that the House was a constituent part of a court of law, namely the High Court of Parliament. The power ensured the independence of the Commons from the courts, as the Commons could itself punish for contempt, without need to refer cases to the courts to be dealt with (where the ultimate right of appeal was to the other Chamber of the legislature—the House of Lords). The House could take action of its own volition to protect its dignity and authority.

Unlike the House of Commons, colonial legislatures created by United Kingdom legislation have never claimed the trappings of a court. The New Zealand legislature, like other comparable Commonwealth legislatures, is a statutory emanation. It is not, and never has been, a “court”. References to the New Zealand Parliament as “the highest court in the land” draw on hyperbole rather than fact, and are historically unfounded.

As a legislative body, in common with other colonial legislatures, the common law vested in the House of Representatives such privileges as were reasonably necessary to its existence and the proper exercise of the functions it was called upon to perform. The primary privilege that the House of Commons possessed, but the House lacked, was the power to punish for contempt. It had been held in 1842 that colonial legislatures possessed no inherent power to punish for contempt. If a colonial legislature wished to inflict punishment for a breach of privilege or for any other reason, it had to seek the aid of the courts. It could not inflict punishment itself.

From the outset, the House of Representatives entertained concern about its precise legal position. Within months of its first meeting, the House set up a select committee to inquire into what were, or ought to be, its privileges. The committee recommended legislation to supply the omission of the common law: in particular, to confer powers on the House to preserve order in the Chamber and in the parliamentary precincts, to call for witnesses and papers, and to punish by fine or imprisonment any failure to obey the House’s directions on such matters. The committee also recommended exemption for members from service on juries and in the militia, and clearer protections for reports of speeches and other parliamentary publications.

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26 Whether or not the House of Commons was ever part of a court has been doubted: see Special Reference No 1 of 1964 [1965] AIR (SC) 745 at [160] per Sarkar J dissenting [Keshav Singh’s case].
27 Kielley v Carson (1842) 4 Moo PC 63.
28 Privileges Committee, report on what are or ought to be privileges of the House of Representatives (1 August 1854) VP, Session I.
Legislation was introduced to implement many of these recommendations, although not, at first, regarding the power to punish for contempt. There was considerable doubt whether or not a colonial legislature could, even by legislation, confer such a power on itself. If the power were to be conferred, it was thought, it would have had to be part of the grant of legislative power from the Imperial Parliament. However, in 1864 the Privy Council held in an appeal from the state of Victoria that a colonial legislature was competent to confer on itself privileges equivalent to those possessed by the House of Commons, including the power to punish for contempt. The New Zealand Parliament wasted little time in passing the necessary legislation the following year.

**Statutory basis for privilege**

The Parliamentary Privileges Act 1865 repealed the piecemeal existing legislative provisions for privilege, and substituted one overarching definition of the privileges enjoyed by each of the Houses that comprised the (then) General Assembly. As re-enacted in 2014, this provision is still the basis of parliamentary privilege today in New Zealand:

The privileges, immunities, and powers exercisable by the House, committees, and members are every privilege, immunity, or power that complies with both of the following:

(a) it was on 1 January 1865 (by parliamentary custom or practice and rules, statute, or common law) exercisable by the Commons House of Parliament of Great Britain and Ireland, its committees, or its members; and

(b) it is not inconsistent with, or repugnant to, the New Zealand Constitution Act 1852 of the Parliament of the United Kingdom as in force on (the date of the coming into operation of the Parliamentary Privileges Act 1865, namely) 26 September 1865.

This provision, while not making the House a court, gives it certain attributes enjoyed by a court. Other Commonwealth countries have also adopted the practice of defining their legislature’s privileges by reference to those of the House of Commons. Likewise, many states and provinces define parliamentary privilege by reference to the Commons. Although the statutory provisions are not identical across the jurisdictions, and they adopted the Commons’ privileges on different dates, this has helped to build a Commonwealth-wide body of precedent on the law of parliamentary privilege.

The Parliamentary Privilege Act 2014 repealed and replaced the Legislature Act 1908 and Legislature Amendment Act 1992, which had formed the statutory basis of parliamentary privilege in New Zealand. The new Act is declaratory of the law and is not intended to codify (at least in any comprehensive way) the law of

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29 See, for example: Privileges Act 1856 and Militia Act 1858.
30 *Dill v Murphy* (1864) 1 Moo PC (NS) 487.
32 Parliamentary Privilege Act 2014, s 8(1).
parliamentary privilege. It is to be read alongside article 9 of the Bill of Rights 1688, which is the legal basis of Parliament's privilege of freedom of speech. The 2014 Act's main purposes are to:36

- reaffirm and clarify the nature, scope, and extent of the privileges, immunities, and powers exercisable by the House, its committees, and its members
- update, and remedy gaps in (so ensure the adequacy of), protections from legal liability for the communication of, and of documents relating to, proceedings in Parliament.

