Office of the Clerk of the House of Representatives

Te Tari o te Manahautū o te Whare Māngai

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Thank you for the opportunity to comment on the *Green Paper on Parliamentary Privilege* (the *Green Paper*). My comments are made from the perspective of my role as Clerk of the New Zealand House of Representatives.

Legislative change in the United Kingdom (UK) would not have a direct impact on New Zealand's (NZ) law of parliamentary privilege. However, it could have an indirect impact, for example by influencing the way our courts approach privilege issues. The NZ experience may be interest to you, because it has its basis in the privileges of the House of Commons.

Before responding to the questions in the *Green Paper*, I will briefly describe the basis for parliamentary privilege in NZ and discuss some of the key themes and challenges that have arisen here in recent years. Some of these overlap with the issues discussed in the *Green Paper*, but in other respects raise different challenges.

Basis for parliamentary privilege in NZ

There is no single instrument or statute that sets out the privileges, powers and immunities of the NZ legislature.

The General Assembly of NZ was established by the NZ Constitution Act 1852 (UK). At this time colonial legislatures did not possess all the privileges of the British Houses of Parliament. Common law held that colonial legislatures enjoyed only those privileges of the House of Commons that were incidental and necessary for their efficient functioning.[1]

Like other colonial legislatures of the time, the NZ General Assembly was concerned about securing contempt powers to uphold its authority. In 1854 a committee of the General Assembly recommended that remedial legislation should be enacted to extend the privileges of the Assembly. This led to the enactment of the Parliamentary Privileges Act 1856. A committee was then appointed in 1861 to investigate the contempt jurisdiction and recommended changes to give the House additional powers. The Parliamentary

[1] For example, *Kielly v Carson* (1842) 4 Moo PC 63; 13 ER 225 at pp 88-90.

Privileges Act 1865 applied the full expression of parliamentary privilege for the New Zealand legislature by adopting all the powers and privileges "held, enjoyed and exercised" by the House of Commons as on 1 January 1865.

This forms the basis of section 242 of the Legislature Act 1908 which is currently in force, and has since been supplemented by other legislation touching on the privileges of the House. This includes the Legislature Amendment Act 1992 (which protects those who publish parliamentary papers from liability in court proceedings) and the Defamation Act 1992 (which provides that certain broadcasts of parliamentary proceedings are absolutely privileged, and others protected by qualified privilege, in relation to defamation claims).

Therefore, to ascertain the privileges enjoyed by the NZ House of Representatives, it is necessary to establish the nature of the privileges enjoyed by the House of Commons as at 1 January 1865 as modified by any changes to NZ legislation since that date. Today parliamentary privilege in NZ is derived from:

- section 242 of the Legislature Act 1908 and other related legislation
- common-law principles developed from decisions of the courts
- parliamentary practice and rules, including Standing Orders and Speakers' Rulings.[2]

For instance, the NZ Standing Orders describe contempt in some detail, including a list of examples set out in Standing Order 407.

A Privileges Committee was first established in 1854. The 126 reports of Privileges Committees since that time provide guidance on a range of issues.

Parliamentary privilege must also be applied in the NZ contemporary legal context, for example, the NZ Bill of Rights Act 1990 (NZBORA) expressly applies to acts of the legislature. This Act, notwithstanding the right of the House to control its own proceedings, has led to procedural changes. For example, Standing Orders now provide processes and remedies to implement the right to natural justice in parliamentary proceedings.

Role of the courts

As in the UK, the courts in NZ play an important role in determining the scope and extent of parliamentary privilege and applying the law in order to establish whether a court or the parties to litigation are constrained by it.

