

**Parliamentary Privilege Developments in New Zealand:
The Good, the Bad and the Ugly**

by

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A Introduction

New Zealand has been a pathfinder for the common law jurisdictions that operate under the protection of art 9 of the Bill of Rights 1688.¹ It has produced two of the leading decisions on the scope of art 9,² and, last year, its Parliament enacted a comprehensive reform of the law of parliamentary privilege. The Parliamentary Privilege Act 2014 (NZ) had dual purposes: to undo the effect of an unfortunate decision of the New Zealand Supreme Court,³ and to reaffirm and clarify the scope of Parliament's freedom of speech privilege. Article 9 reads:

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

This article recounts the leading case law developments and records the primary changes that the Parliamentary Privilege Act 2014 introduced. This Act aligns the law of Australia and New Zealand as several of the Act's provisions were modelled on the Australian Parliamentary Privileges Act 1987 (Cth).⁴ The leading decisions examined are: *Prebble v Television New Zealand Ltd*,⁵ *Jennings v Buchanan*,⁶ and *Attorney-General v Leigh*.⁷ Each decision addressed the scope and application of Parliament's freedom of speech under art 9. In addition, this article examines the Court of Appeal decision in *Awatere Huata v Prebble*,⁸ which addressed Parliament's companion privilege of exclusive cognisance (Parliament's right to regulate its own internal proceedings). This decision

¹ Bill of Rights 1688 1 Will & Mar, Sess 2, c 2.

² *Prebble v Television New Zealand Ltd* [1995] 1 AC 321(PC); *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577.

³ *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713.

⁴ See below for discussion of the decision in *R v Murphy* (1986) 5 NZWLR 18 (NSWSC), which was the catalyst for the Parliamentary Privileges Act 1987 (Cth).

⁵ *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC).

⁶ *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577.

⁷ *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713.

⁸ *Awatere Huata v Prebble* [2004] 3 NZLR 359 (HC and CA).

contained speculative rather than conclusory reasoning but it charts the direction of change – towards a narrowing of the privilege.

B *Prebble v Television New Zealand*

(a) The decision

Prebble was a Privy Council decision on appeal from New Zealand. It concerned events from over 20 years ago but it remains the leading authority on the scope of art 9. The plaintiff was a minister of the Crown in the Fourth Labour Government (1984-1990) under Prime Minister David Lange. He sued the defendant for alleged defamation arising out of a current affairs programme about the plaintiff's actions as Minister for State-Owned Enterprises. The Government had actively promoted the corporatisation and/or privatisation of the State's commercial trading functions (airways, postal services, railways, etc), and the plaintiff claimed that the programme portrayed him as having conspired to sell off the state's assets at under-valued prices in return for donations to the Labour Party.

The defendant denied the claims but also pleaded truth, fair comment, qualified privilege, and mitigation of damages on account of the plaintiff's unenviable reputation as a politician. Several of the particulars the defendant pleaded referred to the plaintiff's and other ministers' speeches in the House of Representatives and to words or actions within the ambit of "proceedings in Parliament" (as that phrase is used in art 9). The Court of Appeal held that all of the particulars pertaining to the House and its proceedings were covered by art 9 and absolutely protected from judicial scrutiny. However, these particulars, the Court held, could not sensibly be struck out with a view to the action continuing. The particulars were neither minor nor inconsequential to the alleged defamation but "very close to the core of this highly political case".⁹ Consequently, the Court resolved that the only just recourse was to stay the action.

On appeal, the Privy Council agreed with the Court of Appeal's ruling on the application of art 9 (all of the particulars pertaining to the House and its proceedings were inadmissible) but reversed the decision to stay the proceedings. The interests of justice did not warrant that recourse as the defendant had relied on a large number of other matters in support of the allegation of conspiracy, to which parliamentary privilege had no application.

⁹ *Television New Zealand v Prebble* [1993] 3 NZLR 513 (CA) at 522.

(b) *Critique*(i) *Judicial correction*

Lord Browne-Wilkinson seized the opportunity that *Prebble* offered to revisit an erroneous ruling he had made 19 months earlier in *Pepper (Inspector of Taxes) v Hart*.¹⁰ His Lordship had held that art 9 was limited in scope and only protected members of Parliament who, in the absence of art 9, would have been exposed to legal liability for their statements in the House. This ruling was palpably incorrect.¹¹

The reach of art 9 extends beyond members of Parliament. All persons – strangers, petitioners, submitters, witnesses, parliamentary staffers and others – are protected from any repercussions arising from proceedings in Parliament. Nor need persons be exposed to criminal or civil liability. His Lordship, in effect, excised from art 9 the protection against *questioning*. The privilege belongs to the House in its institutional capacity in order to prevent courts, statutory bodies or inquisitorial authorities from questioning its proceedings and intruding on its exclusive domain. So, in *Prebble*, Lord Browne-Wilkinson reinstated the protection against questioning by ruling inadmissible attempts to show that parliamentary statements were “inspired by improper motives or were untrue or misleading”.¹² Article 9 had broader purpose than simply protecting members from criminal or civil action. Rather, its purpose was to ensure that members and witnesses may speak freely in Parliament without fear of repercussion: “to ensure that the member or witness *at the time he speaks* is not inhibited from stating fully and freely what he has to say.”¹³ However, even this concession might be too narrowly expressed. “Questioning” embraces more than attempts to show that a parliamentary statement was inspired by improper motive or was untrue. Arguably, proceedings in Parliament are questioned whenever counsel or the courts draw inferences, findings or conclusions from them.¹⁴

(ii) *Lord Browne-Wilkinson’s “wider principle”*

¹⁰ *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (HL).

