

SEINIMILI TU'I'ONETOA FONUA

***ATTORNEY- GENERAL AND GOW v LEIGH: LIFTING THE VEIL OF
PARLIAMENTARY PRIVILEGE AND PARLIAMENT'S RESPONSE***

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ABSTRACT

Parliament in its exclusive cognizance can legislate for anything it sees fit. However this paper finds that the New Zealand Parliament had the opportunity in *Attorney-General and Gow v Leigh*¹ to balance political needs and respect for individual rights rather than to adopt a reactionary attitude in enacting the Parliamentary Privilege Act 2014.

It would be appropriate for Parliament to closely examine the efficacy of the “necessity test” in *Leigh* in the light of the implication of the codification of the definition of “proceedings in parliament” on the scope of parliamentary privilege as the experiences by the Australian jurisdictions showed. On the other hand, the court’s obligations under the Bill of Rights Act, 1990 might result in the Parliamentary Privilege Act 2014 being interpreted in ways that the lawmakers might not have intended.

This paper examines the public/private dichotomy between the public interest justification for parliamentary immunity and the individual’s right to have access to remedy, in the context of the underpinning features of the “necessity” test that give precedence to basic individual rights. The test being; any claim for absolute privilege for an occasion that occurs outside absolutely privileged spheres (Parliament and its committees) that could result in depriving citizens of their basic rights, had to be necessary as in the sense of “essential” for the proper functioning of the core roles of the House.

In conclusion, this paper finds that the contentious issues revolve around comity. It then attempts to address the interests of the three stakeholders in the *Leigh* decision; the individual citizen, the judiciary and the legislature by recommending a number of comity “best practice” reforms to the House’s Standing Orders and the Parliamentary Privilege Act 2014.

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

***ATTORNEY-GENERAL AND GOW v LEIGH*²**
LIFTING THE VEIL OF PARLIAMENTARY PRIVILEGE
AND
PARLIAMENT’S RESPONSE

I INTRODUCTION

While a member’s statement in Parliament is protected by absolute privilege for the purposes of the law of defamation,³ there is uncertainty as to whether absolute privilege should extend to things said outside the privileged proceedings themselves but which are necessarily connected to those proceedings. The law of parliamentary privilege prohibits judicial review of the merits of statements made in privileged proceedings,⁴ other than to refer to them to ascertain what has been stated for “historical” purposes.⁵ Imparting information to a member outside of the House’s privileged proceedings cannot absolutely protect an informant from a criminal or civil defamation suit. The informant is however entitled to a defence of qualified privilege, which can be rebutted if found to have been actuated by ill will or if the occasion had improperly been taken advantage of.⁶

In the case of *Attorney-General and Gow v Leigh*⁷ the Supreme Court of New Zealand held that it was not “necessary for the proper and efficient conduct of the business of the House ...”⁸ for a defamatory statement communicated by a public officer to his or her Minister outside of the proceedings in parliament, to be classified as one of absolute privilege; suffice it for such statement to be protected by qualified privilege only—the privilege could be lost if the maker of the statement was actuated by ill will or he or she had taken advantage of the privileged occasion, to defame.

² *Leigh* above n1.

³ Defamation Act 1992 s13.

⁴ Bill of Rights 1688 art 9.

⁵ *Prebble v Television New Zealand Ltd* (TVNZ) [1994] 3 NZLR 1, [1995] 1 AC 321, [1994] 3 WLR 970 [1994] 3 All ER 407.

⁶ Defamation Act 1992 s19.

⁷ *Leigh* above n1 at 4.

⁸ *Leigh* above n1 at 5.

*A Attorney-General and Gow v Leigh*⁹

The case under discussion was a defamation appeal in the Supreme Court from the decision of the Court of Appeal¹⁰ which held that the appellant Mr Gow was liable for defaming the respondent in an advice he had given to his Minister. The matter emerged when the Minister uttered the defamatory comments in the House of Representatives when answering a question asked of him during question time.¹¹

The respondent, Leigh had been a contract advisor at the Ministry for Environment. She terminated her contract when another advisor was appointed by Government to review the project she had been working on. The then Minister for Environment was asked the parliamentary question for an oral answer about the circumstances surrounding Leigh's abrupt departure from her post.¹² To answer the question, the Minister sought advice from the Deputy CEO for Environment, Mr Gow who advised him both orally and in writing in a manner disapproving of Leigh which then the Minister used in the House to answer the parliamentary question.