The 2014 Act’s related subsidiary purposes are, inter alia, to:37

- define the meaning of “proceedings in Parliament” for the purposes of article 9, and in particular to alter the law in the decision in Attorney-General v Leigh;
- abolish and prohibit evidence concerning proceedings in Parliament being used for “effective repetition” claims as exemplified in Buchanan v Jennings.

Privilege, as part of the general law of New Zealand, is to be taken notice of judicially (without being specially pleaded) by all courts and all persons acting judicially.38 To ascertain specific privileges enjoyed by the House, it is necessary to establish the nature of the privileges enjoyed by the House of Commons so far as they have not been altered by British statutes passed since 1 January 1865. Specific privileges must also be ascertained in the light of any changes in New Zealand law since that date. The leading work on the House of Commons’ privileges, to which reference is ritually made, is Erskine May’s Parliamentary Practice, now in its 24th edition.39

Immediately after being confirmed in office by the Governor-General, the Speaker lays claim, on behalf of the House, to the House's privileges, which are thereupon confirmed by the Governor-General.40 This is a traditional proceeding only and is not an essential prerequisite to the enjoyment of the privileges conferred on the House by statute.

CLASSIFICATION OF PARLIAMENTARY PRIVILEGES

The Parliamentary Privilege Act 2014 intentionally makes no attempt to codify comprehensively, or specify fully or in detail, the privileges held by the House of Representatives.41 Any classification or list of them is, therefore, inherently subjective.

The types of privilege that have been recognised in New Zealand and are discussed in this work are as follows:

- freedom of speech
- freedom of debate
- exclusive control of the House's own proceedings
- control of reports of the House's proceedings
- control of the parliamentary precincts
- control of access to the sittings of the House
- power to inquire
- power to obtain evidence
- power to administer oaths
- power to delegate

36 Parliamentary Privilege Act 2014, s 3(1).
37 Parliamentary Privilege Act 2014, s 3(2).
38 Parliamentary Privilege Act 2014, s 8(2), (3). See Awatere Huata v Prebble [2004] 3 NZLR 359 (CA) at [40].
40 SO 23.
41 Parliamentary Privilege Act 2014, s 3(2)(a).
○ power to punish for contempt
○ power to discipline members
○ power to fine
○ power to arrest
○ exemption from jury service
○ exemption from liability for communicating parliamentary proceedings
○ freedom from arrest
○ exemption from attending court as a witness
○ right to have civil proceedings adjourned
○ exemption from service of legal process
○ power to determine the qualification to sit and vote in the House
○ freedom of access to the Governor-General
○ right to a favourable construction of the House’s proceedings.

These privileges are discussed in detail in Chapters 45, 46 and 47 and in a number of other chapters of this book.

The privileges of the House fall into two main categories: those that are in the nature of immunities from legal processes that would otherwise apply, and those that consist of a power to do something. The immunity-conferring privileges operate primarily in respect of individuals, usually members, but also other persons—officers, witnesses, petitioners—who participate in the work of the House. Freedom of speech is the most important form of immunity enjoyed: nothing said or done in the House or in a parliamentary committee may be called into question in proceedings outside the House. Freedom from civil arrest has lost most of its former relevance (persons are no longer liable to imprisonment for debt), but members enjoy other immunities from legal process. These immunities have no direct connection with actions they might have taken in Parliament (unlike, for example, Parliament’s freedom of speech) but exist on the basis of a presumed priority for members’ parliamentary work over other legal commitments. Although these privileges operate in respect of individuals, they exist for the benefit of the effective operation of the House of Representatives.

The privileges in the nature of powers are exercised collectively by the House or its committees. A major privilege is the power to punish for contempt. Any contravention of the privileges of freedom of speech, or of freedom from arrest, or of the other immunities, is unlawful, and is known as a breach of privilege. As the privileges of the House are part of the general law, the House can expect that if in a case before a court the possibility of a breach of privilege becomes apparent, the court will take that fact into account in applying the law and protect the House’s privileges. Occasionally, to ensure that a court is sufficiently informed on such an issue, the House will seek leave to intervene in the proceedings and address legal argument to the court. However, in addition to the courts’ observance of privilege, the House itself may take action to uphold its privileges: for example, by declaring a breach of privilege a contempt of Parliament and invoking its contempt power to impose punishment. The punishments it may inflict range from imprisonment to requiring an apology.

