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PARLIAMENTARY PRIVILEGE IN NEW
ZEALAND AND THE CODIFICATION
IMPERATIVE

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CONTENTS	i
ABSTRACT.....	ii
I INTRODUCTION	1
II PARLIAMENTARY "PRIVILEGES": SOURCES AND NATURE	5
III PARLIAMENTARY PRIVILEGES AND THE COURT: AN UNRESOLVED TENSION	8
A An Historical Ordeal with Contemporary Relevance	8
B Article 9: Proceedings, Questioning, and Places Out of Parliament	15
1 Proceedings in Parliament	15
2 "Impeaching" and "Questioning"	19
(i) Hansard as an Interpretative Aid in the Courts	19
(ii) Reports and Critique of Speeches and Debates in the House	20
3 Any Place Out of Parliament	22
C An Ordeal into the Future?	23
IV FREEDOM OF SPEECH	27
A Freedom of Speech: A Constitutional Imperative?	27
B Freedom of Speech as a Sword of Oppression	30
C Regulating Freedom of Speech	33
V PARLIAMENT'S PUNITIVE POWERS	38
A Nature and Extent of the House's Punitive Powers	38
B Arcane Privileges and Undefined Contempts	42
C Natural Justice Issue	47
1 Parliament, Citizens, and Fair Play	47
2 Section 27	48
3 Natural Justice: An Evaluation of Regulation by Standing Order	52
D Contempt of Parliament and Punitive Powers: Principal Reform Measures	56
VI OVERCOMING A LACK OF REFORM INCENTIVES AND WHY PARLIAMENT BENEFITS FROM CODIFYING PRIVILEGE	61
A Overcoming A Lack of Reform Incentives	61
B The Codification Imperative and Why Parliament Benefits	64
VII CONCLUSION	65
BIBLIOGRAPHY	68
Cases	68
Statutes	70
Secondary Sources	70

INTRODUCTION

There are few areas of the law as uncertain, discretionary, and dangerous as the law of parliamentary privilege. It does not conform to the proper principles that should govern modern law. While changes have been made, they fall short of making the law of parliamentary privilege satisfactory.

ABSTRACT

New Zealand's Parliament is the key institution of democratic accountability. Consistent with Parliament's status as the Parliamentary privilege is in need of reform. Its nature is discretionary, arcane, complex, and does not square with modern conceptions of justice. Members' absolute immunity from suit for things said in the course of parliamentary proceedings leaves non-members without an enforceable remedy for any damage their reputations might suffer from a Member's free speech salvo. Parliament's punitive powers may be exercised at its own discretion in a context that removes an enforceable right to natural justice for an accused. Parliament may imprison, a role properly the domain of the court and the unresolved tension between court and parliament does little to provide hope to ordinary citizens that they can receive a fair deal from the House. Reform is a necessary step in bringing New Zealand's parliament into the 21st century: that change must come in the form of codification.

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I INTRODUCTION

There are few areas of the law as uncertain, discretionary, and dangerous as the law of parliamentary privilege. It does not conform to the proper principles that should govern modern law.

While changes have been made, they fall short of making the law of parliamentary privilege satisfactory.¹

New Zealand's parliament is "the key institution of democratic accountability".² Concomitant with Parliament's status is the requirement for special privileges, known collectively as "parliamentary privilege". Parliamentary privilege refers to "the sum of the peculiar rights enjoyed by [the House of Representatives] without which [it] could not discharge [its] functions, and which exceed those possessed by other bodies or individuals".³ To that end, parliamentary privilege affords legal protection "to members of a parliament and other participants in parliamentary proceedings".⁴ The principle that informs the breadth of those protections turns on whether or not the rule or privilege in question is necessary for Parliament "to

¹ Geoffrey Palmer and Matthew Palmer *Bridled Power* (4 ed, OUP, Melbourne, 2004) 180. The law and practice of Parliamentary privilege, including its reform, is comprehensively traversed in the following sources: Palmer and Palmer, above; Enid Campbell *Parliamentary Privilege* (The Federation Press, Annandale, NSW, 2004); Senate Committee of Privileges *Parliamentary Privilege: Precedents, Procedures, and Practice in the Australian Senate 1966-2002* (August 2002) 107/2002; Philip Joseph *Constitutional Law in New Zealand* (2 ed, Butterworths, Wellington, 2001); Joint Committee on Parliamentary Privilege *First Report* (HL 43; HC 214, 1998-99) ["Joint Committee (UK)"]; Donald Limon and W McKay (eds) *Erskine May's Parliamentary Practice* (22 ed, London, Butterworths, 1997); Law Commission *The Law of Parliamentary Privilege in New Zealand* (NZLC MP5, Wellington, 1996); David McGee *Parliamentary Practice in New Zealand* (2 ed GP Publications, Wellington, 1994); *Report of the Standing Orders Committee On the Law of Privilege and Related Matters* AJHR 1989 I 18 B; Joint Select Committee of the Commonwealth Parliament *Final Report* (PP 219/1984) ["Joint Select Committee (Cth)"]; Charles Littlejohn *Parliamentary Privilege in New Zealand* (LLM Thesis, Victoria University of Wellington, 1969).

² Richard Mulgan *Politics in New Zealand* (3 ed, Auckland University Press, 2004) 99.

³ Limon and McKay, above n 1, 65; Law Commission, above n 1, 5; Joseph, above n 1, 386.

⁴ Campbell, above n1, 1.

discharge its functions as a legislature effectively”,⁵ the argument being that “[w]ithout this protection members would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive and as a forum for expressing the anxieties of citizens would be correspondingly diminished”.⁶ Parliament is also primarily responsible for ensuring its effective operation is protected through the imposition of sanctions,⁷ including powers to admonish, imprison and fine.⁸ Those punitive powers arise in response to contempt of Parliament itself, or as a consequence of a breach of its privileges – “[i]f non-members improperly interfere with Parliament or its members or officers in discharging their public duties, Parliament for its own protection must have power to take appropriate action in response”.⁹

It has been said of privilege in particular that it is: “exceptional, peculiar, and discretionary”,¹⁰ “uncertain, discretionary, and dangerous”,¹¹ “an exemption from the general law”,¹² and “is, in its detail, a complex, technical and somewhat arcane subject”.¹³

It has also been observed that:¹⁴

Parliament has the capacity to cause substantial injustice to individuals. They have no redress. The time has come to engage in further reform of Parliament and limit the capacity of Parliament to act as an engine of oppression.

⁵ McGee, above n 1, 468.

⁶ Joint Committee, above n 1, para 3-4.

⁷ This jurisdiction is not wholly exclusive: Crimes Act 1961, s 315(1). See generally Philip Joseph *Constitutional and Administrative Law in New Zealand* (Butterworths, Wellington, 1993) 353.

⁸ There is doubt as to whether Parliament is competent to fine: Limon and McKay, above n 1, 138; Joseph, above n 1, 437-9.

⁹ Joint Committee, above n 1, para 262.

¹⁰ O Hood Phillips *Constitutional and Administrative Law* (4 ed, Sweet & Maxwell, London, 1967) 168.

¹¹ Palmer and Palmer, above n 1, 180.

¹² Limon and McKay, above n 1, 65.

¹³ Joint Committee, above n 1, para 11.

¹⁴ Geoffrey Palmer “Parliament and privilege: Whose justice?” [1994] NZLJ 325.

It has been further argued that "the failure to engage in reform has the consequence that New Zealanders will continue to suffer from the hands of their own Parliament".¹⁵ Linked to that concern is whether Parliament should be the sole repository of adjudication on matters affecting its functions and impinging on its privileges.¹⁶ Among the issues that arise from this concern are those relating to natural justice, the exercise of punitive power by a governmental branch *other* than the courts, whether or not a distinction should be drawn between strangers and members and the shape and content of any reform measures.

In identifying those and other issues, the United Kingdom Joint Committee of the House of Lords and House of Commons on Parliamentary Privilege ("the Joint Committee") proclaimed in its *First Report* that,¹⁷

It is in the interests of the nation as a whole that the two Houses of Parliament should have the rights and immunities they need in order to function properly. But the protection afforded by privilege should be no more than Parliament needs to carry out its functions effectively and safeguard its constitutional position. Appropriate procedures should exist to prevent abuse and ensure fairness. Thus the thread running through this report involves matching parliamentary privilege to the current requirements of Parliament and *present-day standards of fairness and reasonableness*.

Eminent Australian academic, Enid Campbell has also observed that "parliamentarians and judges must be sensitive to a need not to extend parliamentary privileges beyond those which can be demonstrated to be vital to the carrying out of the constitutional functions of parliamentary institutions".¹⁸ It is of some comfort therefore that following review of the Standing Orders of the House of

¹⁵ Palmer, above n 14, 325.

¹⁶ Campbell, above n 1, 6.

¹⁷ Joint Committee (UK), above n 1, para 32 (emphasis added). For commentary on the Joint Committee's Report, see Patricia Leopold "Report of the Joint Committee on Parliamentary Privilege" (1999) PL 604.

¹⁸ Campbell, above n 1, 180.

Representatives in 1995 and again in 2003,¹⁹ substantial and positive changes were effected in order to allay fears that Parliament was somehow exempt from society's reasonable expectations of justice and fairness.²⁰

This paper argues that in the light of serious issues arising in relation to the court-parliament relationship, the absolute immunity arising from things said in parliamentary debates and proceedings, and parliament's latent punitive powers, codification remains an important and necessary step in bringing Parliament into the 21st century. This paper, therefore, identifies three key areas for reform that will ensure parliament's privileges and processes accord with reasonable expectations of justice, namely: addressing an unresolved tension between parliament and the courts as to the proper forum for the administration of parliamentary privilege (Part III); reform of strangers' right of reply to their naming in the House under Members' freedom of speech (Part IV); and providing an enforceable right to natural justice before the House (Part V). That step must, however, overcome two significant hurdles discussed in Part VI. Firstly, contemporary debate in the House mitigates any momentum for reform, with many members emphasising the sovereign and supreme role of Parliament, including the exclusive power to regulate its own proceedings.²¹ Secondly, Members' (and perhaps the electorate's) apathy is reflected in the fact that parliamentary privilege reform, and in particular codification reform, has been on and off the political and legislative agenda for twenty years (and in the academic literature for

¹⁹ Standing Orders Committee *Report on the Review of Standing Orders* [1995] AJHR I 18A; Standing Orders of the House of Representatives (2003); Office of the House of Representatives *Natural Justice before Select Committees: A Guide for Witnesses* (Parliament House, Wellington, 2000); See also Clerk of the House of Representatives *Review of Standing Orders* (Parliament House, Wellington, 2003).

²⁰ Principally in the form of SO 232-238, 393.

²¹ Hon Dr Michael Cullen MP (24 May 2004) NZPD 13191-2.

more than thirty),²² yet with no progress. Before turning to those issues, it is helpful first to traverse the nature and sources of parliament's privileges in New Zealand.

II *PARLIAMENT'S "PRIVILEGES": SOURCES AND NATURE*

The legal parameters of parliamentary privilege are established by a combination of statute and common law,²³ and in accordance with the customs and practices of Parliament itself.²⁴ This legal and customary scheme ensures that the House of Representatives "conducts its proceedings without interference by the Crown, the courts, or bodies outside of parliament".²⁵ Common law sources have typically concerned jurisdictional issues,²⁶ which have centred primarily on whether the Courts or Parliament reserve the right to determine the existence, nature, scope, and application of parliamentary privileges. The primary legislative sources in New Zealand are the Legislature Act 1908 and the Bill of Rights 1688 (Imp).

Section 242 of the Legislature Act 1908 provides that,

The [New Zealand] House of Representatives ... and the Committees and members thereof ... shall hold, enjoy, and exercise such and the like privileges, immunities and powers as on the 1st day of January 1865 were held, enjoyed, and exercised by the House of Commons of Parliament of Great Britain and Ireland

The vast majority of Parliament's privileges and powers arise under section 242, which is sourced from the Parliamentary Privileges Act 1865.²⁷ Included is the wide array of privileges that are admitted

²² Littlejohn, above n 1.

²³ Campbell, above n 1, 2; Law Commission, above n 1, 5-6.

²⁴ See generally Limon and McKay, above n 1, 67-82.

²⁵ Palmer and Palmer, above n 1, 175.

²⁶ See below Part III A An Historical Ordeal with Contemporary Relevance.

²⁷ Law Commission, above n 1, 7; Joseph, above n 1, 388-390.

through section 242²⁸ are those of present interest, namely Parliament's power to punish for contempt,²⁹ and Parliament's power to regulate and be the sole judge in its own proceedings.³⁰ The nature and characteristics of the privileges arising under section 242 are a matter for the Court, but the application of privileges is a matter for Parliament.³¹ That dichotomy in approach creates problems for persons subject to the exercise of Parliament's punitive powers. On the one hand the Court will entertain determining the scope and basis of a privilege, but when called upon to adjudicate over Parliament's application of those privileges, the Court may decline to intervene.³² The dichotomy, therefore, presents an unjustifiable lacuna in the law, which has traditionally been viewed as a justification sounding in constitutional necessity.³³ It is submitted that such justifications no longer withstand close scrutiny and is an important reform issue.³⁴

Perhaps the most important of parliament's privileges arises under Article 9 of the Bill of Rights 1688 (Imp), which provides that "the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament".³⁵ Much academic and judicial discussion has centred around this statutory provision, with specific focus on the meaning to

²⁸ Limon and McKay, above n 1, 65-81, 100-107.

²⁹ Joseph, above n 1, 391; McGee, above n 1, 506.

³⁰ Joseph, above n 1, 417.

³¹ *Stockdale v Hansard* (1839) 9 Ad & E 1. However, it has been noted that the House of Commons (and therefore the New Zealand Parliament) has never wholly acquiesced to the view that Parliament does not have sole jurisdiction to determine its privileges: Joseph, above n 1, 393. This issue is discussed in more detail below: Part III A An Historical Ordeal with Contemporary Relevance.

³² *Paty's Case* (1704) 92 ER 232.

³³ *Prebble v TVNZ* [1994] 3 NZLR 1, 7 (PC) Lord Brown-Wilkinson discussed in Joseph, above n1, 413-414.

³⁴ Considered in more detail in Part III, below. Note here that the Joint Committee on Parliamentary Privilege in the United Kingdom has conceded this point: Joint Committee (UK), above n 1, para 306.

³⁵ Bill of Rights 1688, Article 9 is New Zealand law by virtue of the Imperial Laws Application Act 1988, s 3(1) and 1st Sch.

be attributed to "freedom of speech" and "proceedings in Parliament" and "ought not to be impeached or questioned".³⁶

Article 9 is important because "[f]or Parliament to make informed decisions it is essential that its members be able to speak without fear of the consequences".³⁷ The democratic imperative of free speech in Parliament is necessary because "[i]f you are going to have a democracy, discussion has to be free, uninhibited, robust and wide-open".³⁸ To that end, speech in debates and other proceedings in Parliament are absolutely privileged. But do the justifications for absolute privilege also justify the wholesale casting of, unsupported, spurious, or even malicious aspersions on members or non-members without any ability for the target of that "abuse" to mount any defence or vindicate their rights to present the other side? The difficulty with Article 9 is that it at once provides an immensely important constitutional function in the form of uninhibited debate,³⁹ whilst at the same time opening the door to potentially serious damage to innocent citizens' reputations by the very institution that ought to be acting in the best interests of those citizens.⁴⁰ Whether or not the appropriate balance is struck between Parliament's need for uninhibited debate and citizens' rights to be treated fairly by its lawmaking governors is a major reform issue.⁴¹

Parliament's privileges are not only concerned with immunity from suit.⁴² The privileges are also in the nature of powers. Those

³⁶ See generally Joseph, above n 1, Ch 12; New Zealand Law Commission, above n 1.

³⁷ Auckland District Law Society (NZ) Public Issues Committee "Parliamentary Privilege: Progress or Regress?" (The Committee, Auckland District Law Society, Auckland, 1995), 3.

³⁸ Geoffrey Palmer *Constitutional Conversations: Geoffrey Palmer talks to Kim Hill 1994-2001* (Victoria University Press, Wellington, 2002) 173.