Apparently, parliamentary immunity would prevent Leigh from suing the Minister.¹³ She instead sued officer Gow for defamation for the advice he gave to the Minister.¹⁴ The appellant, Mr Gow however contended that his statement to the Minister occurred during "proceedings in Parliament" which was absolute privileged under art 9 of the Bill of Rights 1688.¹⁵ The Supreme Court disagreed. Following the case of *R v Chaytor*¹⁶ and the Canadian case *Canada (House Commons) v Vaid*¹⁷, the Court adopted "necessity" and found that the occasion in which the communication occurred was one of qualified privilege only. In order to succeed in his claim for absolute privilege, which if successful would deprive citizens of their basic rights, Gow must show that his claim for absolute privilege was necessary as in the sense of "essential" to the

⁹ *Leigh*, above n 1.

¹⁰ *Leigh v Attorney-General* [2010] NZCA 624; [2011] 2 NZLR 148 (CA).

¹¹ Miss Leigh instigated a defamation suit against Mr Gow who was a public officer. Government was joint as party as Gow's employer. The case commenced in the High Court and was appealed all the way to the Supreme Court of New Zealand. The High Court's decision found no sufficient evidence to support the defamation claim which was later overturned by the Court of Appeal. The present case is the appeal on the Court of the Appeal's decision. The Attorney General is representing the Government. Although the House of Representatives was not a party to the proceedings, it sent an intervener to address the Supreme Court on the aspects of parliamentary privilege.

¹² Leigh claimed the appointment of the reviewer, was politically motivated. When the case was heard in the Court of Appeal, evidence was adduced that "there was something of a political imbroglio developing in the course of which Leigh had been critical of the Government".

¹³ Defamation Act 1992 s 13.

¹⁴ Privileges Committee Report on *Question of privilege concerning the defamation action Attorney-General and Gow v Leigh* (June 2013).

¹⁵ Bill of Rights 1688, art 9.

¹⁶ *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684, [2011] 1 All ER 805.

¹⁷ *Canada (House of Commons) v Vaid* 2005 SCC 30, [2005] 1 SCR 667 at [4].

proper functioning of the House. It concluded that the defamatory statement was not necessary for the core function of the House to be classified as one of absolute privilege. Suffice it for the statement to be an occasion of qualified privilege, which could be lost if rebutted on the ground that Gow had been actuated by ill will or had taken improper advantage of the privileged occasion of his communication with the Minister, to defame Leigh.¹⁸

Parliament apparently was unhappy with the Supreme Court's decision.¹⁹ Convinced that the Court was impinging on its privilege and causing a "chilling effect" its right to acquire information for the effective conduct of its business,²⁰ Parliament recommended a Bill to protect its privileges by defining the scope of "proceedings in parliament", and to abolish the Supreme Court's decision in *Leigh*.²¹ On 30 July, 2014 Parliament passed the Parliamentary Privilege Act 2014.

It is submitted that Parliament overreacted to the decision in *Leigh*.²² One of the reasons it claimed was the Court wrongly applied the cases of *Chaytor*²³ and *Canada (House Commons) v Vaid*,²⁴ both of which they claimed involved the boundaries of parliament's exclusive cognizance whereas the issue in *Leigh* was one of parliament's freedom of speech, which fell to be determined by statutory interpretation of art 9 of the Bill of Rights 1688. This assertion is doubted as will be seen, art 9 freedom of speech is not a stand-alone phenomenon but falls to be regulated by parliamentary exclusive cognizance.