CREATION OF NEW PRIVILEGES

The privileges enjoyed by the House of Commons in 1865 did not include the right to create new privileges. As long ago as 1704, the House of Commons acknowledged that it had no power to create a new privilege not recognised by the known laws and customs of Parliament. If a new privilege was to be created, it had to be accomplished by legislation. However, the House has been at pains

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to declare that its privileges are not to be construed as having been diminished or surrendered because it has established procedures in its Standing Orders to facilitate their exercise.43

ABROGATION OF PARLIAMENTARY PRIVILEGE

Parliamentary privilege is part of the law and subject to other legal rules, and is liable to be abrogated in whole or in part by legislation. Thus, questions have arisen about the extent to which legislation may have overridden or modified the legal immunities flowing from the House’s freedom of speech. So, too, have questions arisen concerning the House’s power to inquire into particular bodies or insist on the production of certain evidence.

Although parliamentary privilege is a (more or less) well-defined category of law, it must coexist within the general corpus of legal rights, powers and immunities that are established and recognised by legislation and the common law. It is not a body of higher or fundamental law that overrides all other law, but is subject to statutory abrogation in the ordinary way.44 Nevertheless, parliamentary privilege promotes constitutional values that are entitled to high priority when privilege conflicts with other values protected by law.45 Only clear, unambiguous legislation will override or abrogate an aspect of parliamentary privilege. Such provisions are rare owing to the constitutional role of parliamentary privilege.46

Questions have sometimes arisen about a legislative direction to a court to apply a defined standard, such as an international convention, when interpreting and applying legislation. In such a case, the court must make an objective judgement on whether or not Parliament has legislated consistently with the convention standard. Ordinarily, this would breach the principle of comity and the relationship of mutual respect and restraint between Parliament and the courts. However, under such legislation, Parliament itself, by its own direction, requires a judgement on the compatibility of its legislation with the prescribed standard.47

There have been claims that only an express provision in a statute is capable of abrogating parliamentary privilege.48 However, this seems too extreme a position. It has been accepted in a number of cases that privilege will be abrogated if there arises a necessary implication from a statute that this must necessarily be so (for example, where the statute would otherwise be frustrated or incapable of operating sensibly). A necessary implication has been defined in the context of legal professional privilege as one that necessarily, rather than reasonably, follows from the statutory provision in question. It is not sufficient to show that it might have been Parliament’s intention to have abolished some aspect of privilege, or that it might well have abolished it had it thought about it. The question is whether the express language of the statute shows that the statute must have abolished it.49

Another approach is to ask whether, if the privilege continues, an inconsistency is thereby produced or the statutory purpose is thereby stultified.50 In this sense,
parliamentary privilege must be subject to abrogation by necessary implication, for otherwise the enactment would effectively be frustrated or disapplied.

Ordinarily, parliamentary privilege would prevent anyone being held liable in legal proceedings for their parliamentary actions. However, the creation of a criminal offence for certain actions taken in the course of proceedings in Parliament must, if that offence is to be prosecuted at all, set aside the freedom of speech protections that would normally operate. Moreover, where a statute provides for disqualification of a member on the basis of the member's parliamentary actions, judicial scrutiny of those actions is unavoidable if the court is to adjudge the legality of any claimed disqualification. Likewise, the Committee for Privileges of the House of Lords has resolved that mental health legislation had overridden a privilege attaching to peers, although there was no express provision to that effect in the statute. An implication arose as a matter of necessity. Conversely, general words in a statute will not be taken to override parliamentary privilege. Nor will an implication arise indirectly because Parliament has created legal powers that are coextensive (or partially so) with parliamentary privilege. Parliamentary privilege is always a part of the constitutional environment in which Parliament legislates.

On occasion, Parliament may set out to make it absolutely clear that no abrogation of parliamentary privilege is to be implied. A statute may expressly declare this, or make it clear that it seeks to make no implied abrogation. But such saving provisions are not essential to preserve parliamentary privilege. The Parliamentary Privilege Act 2014 now requires article 9 to be taken to have, in addition to any other operation, the effect required by the 2014 Act, except where a different effect is required for the prosecution of a listed offence related to parliamentary proceedings.