I would agree with the approach taken in *Chaytor* in holding that administrative matters, such as expenses claims by members, are not sufficiently connected to proceedings in Parliament to be protected by parliamentary privilege.[3] Our position is that privilege accords to only those matters directly connected to the transaction of the business of the House and its committees. However, recent cases have resulted in some conceptual

[2] David McGee, *Parliamentary Practice in New Zealand*, 3rd edition, 2005, pp 607-608; Philip Joseph, *Constitutional and Administrative Law in New Zealand,* 3rd edition, 2007, pp 32-33; and New Zealand Law Commission, *The Law of Parliamentary Privilege in New Zealand,* Miscellaneous Paper 5, December 1996, p 7.
[3] *R v Chaytor, Morley and Devine* [2011] 1 AC 684 (UKSC).

confusion regarding what are parliamentary proceedings protected by absolute privilege. NZ courts have held that the following are parliamentary proceedings:

- a party caucus meeting and documents relating to such a meeting[4]
- the Attorney-General's function to report to Parliament under section 7 NZBORA concerning whether legislation is inconsistent with certain human rights standards (on two occasions[5]).

NZ courts also have held that the following are not parliamentary proceedings:

- the act of assenting to legislation by the Governor-General[6]
- advice by a public servant to a Minister for the purpose of the Minister answering a question for oral answer in the House.[7]

It is difficult to understand why the first two might be considered to be parliamentary proceedings, and the act of assenting to legislation and providing advice for the sole purpose of informing the key mechanism by which Ministers are accountable to Parliament, might not.

Further, in the *Boscawen* case the Court of Appeal declined to review what it considered to be a parliamentary role which was part of the legislative process, in recognition of the comity principle.[8] But three years later, in the High Court case of *Easton*, the Judge took a different approach and reviewed the same process on the basis that the issue was a matter of manner and form or, in other words, related to legal requirements as to process rather than to content.[9]

Responding to differences in view between Parliament and the courts

In a number of recent cases, the Speaker has found that the court's judgments involve a question of privilege and the questions have been referred to the Privileges Committee. Most notable is *Jennings v Buchanan*,[10] where the Privy Council held that making a statement outside of the House in effect affirming, although not repeating, a privileged statement made inside the House, was not protected by absolute privilege and therefore was liable to civil or criminal proceedings. The Privileges Committee considered this question several times and most recently in 2009, recommended that legislation be introduced to protect by absolute privilege statements outside Parliament that affirm or adopt what any person has said in the House or its committees.[11] Although, legislation has not resulted to date.

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[4] *Rata v Attorney-General* (1997) 10 PRNZ 304 (HC Wellington).
[5] *Boscawen and others v Attorney-General* [2009] 2 NZLR 229 (NZCA) and *Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451 (HC Wellington).
[6] *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC Wellington).
[7] *Attorney-General and Gow v Leigh* [2012] 2 NZLR 713 (NZSC).
[8] *Boscawen* above at footnote 5.
[9] *Easton v Governor-General* [2012] NZHC 206, paras [14]-[17] (HC Wellington).
[10] *Jennings v Buchanan* [2005] 2 NZLR 577 (PC).
[11] *Question of privilege relating to the exercise of freedom of speech by members in the context of court orders*, Report of the Privileges Committee, May 2009, I.17A, pp 6-7: http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/1/7/5/49DBSCH_SCR4379_1-Question-of-privilege-relating-to-the-exercise-of.htm.

Most recently, in 2011 a decision by our Supreme Court in *Leigh* [12], a case where the Speaker had in fact intervened, relied on *Chaytor* and the necessity test to balance the public interest in favour of an individual's right to access to the courts, rather than the promotion of the parliamentary system of government and the maintenance of the separation of powers. The Supreme Court held that it was not necessary to absolutely protect the giving of advice to a Minister by a public official for the sole purpose of a core parliamentary function— the Minister responding to a question for oral answer in the House. The submission by counsel for the Speaker that failing to absolutely protect the giving of the advice to the Minister would have a 'chilling effect' on free and frank advice by public officials to Ministers, as well as members generally, in relation to parliamentary proceedings, because of a fear that what they say may be the subject of court proceedings did not tip the balance in Parliament's favour. This particular question is now before the Privileges Committee

Relevantly, NZ Standing Orders provide a remedy for members of the public harmed by statements by members in the House. If comments made by members are harmful, the harm actually arises from what was said in the House rather than earlier exchanges between a public officials and members. In *Jennings v Buchanan* the Privy Council held that where privilege is abused procedures exist under Standing Orders to afford a remedy to the person defamed, it is not the function of the Court to provide one.[13]