The decision in *Leigh* gave Parliament the opportunity to balance the two competing values of the protection of the individual's reputation while "ensuring that the member ... *at the time he speaks* is not inhibited from stating fully and freely what he has to say" (emphasis in the original).²⁵ Rather than opting to legislate to protect its privilege and immunities, a move that is viewed by many as involving an "unavoidable certain element of self-interest...",²⁶ Parliament should have appropriately examined the efficacy of the "necessity test" in *Leigh* in light of the implication of the codification of the definition of "proceedings in parliament" on the scope of

¹⁸ Defamation Act 1992, s 19.

¹⁹ Vernon Small "MPs clamouring to put Supreme Court in its place" (29 November 2012) <<http://www.stuff.co.nz/the-press/opinion/8011935/MPs-clamouring-to-put-Supreme-Court-in-its-place>>; Privileges Committee above n14; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed. Brookers Ltd, Wellington, 2014) at 421.

²⁰ Privileges Committee above n 14.

²¹ Privileges Committee above n14.

²² Privileges Committee above n14.

²³ *Chaytor* above n16.

²⁴ *Vaid* above n17.

²⁵ *Prebble* above n5 at 8.

²⁶ Andrew Geddis "On Privilege, Absolute and Qualified" (1 December 2012) <www.pundit.co.nz/content/on-privilege-absolute-or-qualified>.

parliamentary privilege and taken into consideration the human rights obligations New Zealand has under the BORA and its international human rights commitments.

Part II of this essay introduces the sources of parliamentary privilege in New Zealand followed by an analysis of the key cases in Part III. Part IV discusses the Parliamentary Privilege Act 2014 and the implication of the interpretation of “proceedings in parliament” on the scope of parliamentary privilege. Part V of this essay discusses a number of reforms that are apt to be considered for striking a balance between the two competing values of protecting the reputation of individuals and parliamentary freedom of speech and for the maintenance of comity.

B Definition

Parliamentary privilege is a term that is used “to refer to immunities and special rights, which are deemed essential for empowering legislatures to protect themselves and their members from outside interference”²⁷ so they can effectively carry out their core functions of “making laws ... providing a government ... scrutinizing and controlling Government ... and representing Government and the people”.²⁸

The traditional definition of parliamentary privilege is found in *Erskine May*:²⁹

Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively... and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law.

Parliamentary privilege in New Zealand has English origins rooted in the Westminster system of government; a constitutional arrangement adopted by New Zealand as a legacy of its colonial past.³⁰ Similar to that enjoyed in the English parliament, parliamentary privilege in New Zealand comprises a series of freedoms, immunities and powers which allow members of the House of Representatives to independently conduct their core functions without the obligation to have to account other than to effectively operate in the overarching interest of the public.³¹

²⁷ Privileges Committee above n14.

²⁸ David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing, Wellington, 2005) at 2-4.

²⁹ William McKay *Erskine May's Treatise on the Law, Privileges, and Usages of Parliament* (23rd ed, LexisNexis London, 2004) at 12.

³⁰ Kelly Buchanan “The Impact of Foreign law on Domestic Judgments” The Library of Congress.
<www.loc.gov/law/hel/domestic-judgment/newzealand.php>.

³¹ McGee above n28 at 605.

Parliamentary privilege is an often misunderstood concept.³² To a great number of people, the word “privilege” implies that there are special protections for parliamentarians, even to the extent that they are above the law.³³ Historically, claims of misuse of parliamentary privilege against members of public are by no means unknown,³⁴ for instance in 1728 for “digging of Lord Gage’s coal”, in 1739 for “killing Lord Galway’s rabbits” and in 1742 for “assaulting Sir Watkin William Wynn’s porter in Downing Street”.³⁵ More recent cases of the “cash for questions” in *Hamilton v Al Fayed*³⁶ and the expenses scandal in *Chaytor*³⁷ have only succeeded in confusing public perceptions about the proper purpose of parliamentary privilege.