Although abrogation of parliamentary privilege by express words or by necessary implication must be rare, a subsisting privilege must still be applied in a contemporary legal context. This means that the way in which an admitted privilege can be exercised may be subject to modification. The New Zealand Bill of Rights Act 1990, for example, while not abrogating parliamentary privilege, outlines a number of fundamental rights and freedoms that the House must observe in exercising its privileges. Thus, notwithstanding the House’s exclusive power to control its own proceedings, the right to natural justice affirmed under the Act has led to substantial procedural changes to give effect to this right in a parliamentary context. The right to be secure against unreasonable search or

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51 Prebble v Television New Zealand Ltd [1994] 3 NZLR 1 (PC) at 10. Section 9 of the Parliamentary Privilege Act 2014 provides for art 9 to have a different effect required for offences related to proceedings in Parliament, and adumbrates the following offences under the Crimes Act 1961: s 102 (corruption and bribery of a Minister of the Crown), s 103 (corruption and bribery of a member of Parliament) and ss 108 and 109 (perjury).
52 See, for example: Crimes Act 1961, ss 108 and 109 (perjury).
55 Duke of Newcastle v Morris (1870) 4 LR HL 661; Aboriginal Legal Service v State of Western Australia (1993) 9 WAR 297 (SC) at 304.
57 See, for example: Crimes Act 1961, s 9(a) (punishment for contempt); Copyright Act 1994, s 225(1)(c) (privileges of the House); Evidence Act 2006, s 68(4) (protection of journalist sources).
58 For example: Human Rights Act 1998 (UK), s 6(3) (a “public authority” subject to the Act does not include either House of Parliament or a person exercising functions in connection with a proceeding in Parliament).
60 New Zealand Bill of Rights Act 1990, s 4(a).
61 New Zealand Bill of Rights Act 1990, s 3(a).
62 New Zealand Bill of Rights Act 1990, s 27(1).
seizure\textsuperscript{63} is another right that the House must accommodate in exercising its power to punish for contempt.

Abrogation of parliamentary privilege must be distinguished, too, from disputes over the scope of privilege. In 1986, the Supreme Court of New South Wales gave an extremely restrictive interpretation to the freedom of speech enjoyed by members of the Parliament of the Commonwealth of Australia.\textsuperscript{64} This decision was not based on any claimed change in the law of parliamentary privilege but it was rather the court’s view of the true meaning of that privilege. The decision led the Australian Parliament to pass legislation reaffirming the parliamentary view of the law.\textsuperscript{65} Any lingering uncertainties arising from the New South Wales court’s interpretation were allayed when the Privy Council declared in 1994 that it did not represent the law in New Zealand.\textsuperscript{66} New Zealand, too, experienced disagreements between the courts and the legislature over the scope of parliamentary privilege. These disputes occurred between the years 2002 and 2013, and eventually led to the enactment of the Parliamentary Privilege Act 2014 to reaffirm and clarify the nature, scope and extent of parliamentary privilege.\textsuperscript{67}

There will always be interpretive differences in this as in other areas of the law. A particularly restrictive interpretation of the scope of a privilege can, from a parliamentary point of view, be little different in effect from a legislative abrogation of privilege. For this reason, the House will seek leave of the court in appropriate cases to intervene in legal proceedings to present a full argument on disputed aspects of parliamentary privilege. Its concern will be to ensure that the court is fully informed before it rules on the law.

### WAIVER OF PARLIAMENTARY PRIVILEGE

An issue analogous to the abrogation of parliamentary privilege is the extent to which parliamentary privilege might be waived or surrendered in a particular case, whether by the House itself or by an individual, who may or may not be a member. A rule of parliamentary privilege may apply to a member or person in a way that is adverse to his or her immediate legal interests.\textsuperscript{68}

Parliamentary privilege is part of the general and public law of New Zealand and need not be specifically invoked by a litigant. The courts themselves are specifically enjoined to take judicial notice of privilege themselves and apply it in the ordinary course of litigation.\textsuperscript{69} Parliamentary privilege cannot, therefore, simply be disapplied or (except by inadvertence) overlooked. Where a rule of parliamentary privilege applies, it must contribute to the legal outcome in the matter under dispute, and may even do so decisively. Thus, in principle, waiver is not possible. But, in practice, the position is more opaque. There may be very little difference between not invoking a privilege and waiving it in a particular instance. Those privileges that comprise powers vested in the House to do or to control something necessarily depend upon the House taking the initiative. If the House refrains from exercising such powers (for example, by not punishing an obvious contempt),\textsuperscript{70} it is not waiving the privilege, although the practical outcome is very much the same.