¹¹ See PA Joseph “Parliament’s Attenuated Privilege of Freedom of Speech” (2010) 126 LQR 568 at 573-575.

¹² *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC) at 337.

¹³ *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC) at 334 (emphasis in original).

¹⁴ See PA Joseph “Parliament’s Attenuated Privilege of Freedom of Speech” (2010) 126 LQR 568 at 574.

Lord Browne-Wilkinson's acknowledgement of a "wider principle" under the law of parliamentary privilege has caused some confusion. His Lordship stated:¹⁵

"In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is just one manifestation, viz. that 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."

The latent ambiguity in that statement has led some courts to view Parliament's freedom of speech privilege as being wider than what art 9 guarantees.¹⁶ The "wider principle" is sourced in the common law but it does not add to or transcend art 9, and is not an independent basis for ruling inadmissible proceedings in Parliament. Article 9 is in no need of embellishment or supplementation as a constitutional bulwark.¹⁷ Rather, Lord Browne-Wilkinson's "wider principle" acknowledges the mutual respect and restraint owed by Parliament and the courts, and the existence of further privileges (the right of exclusive cognisance, the power to punish for breach of privilege or contempt, etc) that the courts are equally astute to respect. The concept of a wider principle should be construed as embracing all of the protections that collectively comprise Parliament's privileges. Each of these privileges is based on the principle of comity and the mutual respect and restraint that joins the branches.

New Zealand has given explicit recognition to the principle of comity in the rules defining the courts' and Parliament's institutional relations. In 2011 the House of Representatives strengthened its sub judice rule, prohibiting reference in debates to matters under or awaiting adjudication in the courts. That prohibition is made subject to the discretion of the Speaker, who, in exercising the discretion, must weigh the "constitutional relationship of mutual respect that exists between the legislative and judicial branches of government".¹⁸ In addition, the Parliamentary Privilege Act 2014 directs the courts to interpret the Act in a way that promotes the principle of comity and "the mutual respect and restraint that is essential to [the courts' and Parliament's] important constitutional

¹⁵ *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC) at 332.

¹⁶ See *Hamilton v Al Fayed* [1993] 3 All ER 317 (CA) at 333-334; *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577 at [10]; *Toussaint v Attorney-General (Saint Vincent and the Grenadines)* [2007] UKPC 48, [2007] 1 WLR 2825.

¹⁷ For judicial endorsement, see *Attorney-General v Mair* [2009] NZCA 625 at [146], per Baragwanath J, quoting the writer's *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at [12.4.1(7)].

¹⁸ Standing Orders of the House of Representatives (2011), SO 112.

relationship”.¹⁹ Lord Browne-Wilkinson’s “wider principle” encapsulates this constitutional imperative but does not embellish or supplement Parliament’s freedom of speech.

(iii) *To impeach or question*

Article 9 does not render inadmissible in court everything that is said or done in parliamentary proceedings. *Prebble* established that what is crucial is the purpose for which the evidence of Parliament’s proceedings is sought to be adduced, not its origin or source as part of the parliamentary record. Article 9 excluded evidence only where the purpose for leading it was to *impeach or question* what was said or done in Parliament. The Privy Council criticised the failure of some courts to distinguish between the right to prove the occurrence of parliamentary events, and the embargo on questioning their propriety or veracity.²⁰ There was no objection to the use of *Hansard* or the House records to prove what was said or done in the House or a committee as a matter of historical fact.²¹

Parties to litigation who adduce the House records for the following purposes do not trip the art 9 embargo. They may wish to: support a particular statutory construction,²² establish that something was said or done in the House as a matter of historical fact,²³ prove that a member was present in the House on a particular day,²⁴ substantiate that a published account was a fair and accurate report of proceedings in Parliament,²⁵ or establish that a newspaper report was referring to persons who had been named in the House.²⁶ Conversely, it is impermissible to lead evidence of Parliament’s proceedings to: establish that a defendant was actuated by malice,²⁷ prove the truth of allegations made about a member’s conduct in the House,²⁸ establish that a member had misled the House,²⁹ or show that a member’s statements in the House were inspired by improper motive or were untrue or

¹⁹ Parliamentary Privilege Act 2014, s 4(1)(b).

²⁰ *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC) at 337.

²¹ See the Parliamentary Privilege Act 2014, s 15(1) for the codification of this principle.

²² *Howley v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404 (CA); *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694 (CA); *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (HL).

²³ *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522 (DC) at 531; *Mundey v Askin* [1982] 2 NSWLR 369 (NSWCA); *Henning v Australian Consolidated Press Ltd* [1982] 2 NSWLR 374 (NSWSC); *Blackshaw v Lord* [1984] 1 QB1 (CA).

²⁴ *Amman Aviation Pty Ltd v Commonwealth of Australia* (1988) 81 ALR 710 (FCA).

²⁵ See New Zealand’s Parliamentary Privilege Act 2014, ss 18 and 20 re-enacting the defence of qualified privilege for the communication of a fair and accurate report of, or extract from, proceedings in Parliament. See formerly the Defamation Act 1992, s 16(1).

²⁶ *Hyams v Peterson* [1991] 3 NZLR 648 (CA).