New Zealand's approach to legislating in the area of parliamentary privilege

My view is that if the rules which govern the operation of core parliamentary business, including Parliament's privileges, need to be described or clarified this is best done in Standing Orders. This approach is consistent with the House having exclusive cognisance over its own proceedings. The inclusion of such rules or descriptions in legislation opens the possibility that, if a requirement were not met in any case, the courts could be invited to review the relevant process. It would be expected that article 9 of the Bill of Rights 1688 and the principle of comity, or mutual respect and restraint between Parliament and the courts, would operate to prevent the courts accepting such an invitation. And it is true that the courts in NZ have tended to be reluctant to become involved in reviewing parliamentary proceedings, for example recently in the *Boscawen* case.[14] However, the courts have not been entirely consistent in their approach.

As discussed above, some aspects of the law of parliamentary privilege are already contained in legislation here. Following the adoption of the UK's law of parliamentary privilege as on 1 January 1865, NZ has legislated in this area on a limited and as-needs basis. There has been little support for legislating more generally, although, from time to time, this possibility has been raised. In 1989 the Standing Orders Committee suggested that the purpose of parliamentary privilege should be stated in legislation.[15] A Parliamentary Privilege Bill was introduced as a member's bill by the Hon David Caygill in 1994. However, in 1999 the Standing Orders Committee recommended that the bill not proceed.[16]

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[12] *The Attorney-General & Lindsay Gow v Erin Alice Leigh* SC 11/2011 [2011] NZSC 106
[13] *Jennings v Buchanan* above at footnote 10 at para [18] (PC).
[14] *Boscawen* above at footnote 5.
[15] *Second report on the law of privilege and related matters*, Standing Orders Committee, I.18B, November 1989, p 7.
[16] *Report on the Parliamentary Privilege Bill*, Standing Orders Committee, I.18C, October 1999, p 3.

Since 1999, the Standing Orders Committee and the Privileges Committee have several times recommended a legislative solution in relation to particular issues. For example, in 2009 the Privileges Committee recommended that the Government introduce legislation to amend the Legislature Act 1908 to protect authorised broadcasts and rebroadcasts by absolute privilege.[17] This was supported by the Standing Orders Committee in its review of Standing Orders in 2011.[18] However, this has not eventuated.

The question currently before the Privileges Committee includes in its terms of reference[19] considering the desirability of possible legislative reform of the legislative basis for parliamentary privilege in NZ, and in particular, whether the meaning of "proceedings in Parliament" should be defined in legislation.

Legislation can provide clarity although it does not remove all ambiguity. An absence of legislation can provide some flexibility. Either way the courts have a role to determine the boundaries of parliamentary privilege. The question now is whether it is time to provide some direction to the courts through legislation.

Specific questions raised in the Green Paper

I have briefly addressed some of the questions in the *Green Paper* in the attached Appendix. I have not attempted to answer all the questions which were raised. Some questions relate to issues outside of the NZ experience. Some appear to arise from challenges that we have not had to deal with, at least to the same extent as the UK, and I am not sure my views would be helpful for making decisions in relation to the UK. However, if I can be of further assistance please do not hesitate to contact me.

Mary Harris
Clerk of the House of Representatives

[17] Above at footnote 11.
[18] *Review of Standing Orders*, Report of the Standing Orders Committee, I.18B, p 6: http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/4/a/8/49DBSCH_SCR5302_1-Review-of-the-Standing-Orders-I-18B.htm.
[19] See the terms of reference for the Privileges Committee here: http://www.parliament.nz/en-NZ/PB/SC/BusSum/0/a/d/00DBSCH_PRIV_11058_1-Question-of-privilege-concerning-the-defamation.htm.

APPENDIX

Q1: Do you agree that the case has not been made for a comprehensive codification of parliamentary privilege?