\textsuperscript{63} New Zealand Bill of Rights Act 1990, s 21.
\textsuperscript{64} R v Murphy (1986) 5 NSWLR 18 (SC).
\textsuperscript{65} Parliamentary Privileges Act 1987 (Cth).
\textsuperscript{66} Prebble v Television New Zealand Ltd [1994] 3 NZLR 1 (PC) at 8.
\textsuperscript{67} Privileges Committee Question of privilege concerning the defamation action Attorney-General and Gow v Leigh (11 June 2013) [2011–2014] AJHR I.17A.
\textsuperscript{68} See, for example: Rost v Edwards [1990] 2 QB 460.
\textsuperscript{69} Parliamentary Privilege Act 2014, s 8(3).
\textsuperscript{70} The Privileges Committee has discussed that there is some discretion as to whether the House should intervene by punishing actions taken against a witness—for instance, if the witness has acted irresponsibly by making extravagant or unjustifiable assertions: Privileges Committee, final report on question of privilege on the action taken by TVNZ in relation to its chief executive (17 October 2006) [2005–2008] AJHR I.17B at 5–6.
The question concerning waiver is likely to arise more directly with privileges that consist of legal immunities pleaded in legal proceedings. It is a rule of law that proceedings in Parliament must not be ("ought not to be") impeached or questioned in any court or place out of Parliament. This rule does not depend upon the individual who initiates legal action, and it is, therefore, not impliedly waived because an individual member brings a legal action. A member initiating a legal action, for example, does not thereby open up his or her parliamentary conduct to judicial scrutiny. The opinion has been expressed that this rule can be expressly waived, either by the House itself or by individual members in their own interest. The House has, to the contrary, taken the firm view that this privilege is not subject to waiver; that, indeed, the courts lack the basic jurisdiction to review proceedings in Parliament and that neither the House nor individual members can confer such a jurisdiction on them. This position has been impliedly endorsed by the Privy Council and has been supported judicially in Australia. Writers on Australian legislatures have also taken the view that this privilege cannot be waived in the absence of legislation, and this is the predominant view among other legislatures.

High judicial pronouncement has now put the matter beyond doubt. In R v Chaytor, the Supreme Court of the United Kingdom was resolute that article 9 was incapable of waiver, “even by Parliamentary resolution”. As Parliament’s privilege of freedom of speech has statutory foundation under the Bill of Rights 1688, no person or body may extend, waive or abridge the privilege in individual cases. It is surprising that the contrary view garnered any support at all. As long ago as 1870, the House of Lords held that a privilege of Parliament, established by common law and affirmed by statute, cannot be abrogated or set aside other than by legislation.

The above position explains legislative developments in the United Kingdom in 1996. The United Kingdom wished to permit waiver of article 9 in defamation proceedings for limited purposes, and introduced legislation to authorise it. More recently, however, this was considered to be contrary to the principle that freedom of speech is a privilege of the House itself and not that of individual members. It was thought, moreover, that allowing one party to litigation but not the other to use the parliamentary record could create an unfair litigation advantage. These misgivings eventually led to the repeal of the relevant provision in 2015.

The preferable view is that parliamentary privilege imposes a jurisdictional bar on a court against questioning or impeaching proceedings in Parliament.
bar cannot be waived, either by individual members or by the House. In these circumstances, legislation would be necessary to confer jurisdiction on a court before it could examine and make findings about matters that were otherwise inadmissible.87

ROLE OF THE COURTS

Parliamentary privilege is part of the general law of New Zealand and it is the constitutional duty of the courts to apply the law. This means that issues of parliamentary privilege may arise in litigation on which the courts must rule. However, as the essential idea of parliamentary privilege is to free Parliament’s functioning from judicial control, justiciable issues of parliamentary privilege must be resolved in a way consistent with this ethos of non-intervention. In one case, where the litigant complained of a wrong done in the course of the parliamentary process, the court rightly observed: “The remedy for a parliamentary wrong, if one has been committed, must be sought from Parliament and cannot be gained from the courts.”88

The courts do not sit in judgement on individual actions taken within the parliamentary process: Parliament asserts its right of exclusive cognisance. However, if the House seeks to project its power outside its proceedings (outside the “walls of Parliament”), it must do so in a way that is lawful. To this extent, exercises of parliamentary power are subject to judicial examination, and “not with tenderness, but with jealousy”.89 Extra-parliamentary exercises of parliamentary power may adversely affect private interests, and can be expected to attract intense judicial scrutiny. The New Zealand Bill of Rights Act 1990 provides a contemporary context for intensive examination of extra-parliamentary actions.