²⁷ *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522 (DC).

²⁸ *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC) at 336, criticising the decision in *News Media Ownership v Finlay* [1970] NZLR 1089 (CA).

²⁹ *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC) at 335.

misleading.³⁰ Article 9 prohibited attempts to pursue those ends in court, “whether by direct evidence, cross-examination, inference, or submission”.³¹

(iv) *Waiver*

The Court of Appeal ruled that the plaintiff’s action should be stayed, “unless and until the House of Representatives and any individual members concerned waive [the] privilege”.³² The Clerk to the House of Commons also acknowledged the possibility of waiver in exchanges preparatory to litigation in *Pepper v Hart*. The Clerk informed the Attorney-General that the proposed use of *Hansard* in those proceedings required leave of the House of Commons so as to avoid a breach of its privilege.³³ This communication contemplated that the Commons might, by granting leave, waive its privilege of freedom of speech.

Use of the word “privilege” to describe the legal protection gives traction to the possibility of waiver (privileges can ordinarily be waived) but the word in this context is a misnomer. Article 9 does not confer any privilege as might be waived.³⁴ Parliament’s freedom of speech has statutory foundation and no person or body can override the laws of Parliament.³⁵ New Zealand’s House of Representatives is a publicly constituted body and, like all other public bodies, it is bound by the law.³⁶ In *Duke of Newcastle v Morris*,³⁷ Lord Hatherley LC held that a privilege of Parliament, established by common law and affirmed by statute, cannot be abrogated except by express words in a statute. A resolution of the House, even if unanimous, could not achieve that purpose.

C *Jennings v Buchanan*

(a) The decision

*Jennings v Buchanan*³⁸ was a further Privy Council decision on appeal from New Zealand. This decision endorsed the application of the principle of effective repetition under the law of defamation. Words spoken outside the House may be actionable where they adopt, affirm or endorse defamatory words earlier spoken in the House. The plaintiff, a member of Parliament, had made potentially defamatory statements under cover of privilege and later commented in a media

³⁰ *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC) at 337.

³¹ *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC) at 337.

³² *Television New Zealand v Prebble* [1993] 3 NZLR 513 (CA) at 522.

³³ See PA Joseph “Parliament’s Attenuated Privilege of Freedom of Speech” (2010) 126 LQR 568 at 574.

³⁴ *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684 at [61].

³⁵ *Stockdale v Hansard* (1839) 9 Ad & El 1; *Bowles v Bank of England* [1913] 1 Ch 57 (ChD).

³⁶ *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at [13].

³⁷ *Duke of Newcastle v Morris* (1869-70) LR 4 HL 661 at 668.

³⁸ *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577.

interview that he did not resile from what he had said. By adopting or affirming statements made inside the House, the defendant stepped outside the protection of art 9. The cause of action was the extra-parliamentary statement, not the intra-parliamentary words which were privileged. Each repetition of a defamatory statement is a fresh publication that creates a fresh cause of action.³⁹ *Hansard* was admissible to establish what the defendant had said in the House, provided counsel did not attempt to examine, comment on, or draw inferences from the evidence. It was immaterial that adducing *Hansard* might also expose the truth or honesty of words spoken in the House.⁴⁰

(c) Critique

Lord Bingham of Cornhill delivered the decision of the Privy Council in an uncharacteristically underwhelming judgment. Much of it comprised lengthy quotations from *Prebble v Television New Zealand Ltd*,⁴¹ the *Report of the Joint Committee on Parliamentary Privilege (1999)*⁴² and the decisions of courts from sundry jurisdictions. The decision confirmed that the effective repetition principle applied in the parliamentary context, notwithstanding Parliament's freedom of speech under art 9. This erroneously discounted the protection that art 9 affords.

Effective repetition is an established principle under the law of defamation. But, in the parliamentary context, it is excluded because the words deemed to be effectively repeated are privileged under art 9 and protected from scrutiny.⁴³ This differs from the typical effective repetition case, where there is no legal impediment to the deemed repetition. *Jennings v Buchanan* exemplifies why the principle is excluded. The words "I do not resile from what I said" are innocuous. To impute defamatory intent, the plaintiff must adduce what was said in the House which the defendant is considered to have affirmed or adopted. But to do that is to "question" proceedings in Parliament. An action in defamation carries the defamatory sting that the defendant was lying, or was careless or economical about the truth. Falsity is presumed (the defendant bears the onus to establish truth as a defence),⁴⁴ so the plaintiff is automatically taken to attack the

³⁹ *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577 at [12].

⁴⁰ *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577 at [15] quoting from *Laurance v Katter* (1996) 141 ALR 447 (Qld CA) at 490.

⁴¹ *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC).

⁴² *Report of the Joint Committee on Parliamentary Privilege* HL Paper 43-I; HC Vol 214-I (30 March 1999) at [42], [49] and [91].

⁴³ See PA Joseph "Parliament's Attenuated Privilege of Freedom of Speech" (2010) 126 LQR 568 at 580ff. The remainder of this critique is based on the writer's text *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 453-454.