The New Zealand approach to date of having a minimal legislative base for parliamentary privilege has worked effectively for many years. However, more recent approaches by the courts appear to have resulted in a tipping of the public interest balance in favour of an individual's right to justice, rather than ensuring that the legislature can exercise it powers freely on behalf of its electors, contrary to *Prebble v TVNZ*[20]. Codification in law may give more certainty on how these differing public interests are to be balanced into the future. However, a cautious approach is required because there are inherent risks that codification may lead to legislating for House procedure and a further clouding of the relationship between the roles of the courts and Parliament.

Q2: Do you think that "proceedings in Parliament" should be defined in legislation?

The meaning of proceedings in Parliament has never been the subject of definition by legislation in NZ. The Australian definition[21] has usually been accepted.

This question will be considered by the Privileges Committee later in the year and I do not wish to pre-empt any conclusions the committee may reach. However, my observation is that we have reached a stage where greater certainty is needed and legislation would provide this, despite my reservations about legislating for the operation of the House and the transaction of parliamentary business.

The fact that the House's privileges may infringe or abridge the rights of others justifies restricting parliamentary privilege to activities that have a real connection with the operation of the House. On this basis, in NZ proceedings in Parliament are confined in their scope to as far as possible avoid trespassing on other rights unnecessarily. Proceedings in Parliament cover the transaction of the business of the House and its committees and actions formally and directly connected with the transaction of such business. By no means all actions of a member constitute proceedings in Parliament. Proceedings in Parliament cover a much narrower range of activities than those performed by members generally.

Of concern to me is the effective operation of the House and the impact for instance of the *Leigh* decision. It is quite possible that such a narrow view of proceedings in Parliament will have a chilling effect on the provision of advice to Ministers and members, if government officials and parliamentary officers may be liable to court proceedings because of the advice they have given in relation to the business of the House.

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[20] *Prebble v Television New Zealand Limited* [1994] 3 NZLR 1, 10 (PC)
[21] *Parliamentary Privileges Act 1987* (Australia) s.16(2)

Q4: Do you think that "place out of Parliament" should be defined in legislation?

"Place out of Parliament" might be defined in order to avoid any suggestion that the media or the public in general should not critically report the House. However, any definition would need to be wide enough to encompass decision making bodies other than just the courts, such as in NZ, the Broadcasting Standards Authority, or the Human Rights Commission, which have powers to make findings about standards in public life.

Q5: Do you think that the situations when the courts can use proceedings in Parliament should be set out in legislation?

The fact that the House has expressed its view on a matter does not preclude a court making its own findings on that matter. In such circumstances evidence of proceedings in Parliament may be admitted before a court provided that the evidence is used in a way that is consistent with article 9 and does not involve an examination of the propriety of the proceedings, or the motives or intentions of those taking part in the proceedings[22]. Evidence of the occurrence of events is therefore permissible and proof that a report of a speech is fair and accurate for instance is allowed. Proceedings are also used to aid statutory interpretation.

While evidence of proceedings in Parliament that is consistent with the House's freedom of speech can be given by members, officials of the House have a special rule about tendering evidence of the House's proceedings. Standing Order 409 prevents the Clerk and other officers of the House giving evidence of proceedings of Parliament without the authority of the House. Any evidence given must of course be consistent with the House's rules on the disclosure of its own proceedings.

Attempting to list situations where something may be done in law is always problematic. The article 9 principle is of very long standing and may be better maintained simply with a definition of proceedings in Parliament, so as to limit as far as possible the situation where access to justice may be affected. It is for the House to control how its proceedings may be used. The challenge with any privilege legislation would be to ensure the courts recognise the House's internal decisions as being conclusive within that sphere, the privilege of exclusive cognisance. It is my view that the adjustments the House has already made to its own procedures are sufficient in the context of article 9.

Q6: Do you believe that the protection of privilege should be disapplied in cases of alleged criminality, to enable the use of proceedings in Parliament as evidence?

In 1996, the House gave a general leave for its proceedings to be referred to in legal proceedings and abolished any requirement for its permission to be obtained. At the same time it made it clear that by granting a standing permission to refer to its proceedings, it was not waiving or abrogating article 9 of the Bills of Rights and reiterated that any use of parliamentary proceedings in court must be in accordance with that provision. It also made it clear that such permission was subject to any rule or order of the House extending

[22] Standing Order 408

confidentiality to its proceedings, such as the rules on confidentiality of select committee proceedings prior to their report to the House.