The development of a body of human rights law under the New Zealand Bill of Rights Act 1990 has provided a testing ground for the constitutional relationship of mutual respect and restraint between Parliament and the courts. The Parliamentary Privilege Act 2014 expressly recognises that this relationship is founded on the principle of comity, which requires the “separate and independent legislative and judicial branches of government each to recognise … the other’s proper sphere of influence and privileges”90. Generally speaking, what is before one branch of government ought not to be adjudged by the other. Nevertheless, legal challenges concerning the consistency of legislation with the New Zealand Bill of Rights Act 1990 do and will continue to arise, bringing the protections of parliamentary privilege under the Bill of Rights 1688 into contest with the newer body of human rights law. However, the courts have acknowledged that these instruments, while three centuries apart in provenance, are capable of operating together so as to produce fair and workable results.91

The courts are mindful that issuing formal declarations of inconsistency of legislation with the New Zealand Bill of Rights Act 1990 could shift the boundaries between Parliament and the courts.92 They have shown particular reluctance to entertain a declaration where the Attorney-General has issued a report under section 7 of the New Zealand Bill of Rights Act 1990 and the House has proceeded to enact the offending provisions intact.93 The judicial sensitivity has been manifest in other contexts also. Where a local bill designed to validate rates was enacted

87 See, for example: Special Commissions of Inquiry Amendment Act 1997 (NSW) authorising the Governor, following a resolution of a House of the state legislature, to establish a commission to inquire into parliamentary proceedings.
88 British Railways Board v Pickin [1974] AC 765 (HL) at 793 per Lord Wilberforce.
89 Stockdale v Hansard (1839) 9 A & E 1, 112 ER 1112 (QB) at 214 per Patteson J.
91 Television New Zealand Ltd v Prebble [1993] 3 NZLR 513 (CA) at 523.
in the interests of those who were affected in the community, the court declined to second-guess the political judgement or look behind Parliament’s processes to evaluate the decision.⁹⁴

In the United Kingdom, the development of human rights law has posed similar challenges to those in New Zealand. In one case, a constituent claimed she had been defamed by her member of Parliament and she took her case to the European Court of Human Rights. She claimed that parliamentary privilege denied her a right to a fair hearing and that such a denial contravened the European Convention for the Protection of Human Rights and Fundamental Freedoms. By a majority, the European Court ruled that the importance of elected representatives’ freedom of speech in debate justified parliamentary immunity from suit.⁹⁵ Representative bodies, the court observed, are “the essential fora for political debate” in a democracy, so that “very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein”.⁹⁶

The courts and Parliament are both astute to acknowledge their respective constitutional roles.⁹⁷ Judicial scrutiny of parliamentary events should be limited to ensuring that Parliament exercises its power lawfully in any extra-parliamentary context. The courts naturally have a primary role in articulating the scope of parliamentary privilege, but it is for Parliament itself to determine how it exercises its privileges.⁹⁸ Where there is uncertainty over the precise extent of a privilege, it is ultimately a matter for the court,⁹⁹ but the court will have careful regard to any views expressed in Parliament.¹⁰⁰

If the courts interpret privilege in a way that Parliament considers to be wrong or “sub-optimal”, Parliament may enact legislation to change the law. Statutory reform of parliamentary privilege has a long history, reaching back over more than three centuries.¹⁰¹ In more recent times in Australia, the Parliamentary Privileges Act 1987 was enacted to overturn certain adverse court judgments and reaffirm the orthodox understanding of parliamentary privilege.¹⁰² A recent United Kingdom committee report entertained the option of legislating, but considered it should be used only when absolutely necessary to resolve uncertainty, or to reinstate Parliament’s exclusive cognisance where it had been materially diminished by the courts.¹⁰³ The Parliamentary Privilege Act 2014 specifically alters the law as set out in the judgments of two cases: Buchanan v Jennings¹⁰⁴ (concerning the doctrine of effective repetition under the law of defamation) and Attorney-General v Leigh¹⁰⁵ (concerning the scope of the parliamentary privilege of freedom of speech).