⁴⁴ Defamation Act 1992 (NZ), s 8(3).

veracity of the parliamentary statement that is endorsed or adopted. Truth is a defence to defamation.⁴⁵ Consequently:⁴⁶

“If the member’s words in debate were true, there could be no actionable defamation, no matter how damaging the words were to the plaintiff’s reputation. The member might endorse the words with impunity, or repeat them verbatim, and incur no legal liability (subject to the defendant successfully establishing truth as a defence). The effective repetition principle dictates that the plaintiff must attack the member’s parliamentary words in breach of the legal protection of act 9. In *Leigh v Attorney-General*, it was inherent in the allegation of defamation that the Minister’s words spoken in the House were false: ‘That is apparent from the pleadings which aver that the Minister’s comments repeated the defamatory sting of the [defendant’s] written and oral statements.’ The Court held that art 9 prevented the plaintiff from alleging that the parliamentary words were false, which is what a plaintiff must do to succeed under effective repetition.”

The decision in *Jennings v Buchanan* is not only legally aberrant. It also has a corrosive effect on political and parliamentary free speech. Members will actively avoid giving media comment where they have made potentially defamatory statements in debates. The courts have readily construed members’ extra-parliamentary statements as having effectively repeated words spoken in the House.⁴⁷ The effective repetition principle might also inhibit parliamentary speech. Members may refrain from making damaging statements in debate, or hedge or qualify their statements, for fear of triggering the effective repetition principle in media interviews. Members come under intense media pressure to defend or explain their political statements. After the decision in *Jennings v Buchanan* had been delivered, the Clerk of the House of Representatives formally warned members of the potential to incur liability for statements that can be linked to debates in the House.⁴⁸

⁴⁵ Defamation Act 1992 (NZ), s 8.

⁴⁶ PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [13.5.5(2)(b)]. The decision referred to in the quotation is reported as *Leigh v Attorney-General* [2010] NZCA 624, [2011] 2 NZLR 148 and the quotation from that decision is at [49].

⁴⁷ *Beitzel v Crabb* [1992] 2 VR 121 (VSC); *Laurance v Katter* (1996) 141 ALR 447 (Qld CA); *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577.

⁴⁸ Personal statement of David McGee, Clerk of the House of Representatives, to the writer.

(d) Reform

In 2005 the Privileges Committee recommended that Parliament exclude the effective repetition principle in its application to the House.⁴⁹ The Clark Government (2002-2005) announced that legislation would be introduced following the 2005 elections,⁵⁰ but nothing eventuated. The Australian legislatures likewise announced that they would introduce legislation, implementing a unified response across Australia.⁵¹ But, as in New Zealand, nothing eventuated. The Privileges Committee repeated its recommendation in 2009, expressing disappointment at the lack of resolve,⁵² and the Standing Orders Committee endorsed the Privileges Committee recommendation.⁵³ Something more pressing was required, and the decision of the Supreme Court in *Attorney-General v Leigh*⁵⁴ provided that “something”. In 2012 the Privileges Committee initiated an inquiry into *Leigh’s* case and, the following year, it recommended that Parliament introduce legislation for the general reform of the law, including the abolition of the effective repetition principle in its application to Parliament.⁵⁵ Under s 11(d)(e) of the Parliamentary Privilege Act 2014 (NZ), evidence must not be offered or received concerning proceedings in Parliament for the purpose of establishing or supporting any liability, remedy or relief sought in judicial proceedings. The Act’s purpose section explicitly refers to the decision in *Jennings v Buchanan* and the effective repetition principle, and identifies its abolition as one of the Act’s “subsidiary purposes”.⁵⁶

D *Attorney-General v Leigh*

“In *Attorney-General v Leigh*, the Supreme Court engaged in exploratory reasoning that rewrote in unintended ways the scope of Parliament’s freedom of speech.”⁵⁷ The writer has critiqued this decision⁵⁸ and appeared before Parliament’s Privileges Committee to explain the flaws in the

⁴⁹ Report of the Privileges Committee *Question of Privilege Referred 21 July 1998 Concerning Buchanan v Jennings* [2005] AJHR I17G at 19.

⁵⁰ New Zealand Press Association Report (1 June 2005).

⁵¹ See Report of Procedure and Privileges Committee of the Western Australian Legislative Assembly; *Effective Repetition: Decision in Buchanan v Jennings* (Report No 3, April 2006).

⁵² Report of the Privileges Committee *Question of privilege relating to the exercise of the privilege of freedom of speech by members in the context of court orders* (I17A, May 2009) at 21-22.

⁵³ Report of the Standing Orders Committee *Review of Standing Orders* (I18B, September 2011) at 6, 27-28.

⁵⁴ *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713.

⁵⁵ *Report of the Privileges Committee Question concerning the defamation action Attorney-General and Gow v Leigh* (I17A, June 2013) at 38.

⁵⁶ Parliamentary Privilege Act 2014 (NZ), s 3(2)(d).

⁵⁷ PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [13.5.12].

⁵⁸ PA Joseph “Constitutional Law” [2012] NZ L Rev 515 at 527-533; PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [13.5.12].

judgment, and why legislation was necessary to negate the effect of the decision.⁵⁹ This commentary reproduces the writer's analysis in *Constitutional and Administrative Law in New Zealand*.⁶⁰

(a) The decision

The plaintiff was on contract to the Ministry for the Environment. Labour Party member (and now Labour member of Parliament), Ms Claire Curran, was appointed to oversee her work, and the plaintiff ended her contract prematurely. Questions were later asked whether Ms Curran's engagement had been politically motivated, and a written question for oral answer was tabled in the House. The responsible Minister sought a briefing from a deputy secretary of the Ministry, and the Minister answered the parliamentary question in the House that day.