³⁹ *Prebble v TVNZ*, above n 33, 10 (PC) Lord Brown-Wilkinson.

⁴⁰ Auckland District Law Society, above n 37, 3.

⁴¹ See Part IV C Regulating Freedom of Speech.

⁴² Other immunities, with which this paper is not directly concerned, include freedom from civil arrest and summons, freedom of access to the Queen, favourable

powers emanate from the principle that "Parliament must be able to consider any matter it chooses and, principally through its committees, investigate any matter".⁴³ Parliament has the power to call for witnesses and documents,⁴⁴ to regulate its own proceedings, and to punish acts amounting to contempt of Parliament. Along with issues arising under freedom of speech, it is with those latter two powers that this paper is principally concerned and to which we now turn.⁴⁵

III PARLIAMENTARY PRIVILEGES AND THE COURT: AN UNRESOLVED TENSION

A An Historical Ordeal with Contemporary Relevance

At the heart of the lacuna in the law that leaves Parliament as the sole arbiter of the exercise of its punitive powers is the relationship between parliament and the courts. The common law and statutory bases for parliamentary privilege form the basis of an unresolved tension between those two branches of government,⁴⁶ variously characterized as modern day mutuality of respect, comity between the Courts and Parliament,⁴⁷ and "a relationship of détente",⁴⁸ each branch being reluctant to interfere in the other's proper spheres of activity. Understanding the precise nature of that unresolved tension is critical

construction, freedom to regulate composition: see generally Limon and McKay, above n 1, 65-81, 100-107 and Law Commission, above n 1, 9-25. On the privilege concerning the freedom to regulate composition see the detailed discussion in *Report of the Privileges Committee on the Question of Privilege referred on 22 July 1997 relating to the Status of Manu Alamein Kopu as a Member of Parliament* [2001] AJHR I 15 B.

⁴³ Joint Committee (UK), above n 1, para 11.

⁴⁴ Campbell, above n 1, 7.

⁴⁵ Other privileges issues that are not dealt with in this paper, including waiver, judicial review of legislative processes (manner and form). See generally for legislative processes *Westco Lagan Ltd v A-G* [2001] 1 NZLR 40 (HC) and *Report of the Privileges Committee on the Question of Privilege referred on July 2000 relating to Westco Lagan Ltd v A-G and the Clerk of the House of Representatives* [2000] AJHR I 17 A.

⁴⁶ Campbell, above n 1, 7.

⁴⁷ *Ah Chong v Legislative Assembly of Western Samoa* [2001] NZAR 418, (CA Western Samoa) Lord Cooke of Thorndon.

⁴⁸ Joseph, above n 1, 393.

to understanding the reform issues that arise under Article 9 and the parliament's punitive jurisdiction. Eight cases concerning questions of jurisdiction to determine the existence, scope and application of privileges are relevant in this regard: *Ashby v White*,⁴⁹ *Stockdale v Hansard*,⁵⁰ *Case of Sheriff of Middlesex*,⁵¹ *Bradlaugh v Gossett*,⁵² *Fielding v Thomas*,⁵³ and more latterly the comments in *Prebble v TVNZ*,⁵⁴ *Awatere Huata v Prebble*,⁵⁵ and *Jennings v Buchanan*.⁵⁶

Ashby v White is the starting point for the Courts' assertion of jurisdiction in parliamentary matters.⁵⁷ In a case involving a returning officer's conduct, the House of Lords held that it had jurisdiction to determine the nature of what does and does not constitute activities to which privilege attaches. Some 135 years later, in *Stockdale v Hansard*, it was determined that the law regulating parliament "was part of the law of the land and known to the courts of law which they could ascertain and declare".⁵⁸ The practical result in *Stockdale v Hansard*, therefore, was that "[i]t enabled the court to decide the question of law, namely, the existence and scope of particular privileges, while it allowed Parliament freedom to determine their manner of application".⁵⁹ The *Case of Sheriff of Middlesex* clarified the latter limb in holding that in the exercise of committal powers [a]

⁴⁹ *Ashby v White* (1703) 92 ER 126; 92 ER 710.

⁵⁰ *Stockdale v Hansard*, above n 31.

⁵¹ *Case of Sheriff of Middlesex* (1840) 113 ER 419.

⁵² *Bradlaugh v Gossett* (1884) 12 QBD 271.

⁵³ *Fielding v Thomas* [1896] AC 600 (PC).

⁵⁴ *Prebble v TVNZ*, above n 33 (PC).

⁵⁵ *Awatere Huata v Prebble* (16 July 2004) CA34/04.

⁵⁶ *Jennings v Buchanan* [2004] UKPC 36 (PC).

⁵⁷ Joseph, above n 1, 392.

⁵⁸ Joseph, above n 1, 393.

⁵⁹ Campbell, above n 1, 7; Joseph, above n 1, 393-4. See also *Prebble v TVNZ*, above n 33, 6-7 (PC) Lord Browne-Wilkinson; *Pickin v British Railways Board* [1974] AC 765, 799 (HL) Lord Simon cited in Joseph, above n 1, 393-4. The Australian position is the same: *R v Richards*; *Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 162 (HCA) Dixon J appeal refused and High Court Judgment affirmed as unimpeachable in *R v Richards*; *Ex parte Fitzpatrick and Browne* (1955) 92 CLR 171 (PC) Simons V-C.

House must be taken to have “adjudicated with due regard for the laws and usages of Parliament”.⁶⁰

The Courts’ assumption of jurisdiction in relation to the existence, nature and scope of a particular privilege is, from a rule of law perspective, entirely understandable. To hold otherwise, that is to leave those questions to Parliament itself, would be to invite an attack on the rule of law, leaving both Court and citizen at the whim of the House and its attendant political, rather than procedural, machinations. *Bradlaugh v Gossett*, however, showed a move away from the Courts’ willingness to question conduct within the House. The basis for the decision does not fit neatly within the parameters established in *Stockdale v Hansard*. In *Bradlaugh*, the Stephen J held that matters concerning the internal workings of the House were matters for the House and not the Court. Therefore, the Court would not exercise jurisdiction, even if it may have held jurisdiction under the test in *Stockdale*. Joseph observes that *Bradlaugh* “defined the courts’ self-denying rule of jurisdiction”, which meant that remedies for wrongs done persons in the House or in the course of the House’s proceedings were to come from the House, not the courts.⁶¹

On the question of the exercise of punitive powers within parliament, *Fielding v Thomas* provides a clear example of the Courts’ role in determining the enforcement of parliamentary privilege. In that case, the Privy Council explained that colonial legislatures did not have the inherent “power to punish the breach[es] of [its] privileges by imprisonment or committal for contempt without the express authority

⁶⁰ Joseph, above n 1, 394.

⁶¹ In contrast, the High Court in *Awatere Huata v Prebble* (19 February 2004) HC AK CIV-2003-404-7014 Gendall J explained at para 28 that, contrary to *Bradlaugh v Gossett*, “[m]embers including leaders of political parties are members of Parliament, who are accountable to Parliament for what they do so far as regards the efficiency, policy and workings of Parliament and in that respect Parliament is the only Judge. But where they are acting pursuant to legislation they are responsible to a Court of justice for the lawfulness of what they do and of that the court is the only Judge”.

from imperial legislation [which did possess such punitive powers]”.⁶² Although New Zealand had in fact pre-empted the effect of this decision (and its antecedent)⁶³ in 1865,⁶⁴ the courts’ role as determining the existence of parliamentary privilege are clear.

In the fifteen years to 2004 the New Zealand judiciary has been asked to revisit the parameters of parliamentary privilege, most prominently in the area of defamation law and its interaction with Article 9. The Article 9 issues and wider questions of proceedings in parliament will be considered below, but in setting the scene for the rest of the paper the cases of *Prebble v TVNZ*,⁶⁵ *Awatere Huata v Prebble*,⁶⁶ and *Jennings v Buchanan* are instructive in articulating the modern tension between Parliament’s and the Court’s jurisdiction.

In *Prebble*, the Browne-Wilkinson LJ reinforced the position in *Stockdale v Hansard* and *Bradlaugh v Gossett* that,⁶⁷

The Courts and Parliament are both astute to recognise their respective constitutional roles. So far as the Courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges.

Jennings v Buchanan affirmed those views, the Privy Council careful to emphasise that,⁶⁸

It is, again, an important principle that the legislature and the courts should not intrude into the spheres reserved to another. Thus if, as may happen, the absolute privilege of Parliament [under Article 9] is abused, procedures exist [...] to afford a

⁶² *Fielding v Thomas* [1896] AC 600, 609 (PC) Lord Halisbury LC cited in Joseph, above n 1, 390.

⁶³ *Kielley v Carson*, above n 53.

⁶⁴ Privileges Act 1865.

⁶⁵ *Prebble v TVNZ*, above n 33.

⁶⁶ *Awatere v Prebble*, above n 55.

⁶⁷ *Prebble v TVNZ*, above n 33, 7 approved in *Jennings v Buchanan*, above n 56.

⁶⁸ *Jennings v Buchanan*, above n 56, para 18 Lord Bingham (emphasis added).

remedy to a person [...], and it is not the function of the court to provide one.

Only slightly more recent, and certainly directly relevant to the jurisdiction question, is *Awatere Huata v Prebble*.⁶⁹ *Awatere Huata* shares similarities with *Bradlaugh v Gossett* in that the case concerned the internal workings of Parliament, but it is complicated by the fact that the particular internal workings in question were regulated by statute. As Hammond J put it:⁷⁰ “[t]he problem in this case is acute: Parliament enacted a statute going to the heart of its own workings”.

In finding for the appellant, *Awatere Huata*, the Court of Appeal identified that courts recognize the importance attendant on “ensuring the effective functioning of the legislative process [and that] the internal proceedings of the House of Representatives must be scrutinized and supervised by the House itself and not by the courts”.⁷¹ But that limitation on the courts’ jurisdiction did not prevent consideration of the existence and determination of the scope of any privilege; deference would only arise where a privilege, once determined, revealed an exclusive jurisdiction in the House.⁷² Nor does it prevent the court applying a statute in those circumstances.⁷³ However, the Court of Appeal went on to consider the scope of *Bradlaugh v Gossett* and identified that the court in *Bradlaugh* did not

⁶⁹ *Awatere v Prebble*, above n 55. At the time of writing, this case was on appeal to the Supreme Court of New Zealand, however, it appears that the question as to whether or not the Courts are competent to inquire into statutorily regulated internal proceedings is not before the Supreme Court: see Supreme Court Minute in *Prebble v Awatere Huata* (25 August 2004) SC CIV 9/2004 Gault and Blanchard JJ. Therefore, the Court of Appeal’s judgment on this point appears to be authority in New Zealand.

⁷⁰ *Awatere v Prebble*, above n 5, para 148 Hammond J.

⁷¹ *Awatere v Prebble*, above n 55, para 51 McGrath, Glazebrook and O’Regan JJ.

⁷² *Awatere v Prebble*, above n 55, para 51 McGrath, Glazebrook and O’Regan JJ.

⁷³ *Awatere v Prebble*, above n 55. Compare *R v Graham-Campbell, ex p Herbert* [1935] 1 KB 594 (EWCA).

state the internal proceedings rule in absolute terms. The Court concluded that it,⁷⁴

Can and should consider and determine the scope of [the relevant] privilege and thus the limits of the area that concerns the internal procedures of the House and is the subject of privilege. [The Court] will also determine rights touching on questions of privilege that are asserted outside and independently of the House.

The passage is interesting in that the Court appeared to view privileged proceedings as a subset of a range of internal House proceedings, what might be coined the “narrow view” of proceedings (proceedings where the Court entertains the possibility of jurisdiction) and the “wide view” (where the Court defers jurisdiction on the principle articulated in *Jennings v Buchanan*,⁷⁵ above). In combination with the fact that the relevant statute put internal decision making power in the hands of a body that is not ordinarily covered by privilege,⁷⁶ the Court found that it had jurisdiction to review non-privileged internal proceedings.

The cases surveyed underlie the common position that there are some matters over which the House has exclusive cognizance. But what should also be clear is that the courts are competent to consider the nature and scope of the matters that make up the House’s exclusive jurisdiction. For members, this is an aspect of parliamentary privilege

⁷⁴ *Awatere v Prebble*, above n 55, para 59 McGrath, Glazebrook and O’Regan JJ.

⁷⁵ *Jennings v Buchanan*, above n 56, para 18 Lord Bingham.

⁷⁶ Namely, the leader of the relevant political party. This, the Court of Appeal explained, was a case of admission of the Court’s jurisdiction by implication, however, that view appears to go against authority in *R v Graham-Campbell, ex parte Herbert* [1935] 1 KB 594. *R v Graham-Campbell* concerned the issue of whether or not the Court had jurisdiction to consider the application of a liquor-licensing statute within the precincts of the House. It was held that unless the relevant statute expressly admits the Court, the application of the statute is the sole domain of the House. Whilst *R v Graham-Campbell* was cited by the Court in *Awatere Huata* (at para 55), its implications, especially on the important issue of express admission of Court’s jurisdiction, is not discussed. It is perhaps more surprising, therefore, that the issue is not on appeal to the Supreme Court: *Prebble v Awatere Huata*, above n 69, Gault and Blanchard JJ.

that raises cause for concern, as a Deputy Prime-Minister Dr Michael Cullen speech in the House implies:⁷⁷

There is an increasing tendency to challenge the exercise of [Parliamentary] sovereignty. This comes not just from some radical Māori, who argue that sovereignty has never been legally acquired in New Zealand; it also comes from within the heart of New Zealand's judiciary. Our own Chief Justice has put the challenge...where she has suggested [that] an untrammelled freedom of Parliament does not exist.

There is interesting academic literature that can be used to back such a view—by no means all of it recent or of a radical bias—but it is not a view that I accept. *In my view, we are approaching the point where Parliament may need to be more assertive in defence of its own sovereignty, not just for its own sake but also for the sake of good order and government.*

In considering parliamentary privilege reform options therefore it is important to be cognizant of the tension between the Courts' "definitional jurisdiction" and the House's "application jurisdiction". Parliament might well benefit from turning its collective mind to the question of whether codification would be to its advantage, given that the contours of privilege are shaped not by Parliament (other than by statute), but by the Courts.⁷⁸ One thing is certain, "a system [...] under which the [parliament does] not regard certain regulatory statutes as applying to [it], but voluntarily submit to their application, is hardly satisfactory".⁷⁹

Before turning to the issues concerning matters from which the Courts are precluded, it is helpful to note that within the areas the Courts determine to be privileged, a difficulty arises in obtaining a

⁷⁷ (24 May 2004) NZPD 13191-2.

⁷⁸ In what appears to be a striking irony, the Courts can never be in breach of Parliament's privileges so long as it holds the definitional wand. That the New Zealand House of Representatives has never considered this aspect of privilege to be of any concern is surprising. This is a matter traversed in VI D 2, below.

⁷⁹ Campbell, above n 1, 188.

remedy for breaches of those privileges. *Ashby v White* and *Paty's Case* illustrate the point starkly.⁸⁰ Following the decision in *Ashby* that a vote was an enforceable "property" right at law as against a parliamentary returning officer, the plaintiffs in *Paty's Case* brought an action against the returning officers for failing to accept their votes. The plaintiff's were held in contempt and the Court of Queens Bench denied it had the jurisdiction to investigate the return of writs. Although the issues at the centre of *Paty's Case* are regulated by statute in New Zealand,⁸¹ the significant problem concerns how plaintiffs that have been wronged by the House obtain a remedy. If the Courts are unwilling or unable to exercise jurisdiction over a wrong so committed, that leaves the House as the sole arbiter of remedial justice. That result may be acceptable when a wider view is taken of the necessity of an uninhibited Parliament, and it is not necessarily the case that no remedy will be forthcoming,⁸² but it is an issue that must be addressed in the reform formula when determining appropriate jurisdictional and procedural measures for meeting citizens' reasonable expectations of justice.

B Article 9: Proceedings, Questioning, and Places Out of Parliament

1 Proceedings in Parliament

The historical ordeal described above provides the backdrop to the interpretation of Article 9, in particular those elements concerning "proceedings in parliament" (over which the court denies it has jurisdiction in most cases),⁸³ freedom of speech,⁸⁴ questioning or

⁸⁰ *Paty's Case*, above n 32: facts summarised from Joseph, above n 1, 393.