II CONCEPTIONS OF PARLIAMENTARY PRIVILEGE

A Bill of Rights 1688

The doctrine of parliamentary privilege in the United Kingdom emerged out of a history of conflicts between the monarch and parliament which culminated in the Glorious Revolution of 1688³⁸. Historically, parliament’s most prominent and oldest privilege, the freedom of speech was introduced to prevent the Monarch from interfering with the functioning of parliament.³⁹ The famous statement in art 9 of the Bill of Rights 1688 declares:⁴⁰

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

McGee⁴¹ observes art 9 is the source from which flows a number of “immunities which apply to the House, its members, and other participants in parliamentary proceedings”.⁴² The basic concept underlying art 9 is the protection of members and participants in parliamentary proceedings; that at the time that they speak, they should do so freely without fear that their words might subsequently be reviewed by the courts.⁴³ Article 9, therefore, is the legislative provision that falls to be interpreted by the courts when determining both whether a privilege

³² New Zealand House of Representatives “Parliament Brief : Parliamentary Privilege” (February 2007) <www.parliament.nz>

³³ Office of the Leader of the House of Commons “Parliamentary Privilege” (April 2012) <www.official-documents.gov.uk> and <www.commonslader.gov.uk>.

³⁴ Public Issues Committee *Parliamentary Privilege* (Auckland District Law Society, 27 September 1979).

³⁵ Public Issues above n34. These incidents were documented by Curwood, Counsel for Stockdale in the leading case of *Stockdale v Hansard* (1839) 9A E 1, 112 ER 1112 (QB).

³⁶ *Hamilton v Al Fayed* [2001] 1 AC 395.

³⁷ *Chaytor* above n16.

³⁸ Bill of Rights 1688, preamble.

³⁹ Bill of Rights 1688, preamble.

⁴⁰ Bill of Rights, 1688 art 9.

⁴¹ McGee, above n 28.

⁴² McGee, above n 28 at 618.

⁴³ *Prebble* above n 5.

exists and the scope of those ones that are known to exist.⁴⁴ For the purpose of the defamation law, art 9 is the foundation of the defence of “absolute privilege”⁴⁵ which affords complete immunity to words spoken during proceedings in parliament.

McGee’s position is to be distinguished from what Adam Tucker identified as an “unitary conception of parliamentary privilege”⁴⁶ where, in order to identify the privilege, one needs only ask “Does the matter for which the appellants are being prosecuted...fall within the exclusive cognizance of Parliament?” If it does, then there is no further requirement to have such matter separately determined under the Bill of Rights. Tucker holds that art 9 of the Bill of Rights 1688 “is not the source or foundation of parliamentary privilege...but a legislative exception to that doctrine”.⁴⁷ The Bill of Rights, then, “should not be treated as more important than it is”.⁴⁸ He is convinced that the foundation of parliamentary privilege is in parliament’s right to self-regulate or its “exclusive cognizance”. Tucker’s proposition is supported by the fact that the Bill of Rights 1688 is merely declaratory of the privilege rather than itself being a source of the privilege.⁴⁹

It is therefore submitted that the Court in *Leigh* was not obliged to adopt the standard techniques of statutory interpretation in considering the scope of the freedom of speech privilege because the privilege is set out in article 9 of the Bill of Rights 1688. It is submitted that the Court was at liberty to use any of the common law tests that it found most appropriately applied to determining the scope of parliamentary privilege in the case before it.

On the Bill of Rights 1688, constitutional experts agree that art 9 has two aspects that guide the relation between the judiciary and the legislature in a democracy and parliament’s scope of privilege. These are the “freedom of speech” and “comity”.

1 Parliament’s Freedom of Speech

The most prominent parliamentary privilege declared in art 9 is the privilege of “freedom of speech”.⁵⁰ Lord Denman CJ in *Stockdale v Hansard* stated:⁵¹

⁴⁴ Enid Campbell, *Parliamentary Privilege* (The Federation Press, Sydney, 2003).

⁴⁵ Public Issues above n 34.

⁴⁶ Adam Tucker *Response to Government consultation on the Green Paper*, Cm 8318, paragraph 17. Tucker’s response to the Green Paper was taken into account in the UK Report of the Joint Committee for Parliamentary Privilege, 2013 at 8, 43, 66.