The plaintiff issued defamation proceedings against the deputy secretary, claiming he had defamed her in his briefing to the Minister (given the Minister's critical statements in the House). The defendant argued that the briefing to the Minister was part of a proceeding in Parliament and protected from action by art 9. The Supreme Court, upholding the decisions below, rejected the defendant's argument. It was not necessary for the Court to extend the protection of parliamentary privilege as the defendant could plead the defence of qualified privilege under the law of defamation. Unlike the parliamentary privilege defence, the defence of qualified privilege was defeasible upon proof that the defendant was motivated by ill-will or took improper advantage of the occasion of publication.⁶¹ It must be "necessary", the Court held, "for the proper and efficient conduct of the business of the House for the occasion in question to be classified as one of absolute privilege".⁶²

(b) Critique

(i) *Wrong test*

The necessity test was applied in error. Previously, the focus was on the limiting language of art 9: in particular, on the breadth of the phrase "proceedings in Parliament" and the meaning of the verbs

⁵⁹ See Privileges Committee Report *Question concerning the defamation action Attorney-General and Gow v Leigh* (I17A, June 2013).

⁶⁰ PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [13.5.12].

⁶¹ Defamation Act 1992 (NZ), s 19. See also the Parliamentary Privilege Act 2014 (NZ), s 18.

⁶² *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713 at [5].

“impeached or questioned”.⁶³ But in *Leigh*, the Supreme Court introduced a common law test of necessity which it borrowed from the Canadian and United Kingdom decisions in *Canada (House of Commons) v Vaid*⁶⁴ and *R v Chaytor*.⁶⁵ This caused the decision-making to misfire because neither of those decisions involved Parliament’s privilege of freedom of speech in debate. Each decision was concerned to delineate the scope of Parliament’s exclusive cognisance (its right to regulate its own internal proceedings), which is sourced in the common law, not statute.⁶⁶ A common law test might logically be used to delineate a common law privilege but not a privilege defined by statute.

In *Chaytor* Lord Phillips PSC distinguished the privileges of freedom of speech and exclusive cognisance.⁶⁷ Parliament’s freedom of speech protected its core or essential business, and its right of exclusive cognisance protected words or actions that required protection to enable Parliament to discharge its core or essential business. The privileges protected different things, had different legal foundations and invited different forensic tests. In *Leigh* the error was to transpose the common law test (necessity) to Parliament’s freedom of speech, which has statutory foundation. Its scope must be fixed through ordinary processes of statutory interpretation, not considerations of necessity.

(iii) *Proceedings in Parliament*

The Supreme Court discounted the phrase “proceedings in Parliament” which, until *Leigh*, had anchored the scope of art 9. Tipping J did not ask whether the deputy secretary’s briefing to the Minister was part of a proceeding in Parliament and protected by art 9. A written question for oral answer by the Minister in the House had been lodged with the Clerk of the House. Under the Standing Orders, notices of questions must be lodged between 10.00 am and 10.30 am on the sitting day in question.⁶⁸ The lodging of the question created a proceeding in Parliament and all that followed sequentially was part of that proceeding. The deputy secretary’s briefing was at the Minister’s request (ministers invariably seek briefings before answering parliamentary questions) and was part of an unbroken chain of events that led to the Minister’s statement to the House that afternoon.

⁶³ See *Fowler & Roderique Ltd v Attorney-General* [1981] 2 NZLR 728 (HC) at 731; *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (HL); *Prebble v Television New Zealand Ltd* [1994] 1 AC 321 (PC).

⁶⁴ *Canada (House of Commons) v Vaid* 2005 SCC30, [2005] 1 SCR 667.

⁶⁵ *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684.

⁶⁶ In *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684, Lord Phillips PSC addressed the art 9 privilege but discounted its application.

⁶⁷ *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684 at [47].

⁶⁸ Standing Orders of the House of Representatives 2011, SO 378.

Curiously, the Court acknowledged this chain of events. “Mr Gow [the deputy secretary],” the Court observed, “briefed the minister both orally and in writing and the Minister used the information supplied to him to answer the parliamentary question.”⁶⁹ Parliamentary privilege should have applied causing the action to be struck out. Ministry officials or parliamentary staffers who facilitate the core business of the House engage in proceedings in Parliament and are protected under art 9. At least, questions cannot arise in the future whether such persons are protected under art 9. The Parliamentary Privilege Act 2014 enacted an extended definition of the phrase “proceedings in Parliament” and removed any doubts as to the scope of the protection.⁷⁰

(iv) *Scope of the privilege collapsed*

Leigh’s decision collapsed the scope of Parliament’s freedom of speech to unknown extent. The privilege, one surmised, protected members for their words or actions in the House or in committee, but other persons engaged in parliamentary proceedings seemingly forfeited the protection. The Court’s reasoning advanced two sides of the same coin. First, it was unnecessary to grant the defendant absolute privilege in order to protect the core business of the House. Secondly, it served the public interest that the defendant would be protected by qualified privilege under the law of defamation. This defence operated as a *disincentive* for ministry advisors who might be motivated by ill-will or would take improper advantage of the occasion of publication. Proof of ill-will or improper advantage defeats the defence to an action in defamation.