⁸¹ Electoral Act 1993, Part 6.

⁸² The decision to provide a remedy will lie with the House.

⁸³ But it does assert jurisdiction in assault cases: *Bradlaugh v Gossett*, above n 52, 283 in Campbell, above n 1, 11. For discussion on assaults in the New Zealand House, see *Report of the Privileges Committee on the Question of Privilege referred on 12 March 1997 relating to the allegation that on Wednesday, 5 March 1997, the Honourable Winston Peters assaulted the Honourable John Banks on*

impeaching things said and done in parliament, and the places in which things said or done in parliament may not be questioned or impeached. The following discussion considers how Article 9's interpretation raises legal problems that appear to be best resolved by recourse to carefully explicated codification.

Beginning with proceedings in parliament, a core privilege is that "[p]arliament is sovereign over its own business",⁸⁵ namely that business falling within proceedings over which it has not conferred jurisdiction in another body nor over which the court has asserted jurisdiction. That said, "there is no comprehensive definition of the term 'proceedings in Parliament', although it has often been recommended there should be".⁸⁶ An important issue, to the extent that the court's reticence in examining proceedings in parliament can leave affected persons without enforceable causes of action or remedies, is setting the parameters of what constitutes "proceedings" over which Parliament has exclusive cognizance.

It has been suggested that the "mutual respect [the courts and Parliament afford each other in terms of jurisdiction] is important, but there are still grey areas where the position of the boundary is unclear. One instance concerns the meaning of 'proceedings in Parliament' in Article 9 of the Bill of Rights".⁸⁷ Because "Article 9 confers absolute immunity against civil and criminal liability in respect of 'proceedings in Parliament', it is important for members and for the public to know what activities are covered by the phrase".⁸⁸ The importance of the preceding observation cannot be overstated. A tenet of the law of state

account of Mr bank's conduct in Parliament and thereby committed a contempt of the House [1997] AJHR I 15 A.

⁸⁴ Considered separately in Part IV Article 9 and Freedom of Speech.

⁸⁵ J Griffith and Michael Ryle *Parliament: Functions, Practice and Procedures* (Sweet & Maxwell, Londres, 1989) p 88 in Joint Committee (UK), above n 1, para 23.

⁸⁶ Joint Committee (UK), above n 1, para 12.

⁸⁷ Joint Committee (UK), above n 1, para 25.

⁸⁸ Joint Committee (UK), above n 1, para 97.

and citizen is that there ought to be a remedy for a wrong.⁸⁹ If it is the case that strangers are unable to right the wrongs of things done to them by the House or its members in the course of proceedings in parliament, there is a strong case that strangers should know what the parameters of those proceedings are, along with expecting Parliament to provide some form of meaningful redress. Urgency for reform in this area is exacerbated by the fact that the courts, ruling case by case, cannot necessarily provide the clarity required of an informed public with expectations of certain individual rights as well as expectations of fair and responsible Parliamentary governance.⁹⁰

The Joint Committee recommended that certain parliamentary "proceedings" do warrant the protection of absolute privilege,⁹¹ but certain proceedings do not.⁹² Reinforced by the Article 9's provision of "an altogether exceptional degree of protection [...]",⁹³ the Joint Committee concluded that "[i]n principle this exceptional protection should remain confined to the core activities of Parliament, unless a pressing need is shown for an extension",⁹⁴ and that statutory expression was the only satisfactory answer.⁹⁵ That conclusion is not

⁸⁹ *Simpson v A-G* (Baigent's Case) [1994] 3 NZLR 667 (CA).

⁹⁰ For discussion on changing human rights expectations and the role that government plays in respect of those expectation see Jack Beatson and Stephen Grosz "The Impact of the Humans Rights Act on Private Law: A Knight's Move" (2000) 116 LQR 380 and Lord Hoffmann "Human Rights and the House of Lords" (1999) 62 MLR 159.

⁹¹ Joint Committee (UK), above n 1,; paras 113-114, "preparatory drafts and notes" and advice relating to parliamentary speeches; para 115, 118 "preparatory material [including research work] related to a member's participation in debate or in committee"; paras 119-123 "keeping the registers [of members interests] and hence the registers themselves" (compare *Rost v Edwards* [1990] 2 QB 460); para 126 strangers' complaints "taken up for investigation, [...] partakes of the nature of a parliamentary proceeding".

⁹² Joint Committee (UK), above n 1,; paras 103-111, 112, "communications between members and ministers"; para 115, 118 "material [including research work] which has no direct connection with proceedings in Parliament is not protected"; para 126 until strangers' complaints are "taken up for investigation, [they are not in] the nature of a parliamentary proceeding".

⁹³ Joint Committee (UK), above n 1, para 110.

⁹⁴ Joint Committee (UK), above n 1, para 110.

⁹⁵ Joint Committee (UK), above n 1, para 128-9.

alien to privilege reformers in New Zealand,⁹⁶ and obviously not in Australia.⁹⁷

The Joint Committee recommended that “proceedings” should “[c]over[s] debates in parliament, including motions, parliamentary questions and answers thereto.⁹⁸ They [should] cover also the proceedings of parliamentary committees⁹⁹ [and] the tabling of documents and petitions once presented to a house”.¹⁰⁰ On the other hand, the Joint Committee explained that there was no basis for protection in relation to caucus meetings,¹⁰¹ nor “[r]epublication or effective repetition by a member of what he or she has said in the course of Parliamentary debate”.¹⁰² The Joint Committee, however, expressed areas of doubt, in particular, “the status of members correspondence, [including] their correspondence with ministers”,¹⁰³ such as a letter by a member to a minister concerning the affairs of a statutory body is not a proceeding in parliament.¹⁰⁴

An obvious problem, therefore, is the doubt surrounding what constitutes an absolutely privileged proceeding with the meaning of Article 9. International jurisdictions have codified or recommended codification of “proceedings in parliament” and it has to be said that such a time has come for New Zealand. That different High Courts have struggled to agree on this element of section 9 should serve as ample warning that not all is certain.¹⁰⁵ Codifying proceedings also

⁹⁶ Parliamentary Privileges Bill 1994, Explanatory Note Introduction, 4-5.

⁹⁷ Joint Select Committee (Cth), above n 1.

⁹⁸ Joint Committee (UK), above n 1, para 100; Campbell, above n 1, 12.

⁹⁹ Campbell, above n 1, 12.

¹⁰⁰ Campbell, above n 1, 12.

¹⁰¹ *Rata v A-G* (1997) 10 PRNZ 304 (HC) overturned in *Awatere v Prebble*, above n 55, para 64 McGrath, Glazebrook and O’Regan JJ; see also David McGee “Parliament and Caucus” [1997] NZLJ 137.

¹⁰² *Jennings v Buchanan*, above n 56; *Hyams v Peterson* [1991] 3 NZLR 648 (CA).

¹⁰³ Campbell, above n 1, 12.

¹⁰⁴ 591 HC Deb 334 (8 July 1958) referred to in Joint Committee (UK), above n 1, para 105 in Campbell, above n 1, 12.

¹⁰⁵ *Solicitor-General v Smith* [2004] 2 NZLR 570 (HC) and *Rata v Attorney-General*, above n 101.

the advantages Parliament in that the House can agree on what it believes ought to be protected proceedings for the purposes of Article 9 or its equivalent.

2 “Impeaching” and “Questioning”

(i) Impeaching, Questioning, and Crossing the Rubicon¹⁰⁶

The *Concise Oxford English Dictionary* defines the modern meaning of “impeached” as “call[ing] into question the integrity or validity of (a practice)”; “charg[ing] with treason or another crime against the state”.¹⁰⁷ The 17th century meaning includes “imped[ing], hinder[ing], prevent[ing]”.¹⁰⁸ The Joint Committee concluded that “the meaning of ‘impeach’ is not clear: possible meanings include hinder, challenge and censure”.¹⁰⁹ On the meaning of the word “questioned” in Article 9, James Allan has argued, in response to the decision in *Prebble v Television New Zealand*, that proving what is said in parliament as a matter of historical fact does involve a calling into question of what was said.¹¹⁰

The importance of the “questioning” and “impeaching” inquiry lies in establishing the bases upon which the House may find a breach of privilege or contempt of Parliament – acts done that fall within the Article 9 prohibition will prima facie give rise to breaches of privilege, upon which a claim for contempt may be established – as well as establishing the limits on what aspects of members’ speech, debates, papers, and conduct may be examined and questioned in a court of

¹⁰⁶ Bryan Horrigan in his article “Is the High Court Crossing the Rubicon? – A Framework for Balanced Debate (1995) 6 PLR 284, 291 describes the “Rubicon” in the title to this section as “[t]he dividing line between legislative and judicial law-making roles [which are] often more fuzzy than bright”.

¹⁰⁷ *Oxford Concise English Dictionary* (10 ed, OUP, Oxford, 1999) 711.

¹⁰⁸ *O’Chee v Rowley* (1997) 150 ALR 1999 in Campbell, above n 1, 16.

¹⁰⁹ Joint Committee (UK), above n 1, para 36.

¹¹⁰ James Allan “Parliamentary Privilege in New Zealand” (1996) 7 Cant ULR 324, 327-8. Allan submitted that confirming the statement in the House is to extract information from that statement, which in turn meets the definition of questioning for the purposes of Article 9.

law. The following two examples illustrate how the courts have finessed the literal words of Article 9 so that its jurisdiction to examine parliamentary proceedings, albeit in a restrictive sense,¹¹¹ is maintained.

(ii) Hansard as an Interpretative Aid in the Courts

It is true that Article 9 “[r]estricts the uses which may be made in courts and other tribunals of evidence of parliamentary proceedings”,¹¹² however, that restriction is not absolute – parliamentary proceedings may be employed as an interpretative aid. In the United Kingdom, the landmark case *Pepper v Hart* decided that “the purpose [of considering Parliamentary debate about a bill (which is now a statute) is] to give effect to, not thwart, the intentions of Parliament”.¹¹³ That case reflected an already established practice in New Zealand courts of referring to parliamentary speeches to inform the courts interpretation of an Act.¹¹⁴ The *Pepper v Hart* rule is entirely justifiable on the basis that the courts are respecting parliament’s sovereign law-making authority and doing what is within its power to give effect to that sovereign intention.

(iii) Reports and Critique of Speeches and Debates in the House

“Article 9 has been held not to prohibit reception of evidence to prove no more than the occurrence of events in Parliament, including what has been said in the course of parliamentary proceedings”.¹¹⁵ The Judicial Committee of the Privy Council in *Prebble v TVNZ* said that the limitations on questioning concerned only cases where it was sought to assert that “action[s] or words [in the House or proceedings]

¹¹¹ Campbell, above n 1, 88.

¹¹² Campbell, above n 1, 88.

¹¹³ *Pepper v Hart* [1993] 1 All ER 1132, 1157 (HL) Lord Browne-Wilkinson.

¹¹⁴ *Pepper v Hart*, above n 113, Lord Browne-Wilkinson.

¹¹⁵ *Prebble v TVNZ*, above n 33, 10 (PC) Lord Brown-Wilkinson.

were inspired by improper motive or were untrue or misleading".¹¹⁶ Examination of statements otherwise from this purpose are not breaches of Article 9.¹¹⁷ *Prebble* is troubling in that it "frustrates the search for truth in political matters and it also inhibits robust criticism of the conduct of those who have participated in parliamentary proceedings".¹¹⁸ That is because parliamentarians may attack, from the floor of the House, any person that might wish to rigorously challenge members' actions.

The consequence of the judgment in *Prebble* and its progeny is that cases concerning Article 9 issues, where "the purpose is to challenge the truth of statements made under parliamentary privilege, or to question the motives of the author of the statement, the evidence must be excluded".¹¹⁹ Nor can a litigant adduce evidence of what was said in parliamentary proceedings to refute other evidence given in court.¹²⁰ But, "evidence of parliamentary proceedings to show the meaning of prior statements not protected by parliamentary privilege"

¹¹⁶ *Prebble v TVNZ* [1995] 1 AC 321, 337 (PC) Lord Browne-Wilkinson (alt cit) in Campbell, above n 1, 88. Article 9 "does not preclude reception by a court of what a member of parliament said in the course of a parliamentary proceedings when that evidence is adduced in solely for the purpose of showing the meaning of a later statement in which the member signified that he or she adhered to what had been said under parliamentary privilege": Campbell, above n 1, 95, fn 38 citing *Buchanan v Jennings* [2002] 3 NZLR 145 (CA). See also *Hyams v Peterson*, above n 102; *Cushing v Peters (No 3)* [1996] DCR 322 (DC).

¹¹⁷ *Pepper v Hart*, above n 113, 1156-7 Lord Browne-Wilkinson. Compare *R v Secretary of State for Trade; ex parte Anderson v Strathclyde Pty Ltd* [1983] 2 All ER 233 and Parliamentary Privileges Act 1987 (Cth), s 16(3). The decisions in this area have not been consistent, turning to a large extent on the semantic nuances of what it means to "question" or "impeach". For such a nuanced discussion see Allan, above, n 110; An interesting aspect of the *Prebble* case is that the Privy Council's approach still requires the court to inquire into the motives behind the words or actions because in order to determine whether the motives of a word or action is being questioned, you have to look at the meaning or motive of the statement's speaker to compare it to the reason for which the statement is adduced as evidence: Campbell, above n 1, 89.

¹¹⁸ Campbell, above n 1, 109.

¹¹⁹ Campbell, above n 1, 17.

¹²⁰ *Prebble v TVNZ*, above n 33; *R v Murphy* (1986) NSWLR 18, 34 (SC NSW) Hunt J in Campbell, above n 1, 91. This issue also affects access to things said in the House for the purpose of judicially reviewing Ministerial decision-making: Joint Committee (UK), above n 1, 55, 59.

is also permissible under Article 9.¹²¹ Fortunately, the Courts have dampened the damage that can arise from persons questioning or criticizing members, especially in cases where members have sought to sue strangers in defamation.¹²² Where the substantive issue cannot be fully or fairly decided without reference to the excluded evidence in House proceedings, the court can (and should) order a stay of proceedings,¹²³ subject to the House's power to waive its privilege.¹²⁴

3 *Any Place Out of Parliament*

In *Jennings v Buchanan* the Privy Council reiterated the Joint Committee's assertion that¹²⁵

To read the phrase [out not to be impeached or questioned in any court or place outside of Parliament] as meaning literally anywhere outside Parliament would be absurd. It would prevent the public and the media from freely discussing and criticising proceedings in Parliament. That cannot be right, and this meaning has never been suggested. Freedom for the public and the media to discuss parliamentary proceedings outside Parliament is as essential to a healthy democracy as the freedom of members to discuss what they choose within Parliament.

The Joint Committee and the Privy Council both recognized that the phrase "any ...place out of parliament" is a product of its time, where the principal concern was "to protect members of parliament against civil and criminal liabilities for things said in the course of

¹²¹ Campbell, above n 1, 95, footnote 38 citing *Peters v Cushing* [1999] NZAR 241 (HC).

¹²² *Lange v Atkinson* [1997] 2 NZLR 22 (HC) and *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

¹²³ *Prebble v TVNZ*, above n 33, 10 Lord Browne-Wilkinson; Enid Campbell "Parliamentary Privilege and the Admissibility of Evidence" (1999) 27 Flinders LR 367, 385.

¹²⁴ Campbell, above n 1, 121.

¹²⁵ Joint Committee (UK), above n 1, para 91.

parliamentary debate”, principally protection from the Crown and more latterly the courts.¹²⁶

Having examined the Parliamentary Privileges Act 1987 (Cth), which prohibits courts and tribunals from questioning parliamentary proceedings, the Joint Committee recommended that “bodies whose proceedings are endowed with a degree of legal solemnity and formality” and who possess a statutory power to administer Oaths are bodies to which Article 9 applies. “Beyond such formal tribunals”, said the Committee, “Article 9 will not apply”.¹²⁷ The Committee concluded that “[b]y this means the boundary can be clearly delineated, with an embargo on examination of parliamentary proceedings in all courts and similar bodies but not elsewhere”.¹²⁸ However, it has been argued that such an approach or definition “fail[s] to take account of the fact that, under today’s conditions, the principle which informs Article 9 of the Bill of Rights 1689 can be violated not only by extra-parliamentary bodies which have power to compel the giving of evidence, but also by bodies which do not possess such power but nevertheless have power to impose sanctions”.¹²⁹ An approach to determining what constitutes a place out of parliament is suggested below.¹³⁰

C An Ordeal into the Future?