⁴⁷ Tucker, above n46.

⁴⁸ Tucker, above n46.

⁴⁹ *Prebble* above n 5.

⁵⁰ McGee above n 28 at 618; *Prebble* above n 5.

⁵¹ *Stockdale v Hansard* (1839) 9 A & E 1, 112 ER 1112 (QB).

For speeches in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete immunity.

Freedom of speech is an “uninhibited speech that is the quintessential requirement of open debate”.⁵² Joseph⁵³ states “that Parliament’s freedom of speech privilege has uncontested application under art 9 of the Bill of Rights”⁵⁴ under which elected members in the performance of their high office are enabled to function freely and fully without interference.⁵⁵

The Privy Council in *Prebble v Television New Zealand*⁵⁶ was explicit that the privilege in art 9 is vested in a member or a witness of a committee “at the time that he speaks”.⁵⁷

The underlying concept of article 9 is a privilege...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 [emphasis in original].

The Privy Council in *Prebble* noted the conflict between the interests of an individual to be able to access remedy in the courts for harmed reputation, and the interest of the public to be able to freely address their concerns through their elected members in parliament, required that the latter interest should prevail over the former even to the detriment of individuals or to the extent that parliamentarians are perceived to be above the law.⁵⁸

In this case *Prebble*, who was a member of Parliament, sued Television New Zealand for defamation. In its defence, the Television sought to produce what had been said by *Prebble* during the proceedings of parliament as evidence in its defence. *Prebble* sought a stay of proceedings on the ground that the material sought was privileged. For the Court to use his statement in the House to determine its merits would constitute a breach of art 9.⁵⁹

What must be noted is that the freedom of speech is not the same as a licence to harm with impunity the reputations of persons who are unable to answer for themselves, nor does it mean that members should disregard how their acts or words might be viewed outside of parliament.⁶⁰ Additionally, it is wrong to assume that conduct that is protected by parliamentary privilege is

⁵² *Prebble* above n 5.

⁵³ Philip A. Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, Wellington, 2014)

⁵⁴ Joseph above n 53 at 427.

⁵⁵ House of Lords House of Commons “Joint Committee on Parliamentary Privilege Report of Session 2013–14” (3 July 2013). <www.publications.parliament.uk/pa/jt201314/jtselect/jtprivi/30/30.pdf>

⁵⁶ *Prebble* above n 5.

⁵⁷ *Prebble* above n 5 at 8.

⁵⁸ Office of the Leader of the House of Commons above n 33.

⁵⁹ *Prebble* above n 5.

⁶⁰ *Geddis* above n 26.

protected absolutely, or that freedom of speech is absolutely free.⁶¹ In fact, the conduct of members during proceedings in parliament is regulated by parliament's Standing Orders, Speaker's rulings and other internal mechanisms. Freedom of speech can also be abrogated by legislation⁶². For example, the Crimes Act 1961 could abrogate a claim of immunity in relation to charges of corruption, bribery or perjury by members of parliament.⁶³

2 Comity

On the other side of the art 9 coin is the concept of comity. Comity is the “mutual restraint” that regulates the relationship between the judiciary, the legislature and the executive which enables each institution to conduct its individual role in maintaining the balance of power in a democracy. Central to comity is the concept of separation of power⁶⁴—the democratic principle that “distributes the power to govern between the three arms of government which each works within defined areas of responsibility so that each keeps check on the action of others”.⁶⁵

The principle of comity that governs the relationship between the judiciary and the legislature requires that debates and proceedings in parliament must not be “questioned in any court or place out of parliament”⁶⁶. Parliament on the other hand is obliged by the *sub judice* rule not to question any matter that is before the court.⁶⁷ To ensure that proceedings before the court or its decisions are not prejudiced by parliamentary proceedings, the Speaker has the discretion to rule on *sub judice* matters. The *sub judice* rule, however, cannot prevent the House from legislating on any matter, whether or not the matter is before the courts.⁶⁸

The principle of comity, however, has evolved over the years with some aspects of the proceedings in parliament becoming justiciable in the courts. In the landmark case of *Pepper v Hart*⁶⁹, the House of Lords established the principle that the legislative history of a piece of legislation could be used to aid judicial interpretation. Prior to this case, such a ruling would have been seen as a breach of privilege. Perhaps the case that caused the most concern for comity was the Australian case of *R v Murphy*⁷⁰ in which the court interpreted art 9 to mean that the statement

⁶¹ Tucker above n 46.