The same reasoning might apply to witnesses before select committees or persons who petition Parliament. If *Leigh* be our exemplar, such persons would not put at risk Parliament’s core business. As with the deputy secretary in *Leigh*, those persons would be compelled to advance the defence of qualified privilege. Parliamentary staffers might also be exposed to action. The Clerk of the House is intimately connected with the business of the House. When the Clerk accepts a member’s written question for a minister’s oral answer in the House, the Clerk “publishes” it on the order paper for the day’s sitting. If, unbeknownst to the Clerk, the question contains a defamatory sting, would parliamentary privilege protect the Clerk? It would seem not. The Clerk would be protected by qualified privilege and be compelled to plead at trial a defeasible defence.

(v) *Chilling effect*

The chilling effect of the necessity test was a major concern. Exposing ministry officials, parliamentary staffers or committee witnesses to legal action would unquestionably chill the free

⁶⁹ *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713 at [1].

⁷⁰ See the commentary below on the Parliamentary Privilege Act 2014.

flow of information, so vital in the parliamentary context. In *Leigh* Tipping J thought any chilling effect “inherently unlikely”.⁷¹ Would the defendant (the deputy secretary) share his confidence? Would he have been as forthcoming post-*Leigh*? Once bitten, twice shy. The damage *Leigh* inflicted on Parliament was incalculable. The thought of legal action would unquestionably cause persons to be economical in their communications. Ministers rely implicitly on their officials’ briefings when they rise to their feet during question time, and they have every right to believe they have been fearlessly and fully informed.

G *Awatere Huata v Prebble*

(a) The decision

*Awatere Huata v Prebble*⁷² involved New Zealand’s controversial “party-hopping” legislation. A spate of party defections tarnished the first Parliament (1996-1999) elected under the Mixed-Member Proportional voting system, and the Electoral (Integrity) Amendment Act 2001 (NZ) sought to impose new disciplines. Under this Act, a member vacated his or her seat where the member resigned from the party membership and gave notice to the Speaker, or where a party leader gave notice that a party member “has distorted, and is likely to continue to distort” Parliament’s election-night proportionality. The new s 55A inserted in the Electoral Act 1993 (NZ) was tied to a sunset clause which caused it to terminate following the 2005 elections.

In *Awatere Huata* the question was whether the member had, by her actions, distorted the proportionality of the House. *Awatere Huata* was a member of Parliament for the ACT Party, which suspended her and then expelled her from the party. She had offered her proxy vote to the Party, although this was refused, and she had voted with ACT on all but one issue. The Court of Appeal held that *Awatere Huata* had not distorted proportionality but this finding was reversed on appeal. The Supreme Court held that proportionality had been affected and that *Awatere Huata*’s seat could be declared vacant under s 55A.

(b) Issues of exclusive cognisance

The rulings on the Electoral (Integrity) Amendment Act 2001 are of principally historical interest, given the Act’s sunset clause. However, the Court of Appeal’s rulings on Parliament’s exclusive

⁷¹ *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713 at [21].

⁷² *Awatere Huata v Prebble* [2004] 3 NZLR 359 (HC & CA); *Awatere Huata v Prebble* [2005] 1 NZLR 359 (HC & CA).

cognisance privilege are of continuing relevance.⁷³ In the High Court, the ACT Party argued that invocation of the party-hopping legislation was within Parliament's exclusive cognisance and was non-justiciable. The House, not the courts, must rule on whether proportionality had been distorted. However, this argument failed in the High Court and the respondents did not pursue it in the Court of Appeal. Despite this, the Court of Appeal resolved (4:1) that it was bound to rule on the question. Section 242 of the *Legislature Act 1908* gave the privileges of the House statutory force and deemed them to be part of the general law of New Zealand. It was not necessary to plead privilege as all courts and judges were required to take judicial notice of them.⁷⁴

The majority (McGrath, Glazebrook and O'Regan JJ) held that the Electoral (integrity) Amendment Act 2001 did not trigger the exclusive cognisance privilege. The statutory sequence was external to Parliament's internal workings. No resolution of the House was required (the Speaker simply informed the House of a vacancy) and the House was not engaged at any stage of the statutory process. The involvement of the ACT caucus did not constitute a proceeding in Parliament (contra *Rata v Attorney-General* (1997) 10 PRNZ 304 (HC)), and communications between the ACT leadership and the Speaker were external to the proceedings of the House. The Court overruled *Rata*, which had held that caucus meetings were proceedings in Parliament and covered by privilege. Caucus meetings are party-political meetings and have never been a function of Parliament.⁷⁵

The majority undertook an expansive review that indicated a narrowing of the exclusive cognisance rule. Their Honours affirmed a ruling which had always been taken to represent the law. In *Bradlaugh v Gossett*,⁷⁶ Stephen J held that the House of Commons had jurisdiction to interpret statutes applying to its own internal proceedings. The courts had no basis for intervening, even if the House applied the statute in error.⁷⁷ The Court of Appeal then emphasised the distinction Stephen J drew: between statutes having exclusively intra-parliamentary application and statutes establishing rights exercised "out of and independently of the House".⁷⁸ Statutes of the latter type, said Stephen J, remained within the jurisdiction of the courts to administer, even if they coincidentally applied to Parliament's proceedings. The question was where to draw the line between the two types of statute.

⁷³ The Supreme Court proffered no views on the Court of Appeal's privilege rulings.

⁷⁴ See now the *Parliamentary Privilege Act 2014*, s 8.

⁷⁵ See D McGee, "Parliament and Caucus" [1997] NZLJ 137; PA Joseph "Constitutional Law" NZ L Rev 197 at 219-220.