Although the House, within its own sphere, is master of its proceedings and free of judicial control, it is principally for the House to assert and enforce its own privileges. Parliamentary privilege does not give rise to a legal cause of action for

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⁹⁵ A v United Kingdom (2003) 36 EHRR 51 (Section II, ECHR).
⁹⁶ A v United Kingdom (2003) 36 EHRR 51 (Section II, ECHR) at [79]. See also Jerusalem v Austria (2003) 37 EHRR 25 (Section III, ECHR) at [36], [40].
⁹⁸ Privileges Committee Question of privilege concerning the defamation action Attorney-General and Gow v Leigh (11 June 2013) [2011–2014] AJHR I.17A at [18].
¹⁰⁰ R v Chaytor [2010] UKSC 52 at [16].
¹⁰¹ The preamble to the Bill of Rights 1688 refers to that bill as a declaration by the Lords and Commons “for the Vindicating and Asserting [of] their ancient Rights and Liberties”. Moreover, the litigation in Stockdale v Hansard (1839) 9 Ad & El, 112 ER 1112 directly led to the enactment of the Parliamentary Papers Act 1840 (UK), which provided for a statutory protection.
which the courts will grant relief, any more than anyone can have a cause of action against the House in respect of the House’s proceedings. The courts will dismiss actions where the relief sought involves a direct attack on a privilege enjoyed by the House.\textsuperscript{106} Moreover, a court will refuse to give relief to an individual where the ground claimed for relief is an alleged breach of privilege or contempt.\textsuperscript{107} This is not to say that the courts should not rule on issues of parliamentary privilege—they must do so where these issues arise in a justiciable form. Nonetheless, the courts’ role regarding privilege tends to be oblique. Questions of privilege generally arise as collateral issues in a dispute that is before the courts on other grounds.

A rule of parliamentary privilege (a rule of law) may be of legal significance as an element in a legal dispute, requiring the court to rule on it as a step in resolving the case. Such questions may relate to the admissibility of evidence, the extent to which submissions may be addressed to the court, the right to cross-examine witnesses, or the question of whether or not there is a lawful excuse to prevent liability for conduct that is otherwise unlawful. Parliamentary privilege may not itself give rise to a cause of action but it may be a defence to an action: for example, by providing justification for using force that would otherwise be a trespass to the person.\textsuperscript{108} It may, in a legal context, be used “as a shield and not as a sword”.\textsuperscript{109}

Where issues of parliamentary privilege arise, the court will need to establish the extent to which it or the parties to the litigation are constrained by the privilege, or how the outcome of the litigation may be affected by it. In some cases, the fact that a breach of privilege or a contempt of the House has been, or may be, perpetrated will be significant in (even determinative of) the legal outcome of the litigation, notwithstanding that the issue has arisen as a collateral matter in the litigation itself.

**Parliamentary intervention in legal proceedings**

The House itself is rarely, if ever, involved directly in legal proceedings as a party to an action. It is also unusual for the House to be involved in legal proceedings as a party through one of its officers, such as the Speaker or the Clerk of the House, although this is not unknown. A declaration has been sought against the Speaker on the treatment of evidence tendered to a select committee,\textsuperscript{110} and injunctions have been sought against the Clerk to restrain the presentation of bills for the Royal assent.\textsuperscript{111} When the House or one of its officers is named as a party to the action, submissions will be directed to the court on behalf of the House on any aspect of parliamentary privilege that may arise.

However, questions regarding parliamentary privilege may arise in legal proceedings to which neither the House nor its officers are parties. Individual members of Parliament may be parties to such proceedings but this is either in their personal capacity or as a Minister of the Crown, rather than as a representative of the House.\textsuperscript{112} In such cases, the members’ interests in the litigation may run contrary to the privileges of Parliament. Also, questions regarding parliamentary privilege may arise in proceedings in which no member of Parliament is involved.\textsuperscript{113}

\begin{itemize}
\item \textsuperscript{106} Dillon v Balfour (1887) 20 LR Ir 600 (freedom of speech); British Railways Board v Pickin [1974] AC 765 (HL) (exclusive cognisance of its own proceedings).
\item \textsuperscript{107} Halden v Marks (1995) 17 WAR 447 (SC).
\item \textsuperscript{109} Combe v Combe [1951] 2 KB 215 at 224 per Birkett LJ (quoting counsel referring to equitable estoppel).
\item \textsuperscript{110} Queen v Speaker, House of Representatives [2004] NZAR 585 (HC); Privileges Committee, question of privilege concerning application by Darryl Bruce Queen (10 May 2005) [2002–2005] AJHR I.17F.
\item \textsuperscript{111} Thomas v Bolger (No 2) [2002] NZAR 948 (HC); Westco Lagan Ltd v Attorney-General [2001] 1 NZLR 40 (HC).
\item \textsuperscript{112} Note that proceedings have also been taken against individual members who were committee chairpersons, as a result of statements made outside committee meetings: Peters v Television New Zealand Ltd [2008] NZAR 411 (HC) and Stonhill v Mackey DC Wellington 0016/01.
\item \textsuperscript{113} For example: Hyams v Peterson [1991] 3 NZLR 648 (CA); Pepper (Her Majesty’s Inspector of Taxes) v Hart [1993] AC 593 (HL); Wilson v Secretary of State for Trade and Industry [2003] UKHL 40, [2004] 1 AC 816; Mangawhai Ratepayers’ and Residents’ Association Inc v Kaipara District Council [2014] NZHC 1147.
\end{itemize}
In litigation to which the House is not a party, the House has no automatic right to address the court on matters of privilege but must seek the leave of the court.