⁶² McGee above n 28 at 618; Crimes Act s102, 103 and 109; Parliamentary Privilege Act 2014 s9.

⁶³ Parliamentary Privilege Act 2014, s9.

⁶⁴ Charles de Secondat Montesquieu *The Spirit of the Laws* (Cambridge University Press, New York, 1989) as cited in Jan-Erik Lane *Constitutions and Political Theory* (Manchester University Press, United Kingdom, 1996) at 39.

⁶⁵ Above n 64.

⁶⁶ Bill of Rights, 1688 art 9.

⁶⁷ McGee above n 28 at 192-194.

⁶⁸ McGee above n 28 at 193.

⁶⁹ *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.

⁷⁰ *R v Murphy* (1986) 5 NSWLR 18.

of a witness in a parliamentary committee could be examined to prove the truth or merit of their testimony in court.

The concern about the *Murphy*⁷¹ case was the court held that art 9 only applied to cases in which the court was being asked to expose the maker of the statement to legal liability. That is, what had been said in parliament was subject to judicial review as long as it did not expose the maker of the statement to legal liability. The ruling in *Murphy* was contrary to the rationale of art 9, that members should be assured, as far as possible, of the freedom to speak during proceedings in parliament so that, while speaking, they should not fear that their words would be held against them in the courts. *Prebble*⁷² held that *Murphy*⁷³ created a “chilling effect” which would prevent members and witnesses in parliamentary committees “from stating fully and freely” what they had to say for fear that such statement might subsequently be questioned in court. As a result the Australian Commonwealth Parliament enacted the Parliamentary Privileges Act 1987 (Cth)⁷⁴ to overturn the decision in *Murphy*.⁷⁵

There is no objection to the use of Hansard⁷⁶ to “prove what was done and said in the Parliament as a matter of history... provided ...the proof of the historical fact is not used to suggest that the words were improperly spoken or statute passed to achieve an improper purpose”.⁷⁷ The United Kingdom courts, however have adopted a flexible approach in regard to the use of privileged material in the judicial review of Government decisions. In *R v Brind*⁷⁸, the court judicially examined a minister’s statement in Parliament to establish whether the minister’s power had been properly exercised. In *Toussaint v Attorney-General of Saint Vincent and the Grenadines*⁷⁹, the United Kingdom Privy Council even held that a minister’s statement in Parliament was judicially reviewable to establish the motive for an executive action outside of parliament.

In light of these developments, the United Kingdom 1999 Joint Privileges Committee⁸⁰ recommended allowing privileged material in judicial review actions of government decisions.⁸¹

⁷¹ *Murphy* above n 70.

⁷² *Prebble* above n 5.

⁷³ *Murphy* above n 70.

⁷⁴ Parliamentary Privileges Act 1987 (Cth).

⁷⁵ *Murphy* above n 70.

⁷⁶ Standing Order 408(2).

⁷⁷ *Prebble* above n 5; Standing Order 408 (2).

⁷⁸ *R v Secretary of State for the Home Department ex parte Brind* (1991) UKHL 4; [1991] AC 696.

⁷⁹ *Toussaint v Attorney-General of Saint Vincent and the Grenadines* [2007] UKPC 48.

⁸⁰ House of Lords House of Commons *Joint Committee on Parliamentary Privilege Report of Session 1998-99*, at [55].

⁸¹ *Joint Report 1998-1999* above n 80.