⁷⁶ *Bradlaugh v Gossett* (1884) 12 QBD 271 at 278.

⁷⁷ *Bradlaugh v Gossett* (1884) 12 QBD 271 at 280-281.

⁷⁸ *Bradlaugh v Gossett* (1884) 12 QBD 271 at 282.

The majority cited the Niue Court of Appeal decision in *Kalauni v Jackson*,⁷⁹ as a counterpoint to the decision in *Bradlaugh v Gossett*. The issue was whether three members of the Legislative Assembly had vacated their seats, and the Niue Court upheld the jurisdiction to intervene. The rights they were asserting related not simply to the internal workings of the Assembly or to actions the Assembly might take to discipline members: “Rather the rights they assert are rights under the general law of Niue and rights, moreover, of the highest importance in a democratic society.”⁸⁰

Kalauni v Jackson realigned the balance between courts and Parliament. Traditionally, disputed membership issues had been subsumed within the exclusive cognisance rule. *Bradlaugh v Gossett* concerned the right of an elected member to take his seat in the Commons, and the court held it could not inquire into a resolution of the House that the member (a declared atheist) could not take the oath or affirm under the governing legislation. However, the reasoning in *Kalauni v Jackson* would have produced a different result. A member who is prevented from sitting in the House cannot exercise the rights of membership of elected members. Preventing the member extinguished both the member’s right to represent the constituents and the constituents’ right to be represented.

The majority in *Awatere Huata* left it open whether *Kalauni v Jackson* represented the law of New Zealand. Nevertheless, the judicial inclination is clear: most legislation applying to the House will be justiciable, as establishing rights that can be asserted under the general law.

F Parliamentary Privilege Act 2014

(a) Referral of question of privilege

The decision in *Leigh* was delivered on 16 September 2011.⁸¹ On 27 September 2011, the Speaker of the House of Representatives referred to the Privileges Committee a question of privilege raising serious concerns for the House.⁸² The Privileges Committee met and held over the question for the new Parliament that would assemble after the November 2011 elections. The Privileges Committee subsequently appointed invited expert evidence from selected organisations and persons, and from the privileges committees of the Australian Parliament, the British House of Commons and the Canadian Senate. The Committee compiled a detailed report which it presented to the House in June 2013. The report recommended that Parliament enact a suite of reforms to negate the effect

⁷⁹ *Kalauni v Jackson* [2001] NZAR 292 (Niue CA).

⁸⁰ *Kalauni v Jackson* [2001] NZAR 292 (Niue CA) at 297-298.

⁸¹ *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713.

⁸² *Report of the Privileges Committee Question concerning the defamation action Attorney-General and Gow v Leigh* (I17A, June 2013), Appendix B.

of *Leigh*, to confirm and clarify the scope of Parliament's freedom of speech, and to effect sundry other reforms. The writer had advocated this recourse in oral and written submissions which were presented at the request of the Committee.⁸³

(c) Suite of reforms

Leigh was the catalyst for the Parliamentary Privilege Act 2014 but its provisions cover a range of matters. The reforms include:

- the enactment of a direction to interpret the Act in a way that promotes: the objectives listed in the Act's purpose section, the principle of comity and the mutual respect and restraint that joins the legislative and judicial branches, and the integrity and independence of the House and its committees;⁸⁴
- the enactment of an avoidance-of-doubt definition of "proceedings in Parliament" as that phrase appears in art 9;⁸⁵
- the provision of statutory guidance on how to interpret "impeaching" or "questioning" as those words appear in art 9;⁸⁶
- the abolition of the effective repetition principle under the law of defamation as it had been applied to proceedings in Parliament;⁸⁷
- the consolidation of the provisions of the Legislature Act 1908, the Legislature Amendment Act 1992 and s 13 of the Defamation Act 1992 so far as those provisions related to the law of parliamentary privilege;⁸⁸
- the conferral of a power on the House to impose a monetary fine for contempt of Parliament;⁸⁹
- the conferral of a power on the House to administer oaths or affirmations to witnesses giving evidence before select committees;⁹⁰
- a confirmation that the House has no power to expel its members,⁹¹ and

⁸³ Letter of PA Joseph to the Chair of the Privileges Committee, Hon Christopher Finlayson QC, dated 19 October 2012, annexing the writer's published critique. PA Joseph "Constitutional Law" [2012] NZ L Rev 515 at 527-533.

⁸⁴ Sections 4 and 7.

⁸⁵ Section 10.

⁸⁶ Sections 11 and 15.

⁸⁷ Section 11(e).

⁸⁸ Sections 8, 9, 17-21 and 24-31

⁸⁹ Section 22. See PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [13.14.2].

⁹⁰ Section 24.

⁹¹ Section 23. Section 55 of the Electoral Act 1993 had earlier overridden the former privilege: see PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [13.7].

- the consolidation and clarification of the law of qualified privilege regarding media reporting of Parliament and the official broadcasts of its proceedings.⁹²

(d) Definition of “proceedings in Parliament”

The phrase “proceedings in Parliament” is the crux of art 9 and Parliament’s freedom of speech. Section 10 of the Act enacted a “for the avoidance-of-doubt” definition of the phrase,⁹³ and s 11 identified five impermissible purposes in seeking to adduce evidence in court. These two sections replicate, in parts verbatim, section 16 of the Australian Parliamentary Privileges Act 1987 (Cth), on which the sections were modelled.