I see no reason to change this position.

The protection does not prevent criminal acts from prosecution because they are committed in a parliamentary environment. Speeches in the House or evidence given to a select committee that might otherwise be subject to criminal liability will be exempt from legal sanction, but criminal actions taken in the face of the House or a committee are not part of their proceedings and are liable to be dealt with by the law, for instance, the private prosecution of a member for fighting in the lobbies immediately outside the Chamber following a verbal exchange in the Chamber.[23]

Q16: Do you agree that it is not desirable or necessary for legislative change to restrict freedom of speech in proceedings in Parliament in respect of court injunctions?

In NZ members have occasionally breached court orders in debates, although this does not happen at all frequently. The issue was the subject of a report by the Privileges Committee in 2009.[24] The Privileges Committee recommended changes to Standing Orders to provide more clarity for members regarding the *sub judice* rule and to make it a contempt to refer to a matter suppressed by the courts in parliamentary proceedings.[25] The recommended changes to Standing Orders were supported by the Standing Orders Committee in its 2011 review of Standing Orders and have now been implemented.[26]

Standing Order 112 contains the *sub judice* rule and now requires prior written notice be given to the Speaker before a member refers in parliamentary proceedings to matters both awaiting or under adjudication in any court or matters supressed by an order of a court. This enables the Speaker to be in an informed position to exercise his or her discretion to allow the reference by a member. Standing Order 112 also sets out matters to which the Speaker is to have regard when exercising his or her discretion to allow the reference to be made. This rule is also subject to the right of Parliament to legislate on any matter or consider delegated legislation.

Standing Orders were also amended last year to make it a contempt for a member to breach the *sub judice* rule to reflect the seriousness of such conduct (Standing Order 407(y)).

In my view, it is neither desirable nor necessary to legislate to restrict freedom of speech in Parliament in relation to court injunctions. Freedom of speech of members and members of the public in parliamentary proceedings is fundamental to the effective discharge of parliamentary business. The issue is one of balance and responsibility, and in particular recognising the relationship of comity between the courts and Parliament.

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[23] Private prosecution of Hon Trevor Mallard MP by Graham McCready 2007, Paula Oliver, *The New Zealand Herald,* http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10483189
[24] Above at footnote 11.
[25] Above at footnote 11.
[26] Above at footnote 20.

The issue is a matter where the House is in the best position to regulate its own proceedings through Standing Orders rather than by legislation.

Q19: Is a general power for each House to waive the protection of privilege to permit inquiries to consider evidence given in proceedings desirable?

In New Zealand the view has been taken that the House does not have the power to waive privilege. Privilege is founded in statute and legislation would be required to affect a waiver. [27]

Q20: In light of the *Chaytor* judgment, do you believe there is a need for legislation to clarify the extent of Parliament's privilege to organise its internal affairs?

It is the courts that determine the scope and extent of privilege by reference to statute, rather than on any ground of necessity. Necessity in this sense means that the privileges, powers and immunities are adapted to the needs or purposes of the legislature, not that the legislature could not function without them. Once established, it for the House to judge whether a privilege should be exercised in a particular case. The exercise of a particular privilege does not have to be justified on a ground of necessity.

Clearly if privilege is to be codified, the privilege of exclusive cognisance must be recognised in law. However, given its importance to the way in which legislatures have evolved, there is a risk in trying to define it in detail. For undoubtedly a definition would tend towards what are the powers the House needs? Necessity is not the legal justification for privilege in New Zealand.

As long as it is understood that the House's privileges are always related to the transaction of parliamentary functions – the business of the House and its committees, the scope and extent of privilege should be clear. In legislation this clarity is probably most effectively achieved through defining proceedings in Parliament.

Qs23—26: Select committee powers

In relation to the four issues below my view is that these all are within the exclusive jurisdiction of the House to control its own proceedings. As such they are best dealt with in Standing Orders rather than legislation. NZ has not encountered problems in relation to these issues sufficient to justify legislation which could draw the courts into questioning proceedings in committees.