In principle, there is nothing untoward with this situation. Parliamentary privilege is part of the general and public law of New Zealand, and is to be given effect to by the courts just as is any other part of the law. However, there are obvious dangers in a laissez-faire approach by the House to litigation involving parliamentary privilege. Litigants may overlook points of privilege, whether through inadvertence or lack of knowledge of the law, or because they do not seem important to them. The House will naturally be more vigilant in such matters and will consider privilege issues more robustly. Even where the importance of a point of privilege is appreciated by the parties, the court may still benefit from hearing full argument from the House. The courts, indeed, may welcome the House's intervention, and may even seek it. Its views will not be tainted by a concern for the outcome of the litigation but will be driven by a wish to ensure that, whatever the outcome, parliamentary privilege is upheld.

In the United Kingdom, the Houses of Parliament have assisted the courts from time to time when privilege issues have arisen. The Attorney-General was invited to appear in proceedings when a question of privilege concerning the House of Commons arose in the course of argument. Other interventions have occurred on the initiative of the House itself. In Australia, too, the Houses of Parliament have assisted the courts in matters of privilege. The Senate instructed counsel to seek leave to appear as a friend of the court in a criminal case in which evidence was tendered of confidential select committee hearings. Similarly, the Australian House of Representatives instructed counsel to seek leave to appear on behalf of the Speaker in an action involving a person who had been a witness before a standing committee of the House. A notable case arose in Canada that involved multiple interventions. The case involved the privileges of the Nova Scotia House of Assembly; and the Canadian Senate and House of Commons and nine other Canadian provincial legislatures intervened in the proceedings. In New Zealand, the Privileges Committee resolved in 1988 that, in appropriate cases, counsel might be instructed on the initiative of the Speaker or the House to appear as a friend of the court to argue any point of parliamentary privilege arising incidentally in legal proceedings.

The practice of the House instructing legal counsel is a comparatively recent one. Counsel was first instructed on the Speaker's initiative in 1989 in a defamation action involving a member of Parliament. Questions arose concerning the extent to which the member's statements in the House could be used in the litigation. However, the action was settled without proceeding to trial. In 1992, and again in 1993, the House gave leave for counsel to be instructed to make submissions on issues of parliamentary privilege in a defamation action brought by a member against Television New Zealand Ltd. The Attorney-General and Crown counsel

114 Parliamentary Privilege Act 2014, s 8(2).
120 R v Murphy (1986) 5 NSWLR 18 (SC).
(as amici curiae) appeared in the High Court and, on appeal, in the Court of Appeal and Privy Council. Subsequently, the House has intervened in actions in which the Clerk of the House was a defendant concerning the submission of a bill for the Royal assent, and where a member was a defendant in a defamation action involving statements he had made in Parliament. In another defamation action involving a member as a defendant, the Privileges Committee reported that it would have recommended that the House intervene had the matter gone to trial, as the likely defence to the action would have led to the court being invited to examine proceedings in Parliament. In the Supreme Court hearing in Attorney-General v Leigh, the Speaker, on his own initiative, instructed counsel to address the Court on aspects of privilege concerning a defamation action against an official, who had briefed a Minister on the background to a parliamentary question.

Any decision to intervene is taken on its merits. The Privileges Committee has declined to recommend parliamentary intervention at too early a stage in litigation, preferring to keep the matter under review. The committee has also said that a decision to intervene should never be made lightly, and should only be made when it is in the public interest to do so. The House intervenes not to protect its members but to protect the House’s privileges. In some instances, parliamentary intervention may be contrary to a member’s litigation interest: for example, if parliamentary privilege prevents a member from introducing evidence that would be to the member’s advantage. The committee has declined to recommend intervention when it considered that a full argument on the parliamentary privilege issue would be made by the parties themselves, and that intervention would add no extra value.

When the House intervenes, it may instruct the Attorney-General to represent the House’s interests. In one case, where the Attorney-General was a party to the proceedings, alternative counsel was instructed. The Attorney-General may apply to the court for leave to intervene as a party to represent the public interest, or may ask the court to require the Solicitor-General to appoint counsel assisting the court.