Virtually identical circumstances led to the enactment of the Australian and New Zealand statutes. The Commonwealth Parliament enacted s 16 to negate the precedent effect of the rulings of the New South Wales Supreme Court in *R v Murphy*.⁹⁴ Hunt J had allowed in evidence of the proceedings of a Senate committee to enable counsel to question the veracity of a witness’s evidence to it. Hunt J also ruled that inferences might be drawn from counsels’ submissions that were based on statements made by the committee. The Australian Act was introduced to undo the damage that those rulings caused. In *Prebble v Television New Zealand Ltd*,⁹⁵ the Privy Council observed that that Act “declares what had previously been regarded as the effect of art 9 and [s 16] contains what ... is the true principle to be applied”.

The operative parts of s 10 read:

10 Proceedings in Parliament defined

- (1) **Proceedings in Parliament**, for the purposes of Article 9 of the Bill of Rights 1688, and for the purposes of this Act, means all words spoken and actions done in the course of, or for purposes of or incidental to, the transacting of the business of the House or of a committee.
- (2) The definition in subsection (1) must be taken to include the following:
 - (a) the giving of evidence (and the evidence so given) before the House or a committee:
 - (b) the presentation or submission of a document to the House or a committee:
 - (c) the preparation of a document for purposes of or incidental to the transacting of any business of the House or of a committee:

⁹² Sections 18-21.

⁹³ Section 3(2)(c) identified this purpose in setting out the objects of the Act.

⁹⁴ *R v Hunt* (1986) 5 NSWLR 18 (NSWSC).

⁹⁵ *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC) at 8.

- (d) the formulation, making, or communication of a document, under the House's or a committee's authority (and the document so formulated, made, or communicated):
 - (e) any proceedings deemed by an enactment (or a thing said or produced, or information supplied, in an inquiry or proceedings, if an enactment provides the thing or information is privileged in the same way as if the inquiry or proceedings were) for those purposes proceedings in Parliament.
- (3) In determining under subsection (1) whether words are spoken or acts are done for purposes of or incidental to the transacting of the business of the House or of a committee, words spoken or acts done for purposes of or incidental to the transacting of reasonably apprehended business of the House or of a committee must be taken to fall within subsection (1).
- (4) In determining under subsection (1) whether words spoken or acts done are done for purposes of or incidental to the transacting of the business of the House or of a committee, no necessity test is required or permitted.
- (5) **Necessity test includes**, but is not limited to, a test based on or involving whether the words or acts or may be (absolutely, or to a lesser degree or standard) necessary for transaction of the business.

Section 11 defines what is meant by "questioning" proceedings in Parliament, contrary to the direction under art 9. The opening words of the section follow closely the Australian wording under s 16 of the Parliamentary Privileges Act 1987 (Cth), while paras (a) to (c) reproduce its provisions verbatim:

11 Facts, liability, and judgments or orders

In proceedings in a court or tribunal, evidence must not be offered or received, and questions must not be asked or statements, submissions, or comments made, concerning proceedings in Parliament, by way of, or for the purposes of, all or any of the following:

- (a) questioning or relying on the truth, motive, 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:
- (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament:
- (d) proving or disproving, or tending to prove or disprove, and fact necessary for, or incidental to, establishing any liability:
- (e) resolving any matter, or supporting or resisting judgment, order, remedy, or relief, arising or sought in the court or tribunal proceedings.

Section 16 of the Australian Act contains no provisions comparable to paras (d)-(e). These paragraphs were inserted to exclude the application of the effective repetition principle under the

law of defamation. The purpose section specifically referred to the decision in *Jennings v Buchanan*,⁹⁶ as exemplifying the principle in operation.⁹⁷

G Conclusion

New Zealand has contributed to the common weal in the area of parliamentary privilege. Some developments have been good (*Prebble v Television New Zealand Ltd* and the Parliamentary Privilege Act 2014), some bad (*Jennings v Buchanan*), and some ugly (*Attorney-General v Leigh*). The decision in *Prebble v Television New Zealand Ltd* remains the leading authority on the scope and application of art 9, which is the primary focus under the law of parliamentary privilege. On the other hand, *Leigh* demonstrates how quickly things can go awry when courts engage in exploratory reasoning in areas that were once thought settled. *Leigh* was an aberrant decision of very real concern. Yet, even untoward developments can produce constructive outcomes.

The Parliamentary Privilege Act 2014 effected the long-awaited consolidation and reform of the law of parliamentary privilege. Provisions long ago introduced to the statute book languished in enactments that resembled a legislative patchwork. The Legislature Act 1908 (NZ), in particular, contained a hand-full of scattered, out-of-date provisions that desperately needed modernising and consolidating. When Parliament responded to *Leigh*, it did not squander the opportunity to make the law relevant and accessible. The Parliamentary Privilege Act 2014 reaffirmed and clarified parliament's privileges but without attempting a comprehensive codification.⁹⁸ This was a sensible and pragmatic approach to avoid the courts intruding further into the parliamentary domain. Overly-prescriptive legislative reform would have left the door ajar for the courts to impose their views on the appropriate scope of parliamentary privilege. The reform settled upon leaves the law on this side of the Tasman in reasonable shape.

⁹⁶ *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577.

⁹⁷ Section 3(2)(d).

⁹⁸ Section 3(2)(a).