Conflicts between Parliament and courts “has been avoided or managed by the exercise of discretion on both sides”.¹³¹ The courts’ interpretation of what it means to “question” and to “impeach” has

¹²⁶ Campbell, above n 1, 10; Clarrie Harders “Parliamentary Privilege – Parliament versus the Courts: Cross-Examination of Committee Witnesses” (1993) 67 ALJ 109, 112-116.

¹²⁷ Joint Committee (UK), above n 1, para 95.

¹²⁸ Joint Committee (UK), above n 1, para 95.

¹²⁹ Campbell, above n 1, 21.

¹³⁰ “An Ordeal into the Future” Part III C, below.

¹³¹ Geoffrey Lock “Parliamentary privilege and the Courts: the Avoidance of Conflict” (1985) PL 64.

shifted over time. That shift reflects a number of values, some of which are embodied in the common law itself, others informed by such statutes as the New Zealand Bill of Rights Act 1990, especially section 14. Parliament has also enacted statutes that limit the extent to which it can claim its proceedings have been called into question or impeached. This shift is a welcome one, but it does raise the issue, one that is a hallmark of the common law generally,¹³² that the shifting sands of what constitutes prohibited questioning creates uncertainty in future cases as to what the Courts will or will not admit.¹³³ In that regard, codification can assist in communicating and clarifying the contours and parameters of prohibited questioning. That said it is equally important to be alive to the consequences of codification.¹³⁴

Whilst the benefits from the courts' interpretation has shifted towards a more modern reflection of fair and proper governance, there is nothing to suggest that the courts wont stay their ground or even retreat from their position in the absence of codified reform. Of course, there is evidence in New Zealand at least to suggest that the courts will not yield,¹³⁵ but nevertheless, it is certainly a latent concern in the absence of statutory clarity and articulation. Moreover, notwithstanding the courts' approach, it is fair to say that the meaning of "impeach" and "question" are in a state of development, "proceedings in parliament" similarly so. Recently overruled cases demonstrate the tenuousness of relying on the courts statements of what constitutes "any place out of parliament".¹³⁶ This latter issue is

¹³² Geoffrey Palmer "The Iowa Sprung Gun Case: A Study in American Gothic" (1971) *Iowa L Rev* 1219, 1248.

¹³³ See Comments of Privileges Committee Chairperson Matt Robson in "Owen Jennings case prompts look at defamation" (24 September 2004) <<http://stuff.co.nz/stuff/0,2106,3044146a6160,00.html>> (last accessed 29 September 2004).

¹³⁴ See below, Part ... for the Australian experience in this area under section 16(3).

¹³⁵ Sian Elias "Sovereignty in the 21st century: Another spin on the merry-go-round" (2003) 14 *PLR* 148, 155, 162.

¹³⁶ *Rata v A-G*, above n 101 overruled *Awatere v Prebble*, above n 55, McGrath, Glazebrook and O'Regan JJ.

pertinent to the discussion of contempt, below, in the light of the House's punitive powers, which includes conduct that does "question" or "impeach" things said in the House. New Zealand does not have the same constitutional freedom of political speech that is embodied in the Australian Constitution,¹³⁷ although *Lange v Atkinson* and the Defamation Act 1992 provide some measure of protection.¹³⁸

As regards Article 9, the courts have hitherto approached the provision as a parallel analysis of claim to jurisdiction and determination of claims that Article 9 precludes. As with the strict jurisdictional questions traversed in the previous section, the courts hold the brush that paints the contours of Parliament's claim to privilege under the Article 9, principally through the instrument of interpretation.¹³⁹

The courts' approach to the determination of what amounts to legally relevant questioning under Article 9 has been a process of ever-more increasing inroads into the absolute protection Article 9 has afforded and in particular speeches in the chamber; for some Members, this is an issue for concern.¹⁴⁰ For the purposes of receiving evidence, it is of obvious benefit to the court to be able to access and consider speeches in the House, as part of the statutory interpretation process or otherwise fighting Members' wanton defamation of strangers outside under House the illusion of an internal proceeding. It should be further noted that in seeking to clarify the parameters of Article 9, through legislation such as a new Privilege Act, the courts are not precluded from (nor should they be expected to be) drawing

¹³⁷ Campbell, above n 1, 7, 11, 222.

¹³⁸ Defamation 1992, ss 16 and 18.

¹³⁹ *Mangawaro Enterprises Limited v A-G* [1994] 2 NZLR 451 (HC); See generally on the question of interpretative review *Bulk Gas Users Group Ltd v A-G* [1983] NZLR 129 (CA) and *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208 (HL).

¹⁴⁰ Robson, above n 133.

guidance from the constitutional principles it currently employs.¹⁴¹ Indeed, the combination of constitutional principle as a guide to the interpretation of a Privilege Act will ensure the continued recognition that Parliament too is subject to the rule of law.

The New Zealand Bill of Rights Act 1990 should not be forgotten in this connection. The courts have become adept at balancing wider constitutional and public interests against individual interests. So it would be with codification of privilege. Codification also has the advantage of enabling Parliament to put a stake in the sand as to what it views as proceedings and matter that should be off limits from the court. It is certainly capable to do so, and the Australian situation is an example of this. Section 16(3) of the Parliamentary Privilege Act 1987 (Cth) provides:

In any proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of

- (a) questioning or relying on the truth, intention or good faith of anything forming part of those proceedings in Parliament;
- (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
- (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament

Section 16(3) sets the parameters of where New Zealand law is now. Indeed, the interpretation of section 16(3) in the Australian case *Laurance v Katter*¹⁴² is very similar to the position reached in *Jennings v Buchanan*.¹⁴³ The former case concerned allusion to and confirmation outside the House of comments made in the House,

¹⁴¹ Elias, above n 135.

¹⁴² *Laurance v Katter* (1996) 141 ALR 446 (CA Qld).

¹⁴³ *Jennings v Buchanan*, above n 56.

without repeating the actual words in question. It was held that the statements in the House were admissible as evidence in an action against the Speaker for its confirmation outside the House. But as with the New Zealand position, the evidence must be tendered only from proving as a fact what was said in the House, and not to question the motives for its expression.¹⁴⁴ In any event, section 16(3) appears to be a sound solution to defining the parameters of what "questioning" or "impeaching" means in Article 9.

On the question of what constitutes places out of parliament in which questioning or impeaching is precluded, it seems that combining the Joint Committee approach with that contained in its Australian critique is appropriate. That solution turns, though, on whether non-parliamentary bodies, other than citizens or the media should question the veracity of things said in parliament. Given that the historical position under Article 9 had been to prevent the Crown using the courts to bring Members to account for things said in the parliament, it seems correct that the bodies in which questioning should be precluded be those bodies of a judicial or quasi-judicial nature and include those in which the compelling of evidence is necessary for determinations that question or impeach the House and its members.

IV ARTICLE 9 AND FREEDOM OF SPEECH

A Freedom of Speech: A Constitutional Imperative?

Article 9 provides:

The freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.

¹⁴⁴ *Laurance v Katter*, above n 142, 447. See also *NSW Branch of Australian Medical Association v Minister for Health and Community Services* (1992) 26 NSWLR 116. In Australia, some have argued that the decision in *R v Murphy*, above n 120, "achieves a better balance than that achieved by section 16(3)": Campbell, above n 1, 108.

Speeches conducted on the House's debating chamber or comment passed in the course of select committee proceedings are absolutely privileged – Article 9 confers on Members absolute immunity for things said or done in the course of parliamentary proceedings.¹⁴⁵ In addressing the importance of free speech in Parliament, the Joint Committee reproduced the House Commons Procedure Committee of Session finding that:¹⁴⁶

We reiterate that the privilege of freedom of speech is an essential protection for members in carrying out their duties. There is no point in this privilege unless it provides guarantees against attempts from outside to control what members choose to say in the House. However, privilege carries with it responsibilities as well as rights; and those responsibilities have to be exercised within the rules laid down by the House and in conformity with the standards it expects of its members. Irresponsible or reckless use of privilege can cause great harm to outside individuals who enjoy no legal redress and, in some circumstances, could be prejudicial to the national interest. The strongest safeguard against so-called abuses is the self-discipline of individual members. This means, for instance, that a member should take steps, before making a potentially damaging accusation against a named individual, to ensure not only that evidence exists but that it comes from a normally reliable source. This does not imply that a member needs to have evidence that would satisfy a court, but that he should act on the basis of something firmer than mere rumour or supposition.

“[T]he constitutional principle [Article 9] encapsulates protect[s] members of [Parliament] from being subjected to any penalty, civil or criminal, in any court or tribunal for what they have said in the course of proceedings”.¹⁴⁷ The historical basis for the privilege was driven by parliament's need to be protected from the Crown. More latterly,

¹⁴⁵ Campbell, above n 1, 51.

¹⁴⁶ House of Commons Procedure Committee of Session HC (1988-89) 290 in Joint Committee (UK), above n 1, para 224.

¹⁴⁷ Campbell, above n 1, 10; Joint Committee (UK), above n 1, para 37; Lock, above n 131.

although not exclusively so,¹⁴⁸ freedom of speech has been viewed as an important principle that goes wider than immunity from suit to a reflection of democratic values that may not have been readily apparent at the time of the Bill of Rights passing.¹⁴⁹

Notwithstanding the free speech imperative, it should be borne in mind that Article 9 has been subject to a variety of qualifications.¹⁵⁰ We have seen in the discussion in the previous Part of this paper that what comprises “proceedings” and what amounts to “impeachment” or “questioning” are vexed issues, although somewhat clarified in recent case law. Our concern now is with uncovering the nature of the relevant interests at stake under a law that permits absolute immunity for things said in Parliament, the governance regime around that immunity, and the rights of recourse for those suffering the wrong end of a free speech salvo.

In *Prebble v TVNZ*, Browne-Wilkinson LJ explained Article 9 and the underlying interests at stake:¹⁵¹

[F]irst, the need to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information; second, the need to protect freedom of speech generally; third, the interests of justice in ensuring that all relevant evidence is available to the courts. Their Lordships are of the view that the law has been long settled that, of these three public interests, the first must prevail. But the other two public interests cannot be ignored.

Although *Prebble* was a defamation case, the principle that the public interest in a free and uninhibited legislature is subject other

¹⁴⁸ Matthew Harris “Sharing the Privilege: Parliamentarians, Defamation, and Bills of Rights” Auck U LR 45, 47.

¹⁴⁹ *Prebble v TVNZ*, above n 33, 10-11 (PC) Lord Browne-Wilkinson.

¹⁵⁰ Joint Committee (UK), above n 1, para 37; Campbell, above n 1, 11.

¹⁵¹ *Prebble v TVNZ*, above n 33, 10-11 (PC) Lord Browne-Wilkinson, approved *Jennings v Buchanan*, above n 56, para 10 Lord Bingham. For a detailed discussion of this *Prebble v TVNZ*, see Patricia Leopold “Free Speech in Parliament and the Courts” (1995) LS 204.

important public interests is generally applicable and a helpful aid in interpreting Article 9.¹⁵² To that end, Lord Browne-Wilkinson ascribes Article 9 with underlying policy considerations, articulating certain defined interests that Article 9 contains, and locating those within a *hierarchy* of *relative* importance, rather than *absolute* importance.

But that is not the whole answer, and determining the parameters of what Article 9 proscribes requires an analysis of the important cases in which it has been squarely before the court. The courts' interpretation of Article 9 should serve as a guide for how a reform of that provision might progress, in the context of wider privilege reform. If it is concluded that the courts are making too large an inroads into parliamentary proceedings and questioning matters properly the domain of the legislature, then codified reform must look to push back the courts' assault.

B Freedom of Speech as a Sword of Oppression

Members may make statements that are "offensive or highly defamatory or unreasonably invasive" and without foundation.¹⁵³ In particular a speech delivered by the Honourable Winston Peters on 22 March 1994 has served as a touchstone for commentators' and members' concerns that the absolute immunity Article 9 affords to speech in the House is open to abuse.¹⁵⁴ Peters' was one example

¹⁵² The public interest in an absolutely privileged freedom of speech in debate is not supported by everyone: Brett Walker "Has Lange Really Settled the Common Law?" (1997) 8 PLR 16, 21.

¹⁵³ Campbell, above n 1, 51. This is a matter about which concern has been expressed in Australia: Joint Select Committee (Cth) para 5.35.

¹⁵⁴ The Hon Winston Peters said in the course of debate that "in the past week we have witnessed the most telling example of political and big business corruption ever to rear its vile head in this country. I am talking about the activities of the European Pacific Group and people in positions of power to aid and abet international money-laundering criminals in a massive cover-up of crimes" 539 NZPD 567 (22 March 1994) reproduced in Harris, above n 148. See also Palmer, above n 14 and Richard Best "Freedom of Speech in Parliament: Constitutional Safeguard or Sword of Oppression?" (1994) 24 VUWLR 91.

giving rise to a wider concern “that individuals were increasingly being named in the House and attacked by MPs and there was no right of reply in respect of such attacks”.¹⁵⁵ Peters has argued, however, that Article 9 affords a legitimate avenue for members to air concerns that have either been ignored or improperly dealt with in the other branches or government forums; in some cases naming is appropriate or necessary.¹⁵⁶ A decade later, Peters appears to maintain that view.¹⁵⁷ In Australia, untrue and unfounded, “‘scurrilous’, ‘scandalous and shameful’” remarks have been made about strangers in the course of Parliamentary speeches and debate.¹⁵⁸ In the United Kingdom, misuse of privilege in the nature of highly offensive and defamatory statements about strangers is not novel.¹⁵⁹

As things stand in New Zealand, there is sufficient justification for the freedom of speech in Parliament,¹⁶⁰ but the price that New Zealand’s liberal democracy pays is the denial of an individual right to seek damages for harm to reputation as a result of words spoken in Parliament.¹⁶¹ That price must be conditioned. A right to have one’s side heard in a timely fashion and in response to the Member’s speech is a fair compromise in the absence of damages. As the Joint Committee found, “there are occasions when members make observations on identified or identifiable people which may be unfairly critical or even defamatory”.¹⁶² Therefore, the difficulty is that no action may be maintained against such observations because “[t]hose impugned [...] cannot clear their names or obtain compensation [as]

¹⁵⁵ Palmer and Palmer, above n 1, 176.

¹⁵⁶ Hon Winston Peters in Palmer, above n 14, 329-330.

¹⁵⁷ Hon Winston Peters (8 September 2004) PD 15463-15466.

¹⁵⁸ Campbell, above n 1, 51, 69. See also Enid Campbell “Investigating the Truth of Statements made in Parliament: The Australian Experience” [1998] PL 125; Joint Select Committee (Cth) para 5.35.

¹⁵⁹ Joint Committee (UK), above n 1, paras 217-223.

¹⁶⁰ See generally Best, above n 154.

¹⁶¹ *Prebble v TVNZ*, above n 33, 10-11.

¹⁶² Joint Committee (UK), above n 1, paras 218.

the legal immunity afforded by Article 9, [provides] no legal redress".¹⁶³

It is important to remember also that statements may be made in the course of debate or in proceedings with Select Committees.¹⁶⁴ It seems somewhat unfair and unjustifiable that persons summoned before select committees against their will should be subject to ridicule, embarrassment and otherwise undignified treatment by select committee members. As such, the Australian Senate resolved to implement a reply procedure for strangers.¹⁶⁵ In the discussion below under "Regulating Freedom of Speech" the reply procedure is explored in more detail. In New Zealand, Standing Orders of the House of Representatives provide that non-members be offered an opportunity to table a response to the House if they are named in the debating chamber.¹⁶⁶ The opportunity to respond is not, however, in the nature of a right. An "application for response" provides that a stranger referred to in the House may make a submission within three months of the reference being made,¹⁶⁷ and only on the basis that the stranger has "been adversely affected by the reference or to have suffered damage to that person's reputation as a result of the reference".¹⁶⁸

Although the reply procedure does enable disaffected citizens some redress against members that detrimentally affect strangers' interests and liberties, that path of redress is limited and in some cases

¹⁶³ Joint Committee (UK), above n 1, paras 218.