Power to summons witnesses, documents and records

In NZ, the practice has been to use a summons only as a last resort. Standing Orders set out the powers to summon witnesses to appear before, or to require documents and records to be produced to, committees. Committees have the power to summon only where it is expressly given. Otherwise the power resides with the Speaker to whom committee may apply for a summons to be issued. If rules for issuing such a summons

[27] *Appendix to the Journals of the House of Representatives,* I.15B, 1991-93, p 4; and *Appendix to the Journals of the House of Representatives,* I.15B, 1993-96, p 5.

were contained in legislation, courts could use the manner and form approach (as occurred in *Easton*) to effectively review the process.

Power to fine non-members

Only the House has the power to punish for contempt. A corporate employer that disciplined its chief executive officer in relation to evidence he had given to a select committee was recently fined. The Privileges Committee considered whether the actions of the employer amounted to "assaulting, threatening or disadvantaging" a witness to a select committee, and found that a contempt had been committed. Following the Privileges Committee's recommendations, the House ordered the employer to make a written apology and pay a small fine.[28] The fine was paid.

Statutory definition of contempt

NZ's Standing Orders set out a definition of contempt[29] and in some detail examples of contempts[30]. The list is not intended to be exhaustive and therefore provides flexibility to deal with unanticipated issues that may arise. It also gives a public indication of the risk of certain behaviours in the parliamentary context.

The power to punish for contempt is a privilege of the House. It is for the House to exercise in particular cases, not the courts.

Criminal offence to fail to comply with an order of a select committee

Making it a criminal offence to refuse to comply with an order of a select committee would run the risk of drawing the courts into a review of parliamentary proceedings. The House's power to punish for contempt is sufficient sanction for the rare occasion on which such a refusal may arise.

Qs27 and 28: Reporting parliamentary proceedings

This is one area where the NZ Privileges Committee has recommended legislation to deal with inconsistencies which exist in law between the protection of parliamentary papers and broadcasts of parliamentary proceedings. The proposal on this point in the *Green Paper* is very similar—although there are some minor differences—to recommendations made by the Privileges Committee in 2009.[31] These recommendations were endorsed by the Standing Orders Committee in its 2011 review of Standing Orders.[32]

The recommendations were:

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[28] *Question of privilege referred on 16 February on the action taken by Television New Zealand in relation to its chief executive, following evidence he gave to the Finance and Expenditure Committee*, Interim report of the Privileges Committee, I.17A, April 2006, p 7: http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/1/d/8/1d8b47469e264dcc84adf57e05bea66b.htm.

[29] Standing Order 406

[30] Standing Order 407

[31] Above at footnote 11.

[32] Above at footnote 20.

- the live broadcast of Parliament's proceedings, including select committee hearings, is protected by absolute privilege
- delayed broadcasts or rebroadcasts of Parliament's proceedings, including select committee hearings, that are made by order or under the authority of the House of Representatives are protected by absolute privilege
- a fair and accurate report of proceedings in the House, or summary using extracts of proceedings in the House, by any person is protected by qualified privilege
- the broadcast and other publication of extracts of Parliament's proceedings, including select committee hearings, that are not made by order or under the authority of the House of Representatives are protected by qualified privilege, in a manner consistent with the provisions of the Defamation Act 1992.

Q29—31: Miscellaneous issues

These privileges are founded in the principle that a members' first duty is to the House. For the House to operate and retain the respect of citizens, members need to be seen to be attending to their parliamentary duties. To this extent, these privileges still have relevance. Members have a duty to their electors to attend to their roles as members and are not in exactly the same position as ordinary members of the public.

Q32: Is there a continuing case for Parliament to retain a power to find individuals guilty of contempt on the basis of insulting or disrespectful language?

Insulting and disrespectful language is not one of the contempts listed in Standing Order 407. It would tend to be dealt with as a matter of order by the chairperson. If such language resulted in an order of the House, which was subsequently disobeyed, or the operation of the House was disrupted or impeded directly or indirectly, such conduct might be raised as a contempt, but this seems unlikely in the NZ context.