¹⁶⁴ Although not explicitly discussed in this paper, it should be noted that defamatory remarks may be made through strangers petitions to the House (Campbell, above n 1, 53; Enid Campbell "Royal Commissions, Parliamentary Privilege and Cabinet Confidentiality" (1999) UWALR 241) or through Members' tabling of documents on behalf of strangers (Senate Committee of Privileges *72nd Report* June 1998 (PP 117/97) para 2.33).

¹⁶⁵ Senate Resolution 5 Cth PD Senate 17 March 1987, 798 in Campbell, above n 1, 70.

¹⁶⁶ SO 160.

¹⁶⁷ SO 160(2).

¹⁶⁸ SO 160(1)(a).

may not be realized – the Speaker has the sole decision-making power in respect of whether or not a reply should be incorporated in the Parliamentary record.¹⁶⁹ And that reply is unlikely to be read in the House.¹⁷⁰

C Regulating Freedom of Speech

“[T]here are clearly concerns about whether an appropriate balance has been achieved between promotion of freedom of speech within parliamentary forums and protection of countervailing public and individual interests”.¹⁷¹ In answering those concerns, the regulation of free speech in the House can be managed in the following ways. First, the absolute immunity Article 9 affords can be changed to a form of qualified privilege. Secondly, assuming that a change in status of free speech is unlikely, a codification of the basis upon which free speech jurisdiction may be exercise is possible. Thirdly, Standing Orders can be the sole repository of free speech regulation. Once the mechanics are established, the next question is what features the regulatory regime ought to contain. Accepting that Article 9 remains intact, the principal concerns reduce to whether or not a member should: provide advanced notification of an intention to name; provide the basis for allegations that could result in sanctions against the named individual; and provide a reply mechanism for persons suffering at the hands of a free speech salvo. Fortunately, changes effected by Standing Orders in 1995 and 2003 “[has] done much to reduce the risk of abuse of Parliament’s power against citizens”.¹⁷² But those reforms may not go far enough.

It has been suggested that “[n]o form of redress can [...] be provided to those who have suffered detriment by reason of statements

¹⁶⁹ SO 161-163.

¹⁷⁰ SO 163.

¹⁷¹ Campbell, above n 1, 108.

¹⁷² Palmer and Palmer, above n 1, 177.

made about them under parliamentary privilege unless parliaments are prepared to enact legislation which abridges [Members'] freedom of speech".¹⁷³ That suggestion may, however, approach the stick from the wrong end.¹⁷⁴ Because freedom of speech in parliament is of such significant constitutional importance, the better view is to ensure that citizens have an equal freedom in reply. The House also possesses the exclusive jurisdiction to regulate its internal proceedings. Attendant on that exclusive jurisdiction is the power to regulate members' speeches and actions in the House. It has been argued in Australia that the misuse issue exists because of the House's failure to adequately or even turn its mind frequently enough to sanction such misuse.¹⁷⁵ As the New Zealand House of representatives regulates the freedom of speech in debates and other proceedings by means of Standing Orders, a similar criticism can be levelled at its House's failure to manage "abuses".

The reply procedure, which has met with some success in the Australian Senate and is provided for in Standing Orders, was rejected by the United Kingdom Joint Committee.¹⁷⁶

The introduction in this country of such a novel form of parliamentary procedure would suffer from the drawback of raising expectations that could not be fulfilled. Simply to publish the text of any reply would mean that the truth or falsity of the criticism would not be established. No financial redress would be forthcoming. The statement itself, even if published in *Hansard*, would not necessarily attract publicity matching the original comments. Moreover, as a matter of principle, statements by non-members ought not, in any event, to have the benefit of the absolute privilege accorded to the official record of parliamentary proceedings.

¹⁷³ Campbell, above n 1, 85 (emphasis added).

¹⁷⁴ Harris, above n 148, 63-64.

¹⁷⁵ Campbell, above n 1, 67.

¹⁷⁶ Joint Committee (UK), above n 1, paras 220-221.

Whether or not the Joint Committee's criticisms are borne out in truth remains to be seen. It is submitted, nevertheless, that a reply system is better than nothing at all.¹⁷⁷

There are a number of advantages in a reply procedure that mandates a tabling of a concise response in reply. Firstly, it is comparatively costless for all affected persons. Secondly, it is an alternative to imposing punitive measures on the Member speaking the words. The Australian Senate has argued that the process is worth pursuing. The Senate has said that:¹⁷⁸

Given the small numbers of persons availing themselves of the right-of-reply procedure, the question arises whether the procedure is worth pursuing. The committee continues to believe that the procedure is both desirable and successful. Indeed, the committee suggests that the right-of-reply procedure may be applicable in forums other than the Parliament. In its dealings with persons who have perceived themselves to be adversely affected by comment made in the Senate, the committee has found in most cases that the persons have been concerned not with vengeance or apology, but rather to ensure that their voice is heard or views are put in the same forum as the original comments were made.

A number of objections were raised by the Joint Committee in response, including claims that there is no contemporaneity in offending speech and its reply and therefore no relevance attaching to a reply tabled in the House.¹⁷⁹ It has been said that for those that fail to respond using the reply procedure it would be an admission of the truth of the Member's speech.¹⁸⁰ Additionally, the reply procedure would tend to give the appearance of passing judgment on Members, although the merit in this objection is difficult to find given that it is

¹⁷⁷ A good case can be made, in the light of the tendencies to use freedom of speech as an alternative court of inquiry, to have Standing Orders contain provisions of such punitive magnitude to ensure that members that make serious allegations without sufficient basis. The matter would be one for the Privileges Committee, which would determine whether or not the allegations had both any foundation and otherwise made in the public interest: Campbell, above n 1, 67.

¹⁷⁸ Senate Committee, above n 1 para 3.20, 22.

¹⁷⁹ Joint Committee (UK), above n 1, para 63.

¹⁸⁰ Joint Committee (UK), above n 1, para 62 and 63.

the Member passing unsolicited judgment on the stranger.¹⁸¹ A fourth argument against the reply procedure is based on the more spurious foundation that strangers “should not” get Members’ absolute privilege and that in any event, strangers (like Members) can use non-House procedures.

The Joint Committee’s concerns about the reply procedure are unfounded. Notwithstanding how “[i]rresponsible or reckless use of privilege can cause great harm to outside individuals who enjoy no legal redress and, in some circumstances, could be prejudicial to the national interest [, t]he strongest safeguard against so-called abuses is the self-discipline of individual members”,¹⁸² those concerns miss the point that no remedy is due a clear and unjustifiable wrong.

In contrast to the Joint Committee position, clause 8 of New Zealand’s Parliamentary Privileges Bill 1994 on the other hand made the following provision:

- (1) No Member shall make an assertion in the House of impropriety, breach of duty, dishonesty, or criminal conduct on the part of a person who is not a Member, unless that Member has given written notice to the Speaker of the proposed assertion.
- (2) The Member shall not make the assertion in the House unless the Speaker has notified the Member that he or she is satisfied that grounds exist for making it.
- (3) It shall be a breach of privilege to make an assertion in breach of this section.
- (4) Where a matter of privilege under this section is referred to the Privileges Committee, the person in respect of whom the assertion was made shall be entitled to make submissions to the Committee.

¹⁸¹ Joint Committee (UK), above n 1, para 63.

¹⁸² Joint Committee (UK), above n 1, para 224.

Clause 8 imposes restrictions on unrestricted freedom of speech.¹⁸³ Secondly, the Speaker must assume a quasi-judicial role to assess the evidence that establish the "grounds" sufficient to support an assertion of impropriety.¹⁸⁴ Thirdly, it is argued that under clause 8 the Speaker becomes Chief House censor, which is not an appropriate role for the Speaker in the context of free and frank parliamentary debate.¹⁸⁵

Given that any form of regulation is a form of censorship on the subject-matter of debate, and given the constitutional importance of the debate and select committee processes, the bases upon which such censorship may be justified must be important. Moreover, the New Zealand Bill of Rights Act reinforces the magnitude of the justificatory censoring device.¹⁸⁶ A pragmatic approach, therefore, involves the recognition of two important values in a manner that obliges each side to concede the expression of those values. On the one hand there is Members freedom of speech, on the other is a citizen's enforceable right to respond to Members' allegations and assertions in the parliament. The rider here: would the right of reply encourage Members to name persons rather than prevent them? The trick will be to ensure that the House's time and energy will be affected by a reply procedure in a way that makes Members think seriously about naming. In addition, the fair balance view required of broadcasters and newspapers would need to be such that in any case

¹⁸³ Introduction to the Parliamentary Privileges Bill 1994, para 17; Harris, above, 60. It should be noted that restrictions are not new and the question is one of degree and binding legal force.

¹⁸⁴ This criticism is not as strong as it first looks when it is borne in mind that existence of matters that result in breaches of privilege are first given life by the Speakers ruling that a matter of privilege stands referred to the Privileges Committee. Such a ruling is certainly in the nature of a quasi-judicial role. The same can be said of the criticism that a matter does have sufficient grounds.

¹⁸⁵ Harris, above n 148, 61-62

¹⁸⁶ New Zealand Bill of Rights Act 1990, s 14. For recent judicial discussion on the importance of freedom of speech see Keith J in *Hosking v Runting* (25 March 2004) CA101/03, paras 178-184.

where a stranger is named, the reply *must* be published in Hansard under absolute privilege.¹⁸⁷

In conclusion, it must be accepted that Parliament will not abrogate its freedom of speech in debate or proceedings in parliament.¹⁸⁸ That reality is reflected in the following passage:¹⁸⁹

We consider it a matter of the utmost importance that there should be a national public forum where all manner of persons, irrespective of their power or wealth, can be criticised. Members should not be exposed to the risk of being brought before the courts to defend what they said in Parliament. Abuse of parliamentary freedom of speech is a matter for internal self-regulation by Parliament, not a matter for investigation and regulation by the courts.

Therefore, Article 9 must "remain on [New Zealand's] statute book or be replaced by more specific provisions".¹⁹⁰ That said disaffected citizens must have a right of reply where they are named in the House. The reply system may be awkward or difficult for the House to work around to ensure that a Member accepts responsibility for and accountability to the House in deciding to name a stranger.

V PARLIAMENT'S PUNITIVE POWERS

A Nature and Extent of the House's Punitive Powers

The privilege of exclusive cognizance or jurisdiction is of "fundamental importance"¹⁹¹ to the operation of parliament:¹⁹²

Acceptance by the executive and the courts of law that Parliament has the right to make its own rules, and has unquestioned authority over the procedures it employs as legislator, is of scarcely less importance than the right to freedom of speech. Both rights are essential elements in parliamentary independence.

¹⁸⁷ Defamation Act 1992, s 16 and 1st Sch.

¹⁸⁸ Campbell, above n 1, 26.

¹⁸⁹ Joint Committee (UK), above n 1, para 40.

¹⁹⁰ Campbell, above n 1, 11.

¹⁹¹ Joint Committee (UK), above n 1, para 13.

¹⁹² Joint Committee (UK), above n 1, para 13.

To that end, parliaments exercise their primary punitive jurisdiction in relation to the application of its privileges:¹⁹³

Parliament's right to regulate its own affairs includes the power to discipline its own members for misconduct and, further, power to punish anyone, whether a member or not, for behaviour interfering substantially with the proper conduct of parliamentary business. Such interference is known as contempt of Parliament. This falls within the penal jurisdiction exercised by each House to ensure it can carry out its constitutional functions properly and that its members and officers are not obstructed or impeded, for example by threats or bribes.

The House maintains its power to punish for contempt through Standing Orders.¹⁹⁴ The House also has common law powers to imprison, which statute expressly preserves,¹⁹⁵ with those powers subject to the issue of a Speaker's warrant.¹⁹⁶ Whilst the origins of the power are obscure,¹⁹⁷ there is no doubt that the power to imprison exists.¹⁹⁸ The manner in which the House might go about drafting and executing the Speaker's warrant appears to be something in which the court has no concern.¹⁹⁹

Although it has been observed that it "would probably be difficult, if not impossible, to demonstrate that houses of parliament which lack penal powers [...] have been less able to carry out their functions effectively than house which do possess such powers",²⁰⁰ ensuring that parliaments possess sufficient tools to ensure persons are

¹⁹³ Joint Committee (UK), above n 1, para 14.

¹⁹⁴ SO 92.

¹⁹⁵ Crimes Act 1961, s 9(a).

¹⁹⁶ Crimes Act 1961, s 315(1).

¹⁹⁷ Joseph, above n 1, 427.

¹⁹⁸ Parliamentary Privileges Bill 1994, Explanatory Note, para 10.

¹⁹⁹ What is particularly surprising, or even extraordinary, is the fact that the less particularised the Speaker's warrant is, the less likely the court will be to intervene: *R v Richards; Ex parte Fitzpatrick and Browne*, above n 59, 162 (HCA) Dixon CJ; *Paty's Case*, above n 32; see generally Joseph, above n 1, 394-5.

²⁰⁰ Campbell, above n 1, 195.

punished for interfering with its effective operation,²⁰¹ or that a parliament has effective means to protect its privileges,²⁰² remains the touchstone for whether or not punitive powers should be retained by the House.²⁰³

The New Zealand Parliament has no inherent power to imprison or fine,²⁰⁴ although it has the power to enact laws that enable it to imprison or fine.²⁰⁵ At present, the House's punitive power arises through section 242 of the Legislature Act 1908, which provides Parliament with all powers, privileges and immunities of the House of Commons as at 1865; that House has inherent punitive power.²⁰⁶ There is some doubt as to whether or not the House possesses a power to fine,²⁰⁷ but this has not stopped the House from doing so in fact.²⁰⁸ As a matter of logic it is not difficult to extrapolate a power to fine from the inherent powers of the House to whatever steps are necessary to ensure its effective functioning; and it is certainly the case that there is no express prohibition on the power to fine.²⁰⁹ High on the agenda of reform efforts has been the codification of the power to fine.²¹⁰

Accepting, then, that the existence of punitive powers is justifiable, the real issue becomes the manner of their exercise. In

²⁰¹ Limon and McKay, above n 1, 108.

²⁰² New Zealand Law Commission, above n 1, para 77.

²⁰³ Standing Orders of the House of Representatives (10 February 2004), SO 394.

²⁰⁴ *Kielley v Carson*, above n 63.

²⁰⁵ Constitution Act 1986, s 15.

²⁰⁶ The punitive powers as they apply in New Zealand have include powers to: imprison; fine; prosecute in the courts; suspend members; exclude from the House and its precincts; censure; expel; and to require an apology - New Zealand Law Commission, above n 1, para 80.

²⁰⁷ See generally Joint Committee (UK), above n 1, para 272; Joseph, above n 1, 437; New Zealand Law Commission, above n 1, para 80.

²⁰⁸ Parliamentary Privileges Bill 1994, Explanatory Note, para 10. See also David Wilson *Questions of Privilege* (Office of the Clerk of the House of Representatives, Wellington, 1999).

²⁰⁹ Palmer and Palmer, above n 1, 176.

²¹⁰ Standing Orders Committee *Report on the Parliamentary Privilege Bill* [1999] AJHR I 18C 5; Standing Orders Committee, above n 1.

1969 former Clerk of the House, Charles Littlejohn, concluded in his LLM thesis that,²¹¹

Though the House of Representatives has always shown itself to be ready to assert and defend its privileges, it has almost invariably realised that the imposition of severe punishments would be followed by strong public reaction. One of the most frequently used warnings, given in the House by members almost throughout its history, has been that the House, being judge in its own cause, should take care not to impose an unjust punishment. Perhaps because this attitude has been held with constancy by the House, it has never restrained itself by making procedural rules to protect the rights of persons brought before it to answer to a charge of breach of privilege or contempt. The power, however, is still there, and there is no certainty that the House will not at some time punish some offender with severity and without due and just investigation.

What makes the existence of Parliament's power to impose punitive sanctions difficult to accept is not so much the existence of the powers themselves, but rather the context that gives rise to their exercise and the adjudication procedures for their administration. Parliament's punitive powers, namely to imprison,²¹² reprimand and admonish,²¹³ and (for members) suspend Members' pay or attendance rights,²¹⁴ arise in a wider variety of circumstances, not all of which are entirely clear or predictable. Punitive powers may arise in response to an otherwise unforeseeable contempt of Parliament, or in response to what might be thought to be legitimate political expression.²¹⁵

²¹¹ Phillip Littlejohn *Parliamentary Privilege in New Zealand* (LLM Thesis, Victoria University of Wellington, 1969) 261.

²¹² Joint Committee (UK), above n 1, para 271.

²¹³ Joint Committee (UK), above n 1, para 272.

²¹⁴ Joint Committee (UK), above n 1, para 272. See generally Timothy Jones "Legislative Discretion and Freedom of Political Communication" (1995) 6 PL 103.

²¹⁵ Unlike Australia, where the "implied constitutional freedom of political communication" restricts the federal parliament from imposing penalties, New Zealanders still face the possibility that the House may deploy its punitive powers in response to adverse or scandalous commentary about members or other parliamentary activity: see Enid Campbell "Contempt of Parliament and the

An uncertain and loose context, however, is not the only issue. Some may argue that the more important issue is the fact that the House is judge and jury in respect of its punitive powers, sitting in judgment over rules from which there is no right of appeal. When such a structure can be used to exert punitive power over strangers, let alone members, a legitimate question must be whether such functions are more properly and solely the domain of an impartial court.²¹⁶ In the case of executive state power, the courts are arbiters of justice in ensuring that the state is using its power in accordance with the rule of law,²¹⁷ namely the law as embodied in statute and common law. There should be no difference, therefore, when Parliament is asserting its powers or immunities – a court presiding over statutorily regulated conduct in Parliamentary proceedings is not foreign to New Zealand's law.²¹⁸

One final but nonetheless important issue is whether Parliament should have a power to imprison at all. Given that New Zealand courts operate under a complex statutory scheme for the administration and execution of orders leading to imprisonment,²¹⁹ it is extraordinary that there remains a residual and loose power to imprison outside the judicial system. It is important, of course, to distinguish between temporary custodial powers, such as the police have, and custodial sentencing powers post-*habeas corpus*, whereas it may be appropriate for the Parliament to retain brief imprisonment power pre-*habeas corpus*; post-*habeas corpus* imprisonment powers must be the domain of the courts.

Implied Freedom of Political Communication" (1999) 10 PLR 196 in Campbell, above n 1, 7 and Palmer and Palmer, above n 1, 176.

²¹⁶ Palmer and Palmer, above n 1, 176.

²¹⁷ *Ali v The Queen* [1992] 2 WLR 357 (PC).

²¹⁸ Crimes Act sections 315; Electoral Act 1993; Electoral Integrity Act 1992.

²¹⁹ Crimes Act 1961; Criminal Justice Act 1985; Sentencing Act 2002.

B Arcane Privileges and Undefined Contempts

“Houses may initiate inquiries to determine whether Article 9 has been infringed and those with punitive powers may decide that offenders should be punished for contempt of Parliament” and its privileges,²²⁰ however, the range of activities that may come within privilege and the scope of the powers and immunities it provides are uncertain.²²¹ The Joint Committee has said that,²²²

Much of the strength of parliamentary privilege, not least the extent to which it is widely recognised and accepted, lies in its antiquity; the same is true of its weaknesses, in particular the obscurity and obsolescence of certain areas of privilege.

In response to an inherent suspicion attendant on antiquated rules the Australian parliament enacted section 4 of the Parliamentary Privileges Act 1987 (Cth), which provides that:

Conduct (including the use of words) [...] constitute[s] an offence [if] it amounts, or is intended or likely to amount to an improper interference with the free exercise by a house or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

In Australia, the threat of legal proceedings falls within section 4,²²³ as does the intended use of privileged materials in non-Parliament disciplinary proceedings.²²⁴

In New Zealand, Parliament has taken steps to remedy claims that contempt of Parliament lacks sufficiently defined contours.²²⁵ In New Zealand, contempt of Parliament includes breaches of the

²²⁰ Campbell, above n 1, 21.

²²¹ Palmer and Palmer, above n 1, 176.

²²² Joint Committee (UK), above n 1, para 9.

²²³ Senate Committee of Privileges *67th Report* (PP 141/97).

²²⁴ Senate Committee of Privileges *72nd Report* June 1998 (PP 117/97).

²²⁵ In the *Report of the Privileges Committee "Question of Privilege Referred on 24 February 1998 Relating to a Reflection on the Speaker"* [1998] AJHR I 15 C, 3 the Committee reflected on the claims that contempts were ill-defined and that the Parliament had taken positive steps to redress the lack of proscriptive boundaries.

House's privileges;²²⁶ contempt that has no source in breach of privilege or no precedent is termed a "constructive contempt".²²⁷ The categories of specific conduct that amounts to a contempt of Parliament are not closed,²²⁸ although the general principle is that it is "any conduct (including words) which improperly interferes, or is intended or likely improperly to interfere, with the performance by either House of its functions, or the performance by a member or officer of the House of his duties as a member or officer".²²⁹

Some attempt has been made in Standing Orders to *outline* rather than *prescribe* acts or omissions that give rise to contempt.²³⁰ The range of contempts is diverse, including: specific contemptuous conduct includes those 21 listed in Standing Order 395;²³¹ "abuse" contempts,²³² being a reflection on the House or its members; media release contempts;²³³ leaked document contempts;²³⁴ and the topical

²²⁶ Joseph, above n 1, 426.

²²⁷ New Zealand Law Commission, above n 1, para 78.

²²⁸ Joseph, above n 1, 427.

²²⁹ SO 394. See generally Limon and McKay, above n 1, 108 in Joint Committee (UK), above n 1, para 264. The Joint Committee at para 264 list 16 specific contempts arising from the conduct of strangers, and three member contempts.

²³⁰ Standing Orders 396 and 397.

²³¹ Standing Order 395: (a) breaches of privilege; (b) deliberately misleading the House; (c) serving legal process in Parliamentary precincts without the Speaker's permission; (d) removing parliamentary papers without permission; (e) falsifying the House's papers; (f) members' failure to declare their interests; (g) members' receipt or solicitation of bribes; (h) accepting fees for business in relation to the House; (i) bribing members; (j) assaulting or threatening members in the conduct of House business; (k) obstructing Officers of the House from doing their duty; (l) reflecting on the character of conduct of the House or its members; (m) misconduct in the presence of a committee; (n) divulging the proceedings of a select committee contrary to Standing Orders; (o) publishing a false or misleading account of proceedings before the House or a committee; (p) failing to attend before the House or a committee after being ordered to do so; (q) failing to obey an order of the House or a summons issued by order of the House or by the Speaker; (r) intimidating, preventing or hindering a witness from giving evidence, or giving evidence in full, to the House or a committee; (s) refusing to answer a question as ordered by the House or a committee; (t) assaulting, threatening or disadvantaging a member on account of the member's conduct in Parliament; (u) assaulting, threatening or disadvantaging a person on account of evidence given by that person to the House or a committee.

²³² See below at p ...

²³³ *Report of the Privileges Committee on the Question of Privilege Relating to an Article Published in the Sunday Star-Times purporting to summarise the contents*

obstruction contempt.²³⁵ These contempts are but a few of a vast range of contempts of parliament that Ultimately, the issue reduces to ensuring that those who might be subject to a contempt of parliament have sufficient advanced warning about what those might be.

One of the great concerns with contempt of parliament, therefore, is the non-exclusive nature of conduct that can amount to contempt, with the attendant punitive consequences that flow from such conduct. That lack of clarity raises concern about the vagueness of the circumstances that has punitive consequences.²³⁶ One of the great principles of the criminal law in New Zealand is that conduct upon which the state's punitive powers may visited ought to be precisely defined and ascertainable in advance – contempt of

of a draft report of the Maori Affairs Committee on its inquiry into the Crown Forestry Rental Trust [2003] AJHR I 17 D; *Report of the Privileges Committee Three Questions of Privilege concerning the disclosure of select Committee Proceedings* [2003] AJHR I 17 A.

²³⁴ For example see *Report of the Privileges Committee on the Question of Privilege referred on 14 August 2001 relating to the release of the report to the Education and Science Committee on its enquiry into the teaching of reading in New Zealand* [2001] AJHR I 17 C and *Report of the Privileges Committee on the Question of Privilege relating to an article published in the Sunday Star-Times purporting to summarise the contents of a draft report of the Maori Affairs Committee on its inquiry into the Crown Forestry Rental Trust* [2003] AJHR I 17 D. Joint Committee (UK), above n 1, para 267.

²³⁵ The Speaker noted recently that "I nevertheless require that journalists act with consideration to everyone using the Parliament Buildings corridors, and, in particular, do not in any way impede the free access of members to the Chamber. In the latter regard, I wish to quote from *Erskine May*, 22nd edition, at page 121: "It is a contempt to molest a member ... while attending the House or coming to or going from it ...". In our own Standing Orders—Standing Order 395(k)—it is specifically made a contempt to obstruct or molest a member. It is therefore necessary for me to re-emphasise the seriousness of obstructing a member in those circumstances": PD 7 April 2004 12431.

²³⁶ The Legislature Act 1908, s 242 merely states that "The [New Zealand] House of Representatives ... and the Committees and members thereof ... shall hold, enjoy, and exercise such and the like privileges, immunities and powers as on the 1st day of January 1865 were held, enjoyed, and exercised by the House of Commons of Parliament of Great Britain and Ireland". Jeffrey Jowell observes that the principle for specific articulate of legality of action by government bodies "cannot be overridden by general and ambiguous words": "Beyond the Rule of Law: Towards Constitutional Judicial Review" (2000) PL 671, 673.

parliament seems to run counter to those principles in many respects.²³⁷

One specific point might be made regarding "abusive contempts". The Joint Committee explained "abusive" contempts as those that "consist of words or actions by any person which [the] House considers disrespectful, insulting or defamatory".²³⁸ The Committee observed that the House of Commons had been inclined to treat any "affronts to its dignity, such as insults addressed to the House or members, and defamations of the House or the Speaker or individual members" as contempts.²³⁹ Like contempt of Court, there is nothing new in an institution of government protecting itself from wanton attacks on its dignity.²⁴⁰ Nevertheless, the competing interest of citizens' ability to make free, frank and honest comment about its government is a hallmark of a strong and open democracy.²⁴¹ To that end, "[i]t may be noted that the Australian joint committee in 1984 considered claims of contempt in this area should be abandoned, and sections 4 and 6 of the Parliamentary Privileges Act 1987 (Australia) effectively abolished abusive contempt".²⁴² Unsurprisingly, in the light of Australian resolve, the Joint Committee could²⁴³

See no need to retain abusive contempt as a separate head of contempt of Parliament. If the abuse is so sustained or of such a degree that it amounts to an improper interference with the House or its members, then it constitutes a contempt anyway. Similarly, any

²³⁷ Palmer, above n 14.

²³⁸ Joint Committee (UK), above n 1, para 268.

²³⁹ Joint Committee (UK), above n 1, para 268.

²⁴⁰ Crimes Act 1961, s 401.

²⁴¹ Campbell, above n 1, 7, 11, 222.

²⁴² Joint Committee (UK), above n 1, para 268. It is important to note that the Australian regulation of privilege, especially that concerning free political expression, turns on more than just the mere enactment of a Privileges Statute. The Federal Constitution of the Commonwealth impliedly limits the ability of State Parliament's ability to enact statutes regulating free political expression: *Lange v ABC* (1997) 189 CLR 520 (HCA); *Nationwide News Pty Limited v Wills* (1992) 177 CLR 1 (HCA).

²⁴³ Joint Committee (UK), above n 1, para 268.

abuse which occurs in the course of and interrupts parliamentary proceedings constitutes a contempt. If there is no interference with Parliament's work, the abuse does not call for action from Parliament".

Sadly, the New Zealand Parliament has not always been so thick-skinned, even in comparatively modern times. Examples of circumstances giving rise to claims for abusive contempt have been: a member's allegations that the Speaker was biased against the member and their party;²⁴⁴ allegations that a member has lied to the House;²⁴⁵ a reflection alleging the poor conduct and character of Chair of Committees;²⁴⁶ and allegations that members have been involved in "unspecified but disreputable conduct".²⁴⁷ Of course there must be limits, and perhaps casting aspersions on the integrity of a member without sufficient or any evidence is to attack the dignity of the House.²⁴⁸

C Natural Justice Issue

1 Parliament, Citizens, and Fair Play

The regulation of parliament's punitive powers suffers from a "lack of protection for the rights of strangers to Parliament who become enmeshed in its proceedings",²⁴⁹ including "the fact that select committees [do] not appear to be obliged to follow the rules of natural

²⁴⁴ *Report of the Privileges Committee Question of Privilege Referred on 24 February 1998 Relating to a Reflection on the Speaker* [1998] AJHR I 15 C.

²⁴⁵ (1987-1990) AJHR I 15 E.

²⁴⁶ (1987-1990) AJHR I 15.

²⁴⁷ (1984-85) AJHR I 6 A. The "unspecified but disreputable conduct" in question concerned some innuendo that the members had been or were involved in bisexual or homosexual practices. In an amusing irony, the claim for contempt arose from the suggestion that the editor of the *New Zealand Truth* was attempting to influence members' votes by threatening to publish the relevant members' identities. The irony ultimately resides in the fact that the House passed the Homosexual Law Reform Bill legalising the so-called "unspecified but disreputable conduct".

²⁴⁸ For example see *Reports of the Privileges Committee*, above n 244.

²⁴⁹ Palmer and Palmer, above n 1, 176.

justice when dealing with matters that could damage individuals".²⁵⁰ In *Ridge v Baldwin* the House of Lords emphasised that natural justice is "something basic to our system [of law]: the importance of upholding it transcends the significance of any particular case".²⁵¹ That view was approved and reinforced in *R v Taito*,²⁵² a New Zealand case concerning the rights associated with criminal appeal. The principle articulated in those two cases underlined the importance that the law attaches to ensuring that persons subject to the power of the state are able to access, in substance, procedural fairness in deliberations affecting their rights and freedoms. That said, Joseph makes a strong case that justifies a tribunal being a judge in its own cause:²⁵³ there are common law exceptions to the rule against bias; and the courts sit in judge of their own in its contempt jurisdiction. There is nothing exceptionable in these "exceptions", however, the fact remains that the Parliament's decisions are open to partisan influences, and are non-reviewable by another or higher tribunal.

2 Section 27

In New Zealand's liberal democracy procedural fairness is an important value. Ensuring procedural fairness becomes most acute in cases where the State is exerting power in relation to its citizens, either as individuals or as a class. Citizens ought to expect, therefore, that the State will conform, in the exercise of its powers, to certain minimum standards of conduct and fairness. To that end, sub-section 27 of the New Zealand Bill of Rights Act 1990 relevantly provides that:²⁵⁴

Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has

²⁵⁰ Palmer and Palmer, above n 1, 176.

²⁵¹ *Ridge v Baldwin* [1964] AC 40, 114 (HL) Lord Morris.

²⁵² *R v Taito* [003] 3 NZLR 577, 600 (PC) Lord Steyn.

²⁵³ Joseph, above n 1, 434.

²⁵⁴ New Zealand Bill of Rights Act 1990, s 27(1) (emphasis added).

the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

In addressing the role of section 27 in Parliamentary proceedings, Joseph observes that “[the] *lex parliamenti* is an historical emanation which makes the House judge in its own cause, *contrary to modern expectations of fairness and natural justice*”.²⁵⁵ Section 27 is the progeny of Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”), which provides:²⁵⁶

[E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The press and the public may be excluded from all or part of a trial [...] when the interest of the [...] parties so requires.

Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

Section 27 is drafted in wider terms than Article 14(5) as it concerns a “person’s rights, obligations, or interests protected or

²⁵⁵ Joseph, above n 1, 386-7. Section 27 should also be read in combination with section 25(h), which provides that a person has “the right, if convicted of [an] offence, to appeal according to law to a higher court against the conviction or against the sentence or against both”. The availability of the procedural protections that fall within the auspices of section 25 of the Bill of Rights Act turns on whether the nature of Parliament’s powers are civil regulatory sanctions or more in the nature of criminal sanctions. Section 9(a) of the Crimes Act 1961 provides that no one shall be convicted of a common law offence however that section does not affect the power of the House to punish for contempt. But that does not mean that contempt of parliament, which includes a breach of its privileges (SO 395(a)) is a criminal offence for which section 25 of the Bill of Rights Act is available to guarantee minimum standards of justice. In *Solicitor-General v Smith*, above n 105, Wild and McKenzie JJ Full Court held that the defendant was in contempt of court for placing improper pressure on a litigant, interfering with the administration of justice, usurping the court’s role and undermining the public confidence in the Family Court (Crimes Act 1961, s 401(1), and (3)). In Parliament, on the advice of the Clerk of the House, the Speaker ruled that a finding of contempt of Court was not a crime within the meaning of the Electoral Act 1993, s 55(1)(d) (PD April 6 12365).

²⁵⁶ The importance of international covenants as aids in interpreting common law cannot be overlooked. In *Hosking v Runtig*, above n 186, Gault P (Blanchard J concurring) said at para 6 that “[t]he historical approach to the State’s international obligations as having no part in the domestic law unless incorporated by statute is now considered as too rigid. To ignore international obligations would be to exclude a vital source of relevant guidance”.

recognised by law", not just matters relating to criminal sanctions. Therefore, affected citizens may invoke the protections in section 27 in any case concerning breach of privilege and contempt of Parliament. In addition to section 27, New Zealand, either directly through statute, or indirectly through international law, recognizes the importance of permitting persons affected by the state's punitive powers to have their case heard publicly before a fair and impartial tribunal.²⁵⁷

The principal elements of natural justice may be characterised as comprising the right to be heard based on sufficient advance notice of a matter affecting person's rights, obligations, or interests protected or recognised by law;²⁵⁸ and to have the matter heard and determined by a "disinterested and unbiased" decision-maker.²⁵⁹ At a very general level, the rights to notification and to be heard require that the decision-maker: gives notice of the impending decision;²⁶⁰ discloses all relevant material upon which the decision is to be based,²⁶¹ including access to and cross-examination of witnesses; allowance for legal representation;²⁶² and to ensure, as much as possible, that fair weight is given to the circumstances affecting a person subject to decision, natural justice provides that the decision-maker is impartial and not interested in the outcome of the

²⁵⁷ New Zealand Bill of Rights Act 1990, s 24 and 25; International Covenant on Civil and Political rights 1966, art 2, 4, and 26.

²⁵⁸ "Audi alteram partem": Joseph, above n 1, 848.

²⁵⁹ "Nemo iudex in causa sua": Joseph, above n 1, 848.

²⁶⁰ Joseph, above n 1, 860.

²⁶¹ Joseph, above n 1, 861.

²⁶² Joseph, above n 1, 864.

proceedings,²⁶³ and which has no inclination to predetermination.²⁶⁴ In other words, the decision-maker should not be biased.²⁶⁵

One issue facing persons seeking to enforce the Bill of Rights Act is that the right under section 27 is subject to section 4, which provides that the Act cannot be used to invalidate another statute. Nor can the Bill of Rights Act impliedly repeal an earlier enactment by reason only of that enactment's inconsistency with the Bill of Rights Act.²⁶⁶ Nevertheless, through a range of interpretative techniques, the New Zealand courts have been able to achieve the ends articulated in the Bill of Rights Act notwithstanding section 4.²⁶⁷ In addition, because the section 27 has been viewed as restating the common law's insistence on natural justice in the absence of express statutory provision to the contrary, the section 4 issue is not as significant as might first appear. Accepting that section 242 of the Legislation Act establishes that any parliamentary privilege is statutorily endorsed, the interpretation of that privilege must be read, under section 6 of the Bill of Rights Act, consistently with the provisions of that Act. Section 6

²⁶³ Joseph, above n 1, 874. Whether a decision-maker is interested appears to lack definitional precision. At 877, Joseph cites *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet (No 2)* [2000] 1 AC 119 (HL) for the proposition that any decision-maker found to have a relationship with parties to the case faces disqualification as adjudicator.

²⁶⁴ Joseph, above n 1, 885.

²⁶⁵ Joseph, above n 1, 886 explaining exceptions to the rule against bias is necessary. That exception provides that where no decision-maker other than that who is apparently biased is competent to adjudicate, the "biased" decision-maker may hear the case. In a judicial review case concerning executive action it was held that "[t]here can be no doubt [...] that Parliament can exclude any particular rule of natural justice by express words or by patent necessary implication".

²⁶⁶ *R v Pora* [2001] 2 NZLR 37 (CA); *R v Poumako* [2000] 2 NZLR 695 (CA). Compare the view that implied repeal falls in favour of human rights legislation: *R v Secretary of State for Transport, ex p Factortame Ltd* [1990] 2 AC 85 (HL) and *Re Winnipeg School Division (No 1)* (1985) 21 DLR (4th) 1 (SCC) discussed in Andrew Butler "Implied Repeal, Parliamentary Sovereignty and Human Rights in New Zealand" (2001) PL 586, 592-3.

²⁶⁷ David Mullan "A Comparison of the Impact of the New Zealand Bill of Rights Act and the Canadian Charter of Rights and Freedoms on the Judicial Review of Administrative Action" (2003) 1 NZJPL 115, 120; see also Janet McLean "Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act" [2001] NZ Law Rev 421.

therefore enables section 27 of the Bill of Rights Act to guide the interpretation of Parliament's privilege to regulate its own proceedings. That argument requires, of course, that the courts be permitted (and willing) to evaluate a proceeding or parliament in the light of the Bill of Rights Act. In order to get that point, the Article 9 hurdle must be overcome. That hurdle is all the more real in the light of Joseph's argument that "it would effect major constitutional change by a side wind for [the Bill of Rights Act] to deprive Parliament of its penal jurisdiction" because it is judge in its own cause.²⁶⁸ That consequence, however, need not be inevitable. The review jurisdiction of the Court need only go as far as is necessary to ensure adherence to fair and reasonable procedural safeguards, including the providing of reasons for privilege and contempt decisions.

3 *Natural Justice: an Evaluation of Regulation by Standing Order*

Do the House's procedures and codes of conduct withstand the scrutiny under a principled natural justice framework? The House's principal tool for ensuring natural justice principles are adhered to are Standing Orders of the House of Representatives. Standing Orders are the House's code of conduct and govern the members' conduct in the House as well as the conduct of strangers.²⁶⁹ The Standing Orders' coercive strength lies in the respect members have for the orderly functioning and dignity of the House as an institution. The Standing Orders may be amended or suspended in accordance with procedures contained within the Standing Orders themselves,²⁷⁰ and their interpretation is ultimately a question for the Speaker.²⁷¹ Standing

²⁶⁸ Joseph, above n 1, 419, 433. See also *Bradlaugh v Gossett*, above n 52 (EWHC); *Thomas v A-G* (27 November 1995) HC WN CP289/95 Gallen J (HC).

²⁶⁹ David McGee *Parliamentary Practice in New Zealand* (2 ed, GP Publications, Wellington, 1994) 81.

²⁷⁰ SO 6.

²⁷¹ SO 2.

Orders are the subject of ongoing review by the Standing Orders Committee.²⁷²

The House is empowered to call for witnesses and papers on its own motion,²⁷³ either as a committee of the whole house,²⁷⁴ or through select committees.²⁷⁵ Where a committee does not have the power to call for persons or records within its field of inquiry, it may seek the Speaker's authorisation so to do.²⁷⁶ These powers are not peculiar to Parliament and no issue, from a natural justice perspective, can be taken with the House's power in this regard.

Standing Orders 199 and 200 are, however, difficult to reconcile with conceptions of natural justice and fair trial. At first glance, the preclusion against a committee's inquiry into criminal conduct of a stranger is consistent with 21st century conceptions of justice. However, Standing Order 199 provides that the House does have the power to order or allow a committee to inquire into such matters further.²⁷⁷ Moreover, a committee is not prevented from "conducting inquiries and making findings, of a general nature into alleged criminal wrongdoing by" strangers.²⁷⁸ In contrast, members receive much stronger protection in that at the merest hint of wrongdoing, that member must be notified and the relevant committee may not pursue the matter without express warrant of the House.²⁷⁹ The distinction hardly seems fair as it places a Member in a better position to answer an accusation as the Member has advanced notice that strangers do not receive.

²⁷² SO 7.

²⁷³ SO 195, 196.

²⁷⁴ SO 173-174.

²⁷⁵ SO 157, 184-5, 195-200.

²⁷⁶ SO 197.

²⁷⁷ SO 199(1).

²⁷⁸ SO 199(2).

²⁷⁹ SO 200(1), and (2).

The House's evidence rules also create a cause for concern, in particular those pertaining to "secret" and "private" evidence, as well as rules enabling committees to delete any evidence that is offensive or possibly defamatory, and "allegations evidence".²⁸⁰ Those evidence rules create a barrier to information that an accused can use to mount a defence. These issues are overcome to an extent by Standing Order 235, which provides "access to information by person[s] whose reputation may be seriously damaged", as well as the rules restricting the use of "irrelevant or unjustified allegations"²⁸¹ and ancillary procedures.²⁸² Procedural protections under Standing Order 228 go some way to ensuring that the interests of natural justice are being served. In this regard, ensuring that persons attending as witnesses at select committees are adequately informed and protect, as much as possible, from attacks by committee members. Standing Order 232 provides that members who have been involved in accusing others, and in particular strangers, of misconduct cannot participate in any committee that is responsible for further inquiry into the conduct of the accused; similarly Standing Order 394 in contempt cases. Both Standing Order 228 and 232 remedy the possibility that the decision-making power is exercised by an accuser. But it does not remedy the wider natural justice issue that the Parliament, through its other members, is a judge in its own cause and otherwise carrying out a function that is properly the domain of the courts who, at least in the case of strangers, have much more refined experience in fact finding, rules of evidence, and otherwise fair trial.²⁸³

The Privileges Committee procedure is also of crucial importance to the reform debate, for the reasons hitherto discussed, but

²⁸⁰ SO 219, "secret evidence"; SO 218, "private evidence"; SO 216 "offensive or possibly defamatory" evidence; and SO 234 "allegations evidence".

²⁸¹ SO 236.

²⁸² SO 237, and 238.

²⁸³ Campbell, above n 1, 192.

also for the specific operation of that Committee. Matters of privilege may be raised with the Speaker in writing,²⁸⁴ before the next sitting of the House,²⁸⁵ and in the case of matters of privilege arising from select committees, before the House next sits one day after the committee meets.²⁸⁶ Allegations amounting to contempt or breach of privilege must be formulated clearly and precisely, for consideration by the Speaker.²⁸⁷ Any reference to the Privileges Committee is solely at the discretion of the Speaker,²⁸⁸ unless the matter is technical or trivial (although that status appears to be a question for the Speaker in any event).²⁸⁹ The Speaker's ruling that privilege is in issue means that the matter stands referred to the Privileges Committee.²⁹⁰ One gap that remains is the Speaker has the absolute discretion to refer to the Privileges Committee, which a Member has identified creates uncertainty as to the grounds upon which a matter of privilege is referred.²⁹¹

In conclusion, regulation by Standing Order is generally effective, and Standing Orders are followed. But courts cannot enforce Standing Orders to bring "rogue" Members to account.²⁹² Standing Orders do not expressly require a Member to apologise to an unjustifiably affected individual. The same is true of partisan Privileges Committees deciding whether or not a person ought to be fined or imprisoned, or both.²⁹³ The fact that the Speaker has the sole and unreviewable discretion to refer adds further hurdles to persons

²⁸⁴ SO 387(1).

²⁸⁵ SO 387(2).

²⁸⁶ SO 387(3).

²⁸⁷ SO 388.

²⁸⁸ SO 389(1) and (2).

²⁸⁹ SO 389(3).

²⁹⁰ SO 392.

²⁹¹ Hon Richard Prebble identified that the Speaker's basis for referring matters to the Privileges Committee seemed rather opaque: PD 12365 (6 April 2004).

²⁹² "Rogue" is used in the sense that a member wantonly abuses the right of free speech, rather than to use the free speech privilege when other avenues have failed: see response of Hon Winston Peters in Palmer, above n 14, 329-330.

²⁹³ Enid Campbell, above n 1, 159.

who are the subject of a claim of parliamentary contempt. It appears, therefore, that while Standing Orders containing natural justice provisions are a step in the right direction they also suffer from weakness in enforcement.

D Contempt of Parliament and Punitive Powers: Principal Reform Measures

The “penal nature of contempt of Parliament makes it particularly important that its scope should be clear and readily understandable by all”.²⁹⁴ Contempts must be listed, constructive contempts eliminated, and include a draft clause that clearly states the basis for and circumstances upon which contempts arise. The laws that people are accused of breaching should be known in advance, clear, and accessible. Exacerbating the issue is that Parliament’s decisions in relation to privilege, breaches, and contempt, are unreviewable in New Zealand courts. Natural justice, being principally informed by the common law and reinforced by the Bill of Rights Act, establishes minimum standards of justice – but, again, those principles are not reviewable. In addition, Parliament, as sovereign and supreme law maker, possesses the power to alter the nature and incidents of citizens’ rights. Those alterations in rights may be coercive or detrimental in consequence, but what ensures that such powers are lawful in themselves is the Parliament’s adherence to procedural propriety; it is that procedural propriety that gives Parliament its legitimacy.

“It is important, therefore, that the procedures followed in the investigation and adjudication of complaints should match contemporary standards of fairness”.²⁹⁵ “While fairness is fundamental to any disciplinary procedure, the more serious the consequences, the more extensive must be the safeguards if the procedure is to be

²⁹⁴ Joint Committee (UK), above n 1, para 315.

²⁹⁵ Joint Committee (UK), above n 1, para 280.

fair”.²⁹⁶ Consistent with the natural justice discussion and in the light of New Zealand’s commitment to the ICCPR, it is important that any reform ensure the following minimum safeguards: a right to be informed of the fact that one is accused of contempt of parliament, including any breaches, and the precise factual basis for the allegation;²⁹⁷ the opportunity to be heard in person;²⁹⁸ the ability to prepare a defence and to seek legal counsel, funded by the state in the same way as other legal aid is provided;²⁹⁹ the opportunity to present and to cross-examine witnesses as the accused feels is necessary;³⁰⁰ and the preservation of a right against self-incrimination to the extent that such is allowable under the ordinary criminal law.³⁰¹ And finally, decision-makers should not be persons implicated in bringing the accusations.³⁰²

On the question of punitive power, “[i]f the work of Parliament is to proceed without improper interference, there must ultimately be some sanction available against those who offend”.³⁰³ Therefore, enabling the House to impose punitive sanctions is acceptable. That said Parliament does not need a power to imprison. Its abolition in the United Kingdom was recommended.³⁰⁴ It still remains in Australia, but it has been argued that it is not necessary other than as a temporary measure to deal with disorderly conduct in the gallery or select committee hearing.³⁰⁵ Therefore, a limited power to fine is an

²⁹⁶ Joint Committee (UK), above n 1, para 280.

²⁹⁷ ICCPR, Article 14(3)(a).

²⁹⁸ Joint Committee (UK), above n 1, para 281.

²⁹⁹ ICCPR, Article 14(3)(b)-(d).

³⁰⁰ ICCPR, Article 14(3)(e).

³⁰¹ ICCPR, Article 14(3)(f), and (g).

³⁰² Joint Committee (UK), above n 1, para 283.

³⁰³ Joint Committee (UK), above n 1, para 302.

³⁰⁴ Joint Committee (UK), above n 1, para 302.

³⁰⁵ Joint Committee (UK), above n 1, para 306. See also Enid Campbell ...

appropriate reform,³⁰⁶ but the wholly draconian nature of imprisonment should solely be the domain of the courts.³⁰⁷

In Australia, the changes effected by the Privileges Act (Cth) included:³⁰⁸ withdrawal of the power to punish for contempt for defamation (but otherwise retaining the common law power to punish for contempt);³⁰⁹ removal of the power to expel members;³¹⁰ and a rationalization of the scope and bases for which the Australian House could impose penalties.³¹¹ The measures comprising the Australian Parliament's punitive powers include the codification of powers to imprison and fine,³¹² and it is clear that the Parliament's powers in relation to imprisonment may be exercised only in accordance with the Privileges Act (Cth).³¹³ It is unclear that a similar approach is to be expected in the case of fines.

Given that New Zealand's parliament should retain some punitive powers there remains one final but very important issue, namely the distinction between Members and strangers in cases where parliamentary sanctions are in issue. The Joint Committee resolved, as appears to be the appropriate course in other jurisdictions, to ensure that "contempt of Parliament by non-members should still attract [...] punishment".³¹⁴ It was said in addition that "[t]he underlying mischief of contempt of Parliament is the same in the case of members and non-

³⁰⁶ Joint Committee (UK), above n 1, para 278.

³⁰⁷ Joint Committee that the Commons reinforced that parliament retain "its powers of admonishment, suspension or expulsion, which are widely seen as essential for internal discipline": Joint Committee (UK), above n 1, para 276.

³⁰⁸ Campbell, above n 1, 189.

³⁰⁹ Parliamentary Privilege Act 1987 (Cth), s 6.

³¹⁰ Parliamentary Privilege Act 1987 (Cth), s 8.

³¹¹ Parliamentary Privilege Act 1987 (Cth), s 7.

³¹² Parliamentary Privilege Act 1987 (Cth), s 7.

³¹³ Parliamentary Privilege Act 1987 (Cth), s 7(3).

³¹⁴ Joint Committee (UK), above n 1, para 301.

members”.³¹⁵ However, a strong case exists that Members should be punished by the House, strangers by the courts.³¹⁶

Under Standing Orders, members are afforded the “privilege” of advanced notice of another member’s intention to raise a matter of privilege affecting members of the House.³¹⁷ There is no equivalent provision for strangers. A significant issue exists as to whether the House ought to retain what are effectively judicial powers of imprisonment and fine for the purpose of taking punitive measures against strangers. Members accept the House’s powers to regulate its own proceedings and to punish Members for breaches of protocol as a condition of membership (as it is with professional associations), but to apply the same procedure in respect of non-members seems to run counter to modern expectations of fairness.³¹⁸ As the Joint Committee observed,³¹⁹

Parliament is not a court of law. It is one thing for the House to discipline its own members. That can be regarded as primarily an internal matter, even though suspension of a Commons member has unhappy consequences for the member’s constituents. It is altogether different for the House to impose punishment, potentially serious, on non-members. By becoming members of Parliament, members agree to abide by the rules of the House, including the rules relating to discipline; outsiders have agreed to nothing.

The Joint Committee further noted that “[a] debate by the whole House, for instance, on whether to impose a fine on a non-member, and if so how much, is far removed from current perceptions of the proper way to administer justice”.³²⁰

³¹⁵ Joint Committee (UK), above n 1, para 274.

³¹⁶ Campbell, above n 1, 6-7.

³¹⁷ SO 390 and 391.

³¹⁸ Joint Committee.

³¹⁹ Joint Committee (UK), above n 1, para 305.

³²⁰ Joint Committee (UK), above n 1, para 306.

The obvious reform measure is to transfer strangers' alleged contempt of parliament to the High Court. Nevertheless, there is a caveat to such a measure. One of the hallmarks of contempt of parliament and breach of privilege is the Privileges Committee recommendation for no further action to be taken. The Privileges Committee possesses a discretion that is not well exercised by the court. If a Privilege Act were to hand jurisdiction for contempt of parliament over the courts entirely, the latter would be forced to impose a sanction or exercise discretion not to punish. Although the courts possess this discretion for other purposes, the factors that a court takes into account are likely to be very different from those that parliament, through the Privileges Committee, considers when deliberating over a decision to sanction. There is much to be said for parliament's political flexibility in determining the appropriate form of punishment in a given set of circumstances; a political flexibility that the courts do not have and do not want.

In reconciling the need for partisan tribunals with political flexibility, one option is to leave parliament with a residual jurisdiction to exercise a power of referral to the High Court when it feels that is the appropriate course. There is the obvious disadvantage that any referral might prejudice the court towards a finding of contempt, but that need not be so. Courts operate under a presumption of innocence which the parliament, through the Attorney-General or Solicitor-General, must overcome beyond reasonable doubt. Therefore, the mere fact of referral need not be presumptive of the outcome for an accused stranger.

The preceding proposal differs slightly from that proposed by the Joint Committee, which recommended that "[f]or practical reasons Parliament's penal powers over non-members should, in general, be transferred to the High Court. Parliament should retain a residual

jurisdiction, including power to admonish a non-member who accepts he acted in contempt of Parliament".³²¹

VI OVERCOMING A LACK OF REFORM INCENTIVES AND WHY PARLIAMENT BENEFITS FROM CODIFYING PRIVILEGE

A Overcoming A Lack of Reform Incentives

Committees and sponsors have produced two draft bills,³²² with proposed amendments to the relevant bills from two additional sources.³²³ For various reasons, each incorporating their share of merit, the bills have not progressed. The first significant reform to parliamentary privilege after 1865 occurred in 1989. There the Standing Orders Committee recommended codification in the form of a new Legislature Bill. That reform, which was never enacted, proposed:³²⁴ retention of section 242 of the Legislature Act 1908; enact the power to fine; abolish the power to expel members; and address certain mechanics in the operation of the proposed Legislature Bill. The Standing Orders Committee in 1999 turned its attention to the 1994 reform efforts contained in Hon David Caygill's private member's Parliamentary Privilege Bill. That Bill proposed a number of sweeping reforms, including:³²⁵ abolishing the power to imprison and fine; defining contempt of Parliament; providing High Court jurisdiction to punish for contempt; providing a definition of "proceedings in Parliament"; and the introduction of a notification and reply procedure for comments that would detrimentally affect the

³²¹ Joint Committee (UK), above n 1, para 324, sub para 3.

³²² Standing Orders Committee, above n 1, 13; Parliamentary Privileges Bill 1994.

³²³ Standing Orders Committee *Report on the Parliamentary Privileges Bill* [1999] AJHR I 18C; Auckland District Law Society, above n 37.

³²⁴ As listed in the Summary Recommendations of the Standing Orders Committee, above n 1, 3.

³²⁵ A useful summary of the principal reforms are discussed in Standing Orders Committee, above n 323, 4-7 and in New Zealand Law Commission, above n 1, para 27-29.

reputation of others. The Bill never got past the first reading. Not surprisingly, the Standing Orders Committee in 1999 believed that “a number of the more important aims of the Bill [were] addressed by procedural changes adopted by the House following its major procedural review carried out over 1995 and 1996”.³²⁶ The Committee considered that amendments to the Standing Orders “satisfactorily resolved the most important objectives and uncertainties identified in the bill”.³²⁷

As will be clear from the preceding discussion, reform has not been isolated to New Zealand. In the United Kingdom, The Joint Committee has aptly explained that “parliament should be [...] vigorous in discarding rights and immunities not strictly necessary for its effective functioning in today’s conditions.”³²⁸ The United Kingdom position, it must be noted, is informed to a great extent by the Human Rights Act 1998 (UK), where it has become clear that parliament cannot necessarily rely on its absolute privileges – proceedings in Parliament are not beyond the reach of the European Court of Human Rights.³²⁹ In Australia, key drivers for reform lay in addressing conflicting decisions in the New South Wales courts,³³⁰ so far as those judgments concerned “proceedings in parliament,”³³¹ as

³²⁶ Standing Orders Committee, above n 323, 4.

³²⁷ Standing Orders Committee, above n 323, 4. The Standing Orders Review underway at present provides a useful opportunity to consider whether or not the 1999 Standing Orders Committee was correct in its assertion.

³²⁸ Joint Committee (UK), above n 1, para 4.

³²⁹ The jurisprudence of that court has developed apace. In *Demicoli v Malta* (1992) 14 EHRR 47 (ECHR) the Malta House of Representatives pursued a claim for breach of privilege against a journalist. The Court decided that the procedures adopted by the House of Representatives violated the journalist’s right under the European Convention of Human Rights to have a fair hearing by an independent and impartial tribunal.

³³⁰ Senate Committee of Privileges *Parliamentary Privilege, Procedures and Practice in the Australian Senate 1966-2002: 107th Report* (August 2002) 13.

³³¹ *Egan v Willis* (1998) 195 CLR 424 (NSW CA); *Egan v Chadwick* (1999) 46 NSWLR 563 (NSW CA).

well as to implement the recommendations of the Australian Joint Select Committee on Parliamentary Privilege.³³²

Working out the finer points of whether the courts or Parliament should bear the responsibility for presiding over disputes between Parliament and strangers remains a difficult question. "At the root of the conflict are two competing constitutional principles: on the one hand, the need for Parliament to be free from outside interference and, on the other, the right of every person to seek redress in the Courts".³³³ Nevertheless, the issues are clear. Firstly, Parliament either relinquishes some of its unilateral power of free speech or it provides an avenue of redress to innocent individuals of malicious verbal attacks. Secondly, Parliament must provide reviewable and enforceable procedures that meet minimum standards of justice, with the Parliament called to account, even if by declaration, in an impartial tribunal offering effect procedural safeguards. Thirdly, the fact remains that privilege is unprincipled, discretionary in its execution and is the wand that puts citizens at the mercy of legislators in a manner that does not arise under legislation. Fourthly, the fact that the United Kingdom and Australia have seen a pressing need for reform must send a strong message to the New Zealand parliament to similarly engage.

Rule, accordingly law, requires certain standards of conduct by the governors. The governed have rights and legitimate expectations of fairness from their elected officials. That should be incentive enough – but it is not – New Zealand's recent reform efforts are testimony. That position must change.

³³² Joint Select Committee (Cth), above n 1.

³³³ *The Laws of New Zealand* (Butterworths, Wellington, 2004) Origins of Parliamentary Privilege para 235 (last updated June 2004) <www.butterworthsonline.com>.

B *The Codification Imperative and Why Parliament Benefits*

The New Zealand parliament benefits from codification in three main ways. Firstly, it comes into line with modern expectations of justice in accordance with international human rights law. In its contribution to the Parliamentary privilege reform debate, the Auckland District Law Society observed that,³³⁴

As the maker and giver of laws which are intended to operate as instruments of justice, Parliament simply cannot afford to allow its process to be used as an instrument of oppression. So to do would be to forfeit the legitimacy upon which Parliament's authority must ultimately rest. Parliament has, after all, committed *itself* to acting in accordance with the Bill of Rights Act [1990, section 3].

Secondly, it clarifies areas of uncertainty in the courts' interpretation of what amounts to a privilege as well as setting the parameters for justiciability. In the words of the Joint Committee: "[i]t is preferable for Parliament to declare now what is the scope of Article 9, rather than risk having to change this constitutional provision in Parliament's favour after an unsatisfactory court decision".³³⁵ Codification, therefore, provides Parliament with an opportunity to clearly and definitively articulate its privileges, powers and immunities to the body politic and to the courts. Parliament can overcome the lack of clarity surrounding "proceedings in Parliament" and what it means to "question or impeach". It would also enable the imposition of fines without the risk that a court of law will deny the House's power to assert its punitive authority. More generally, the House will uncover for all to see one of the more mysterious and arcane pockets of jurisprudence known to the common law and to provide a coherent and accessible structure to that jurisprudence.

³³⁴ Auckland District Law Society, above n 37, 5.

³³⁵ Joint Committee (UK), above n 1, para 85.

It has been acknowledged that there are disadvantages to codification, although these may be matters of perception rather than substance. Firstly, codification invites the Courts' review jurisdiction.³³⁶ Secondly, there may be a constitutional crisis that follows the Court's intervention in matters of fact occurring in Parliamentary "proceedings". Thirdly, political factors will be unable to influence the outcome of cases coming before the court. Fourthly, undefined residual powers and privileges, which would be a necessary feature of an Act and are a feature of the Australian Privileges Act 1987,³³⁷ as well as the proposed recommendations of the Joint Committee in the United Kingdom,³³⁸ may result in reform in name only leaving the House with wide, impenetrable and unreviewable discretions.³³⁹ Finally, essence of what makes codification an appropriate reform measure is best captured in the following note on the role of the common law as an informant of the courts' self-denying jurisdiction and its incremental decision-making:³⁴⁰

To the extent that the common law functions as a creator of social norms, the process of communication with the society whose norms they are supposed to represent often seem inadequate. The particularistic approach of the common law makes communication difficult. This not to suggest that the common law ought not to decide hard cases. Rather it is a plea not to burden the common law with the weight of partisan decisions. The appropriate way to deal with [a] common law problem is by legislation, which would take the heat of the common law.

VII CONCLUSION

The Joint Committee resolved that "[t]here is merit [...] in making the boundaries [of parliamentary privilege] reasonably clear

³³⁶ *Awatere v Prebble*, above n 55.

³³⁷ Parliamentary Privileges Act 1987 (Cth), s 5.

³³⁸ Joint Committee (UK), above n 1, para 315.

³³⁹ Standing Orders Committee, above n 19, 87.

³⁴⁰ Palmer, above n 132, 1248.

before difficulties arise, [as...] people are increasingly vigorous in their efforts to obtain redress for perceived wrongs".³⁴¹ Following the Review of Standing Orders, a number of procedural safeguards were introduced to address "almost all the matters the [Parliamentary Privileges] Bill [1994] provided for".³⁴² Nevertheless, Standing Orders are not legally enforceable and as such Parliament's failure to adhere to any rules it makes are met with an empty remedy – a vote at the next election. Without a manifest right of redress or review, Parliament is both a law unto itself and accountable only to itself and the electorate every 3 years, but it is not accountable to individuals or the law.

While reasonable people may disagree on whether or not a "right of reply" to accusations made in the debating chamber ought to be an additional reform in New Zealand, the recommendation that shifts the contempt jurisdiction in cases involving non-members is welcome, and certainly overdue. Such a shift ensures that the alleged contemnor receives a fair trial from an unbiased tribunal. It can only be hoped that the implementation is not far away.

Recent New Zealand cases are instructive in illustrating that Parliament would be required to set the parameters of what the courts could consider under a Privilege Act. Notwithstanding the courts' self-imposed restraint in matters concerning the legislature,³⁴³ the courts are not incompetent to judge the application of law to matters of fact. One problem of course is getting access to fact when it occurs in the context of a proceeding in parliament. The codification of privilege invites the possibility of court inquiry into matters that have hitherto been non-justiciable. It has been noted cases concerning the courts'

³⁴¹ Joint Committee (UK), above n 1, para 26.

³⁴² New Zealand Law Commission, above n 1, para 108.

³⁴³ See discussion above at Part III A "An Historical Ordeal with Contemporary Relevance".

jurisdiction when called on to apply statutes directly affecting Parliament that,³⁴⁴

Members including leaders of political parties are members of Parliament, who are accountable to Parliament for what they do so far as regards the efficiency, policy and workings of Parliament and in that respect Parliament is the only Judge. But where they are acting pursuant to legislation they are responsible to a Court of justice for the lawfulness of what they do and of that the Court is the only Judge.

The dictum illustrates that Parliament can and has provided the courts with avenues of review within specified parameters. A privilege Act should be no different. As has been recently observed, “nowadays the judges could be trusted to try cases of alleged contempt or parliament fairly and impartially and in accordance with all” procedural protections.³⁴⁵ In a world of codified privilege, courts can and should be trusted and the House has the power to set the parameters. The time for reform is *now*.

³⁴⁴ *Awatere Huata v Prebble* (19 February 2004) HC WN CTV-2003-404-7014 para 27-29 (HC) Judgment of the Court. Compare *Rata v Attorney-General*, above n 101 (subsequently overruled: *Awatere v Prebble*, above n 55, para 63 McGrath, Glazebrook and O’Regan JJ).

³⁴⁵ Campbell, above n 1, 192.

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