However, recent 2014 Joint Privileges Committee⁸² report recommended a “middle way” approach in which the courts would be left “to develop their interpretation of Article 9, in respect of admissibility of parliamentary proceedings, while requiring them to notify Parliament whenever it is proposed to refer to such proceedings in evidence”.⁸³

This approach by United Kingdom to comity has been criticised as:⁸⁴

[A]n unprincipled exception to art 9...The courts in New Zealand have judicially noted but not adopted the English practice. Article 9 has never taken notice of the subject-matter of ministers’ statements in Parliament – be they defamatory statements [If English practices] were ever to take root in New Zealand, the ministers would have cause to fear the ‘judge over the shoulder’.

More recently in New Zealand, tension in comity arose from the *Buchanan v Jennings*⁸⁵ case in which the Privy Council held that absolute privilege did not extend to repetitions outside of Parliament of protected statements made earlier in the House, irrespective of the fact that the repetition was not exactly the words earlier spoken in the House and were not in themselves defamatory (“effective repetition”). Parliament regarded the court’s ruling in *Buchanan* as a judicial questioning of its privilege and recommended an enactment to overturn the Privy Council’s decision.⁸⁶

(a) Judicial Notice

Comity imposes a duty on the judiciary to take judicial notice of parliamentary immunities and privileges. Section 242(2) of the Legislature Act 1908 provides ⁸⁷ that parliament immunities and privileges are expected to be judicially taken notice of and it “shall not be necessary to plead the same, and the same shall be judicially taken notice of in all Courts and by and before all judges”.⁸⁸

The Supreme Court is being criticised for failing to observe comity by not taking judicial notice of the practicalities of parliamentary procedures when it determined *Leigh*. Parliament⁸⁹ protested that the *Leigh* decision was the result of the Court failing “to recognize the practical

⁸² Joint Committee 2014 above n 55 at 133.

⁸³ Joint Committee 2014 above n 55 at 133.

⁸⁴ Joseph above n 53 at 460 and 461.

⁸⁵ *Buchanan v Jennings* [2004] UKPC 36; [2005] 1 AC 115.

⁸⁶ Mary Harris, Clerk of the House of Representatives of New Zealand “Submission to the Parliamentary Privilege Consultation for UK Joint Committee on Privilege 2012” at 3.

⁸⁷ Legislature Act 1908, s242 (2) now repealed and replaced by new provisions in the Parliamentary Privilege Act 2014.

⁸⁸ Legislature Act above n 87, s242 (2).

⁸⁹ Privileges Committee Report on *Leigh* above n 14.

operations of the House and its committees”.⁹⁰ Section 24 of the Supreme Court Act 2003 provides that “Appeals to the Supreme Court proceed by rehearing”.⁹¹ Effectively the Supreme Court had the power to hear the full evidence of the Leigh case and act as judges of both the fact and law.

The doctrine of judicial notice requires the Court to take judicial notice only of a fact which is “so notorious that it cannot be the subject of serious dispute”.⁹² In this context, parliamentary practice can be classified as a “legislative fact” which is one of four classes of facts that a court is expected to take notice of.⁹³ A legislative fact informs judges when they formulate, interpret or develop the law”.⁹⁴

(b) Testing of Facts

Ultimately though, taking judicial notice facilitates the discharge of the applicable burden of proof i.e. on the balance of probabilities on the basis of the evidence before the court.⁹⁵ According to the Privileges Committee, the fact in issue the Court should have taken judicial notice of was, the adverse statement conveyed by the public officer to the Minister was made during a “proceeding in parliament” of question time which was an occasion of absolute privilege, and therefore protected by parliamentary immunity. However when the Court evaluated the evidence against the law,⁹⁶ the evidence on a balance of probabilities did not justify elevating the qualified privilege of the occasion of the officer communicating with his Minister, to that of absolute privilege.⁹⁷

Collisions between the legislature and the judiciary can sometimes impair their power to impart those constitutional rights for which individuals look to them to protect on their behalf.⁹⁸ However, comity is not static. The UK Joint Report acknowledges that the “...general principle of comity, which nobody would challenge, does not prevent constant evolution and occasional tension”.⁹⁹ The development from a direct challenge to the House of Commons in *Stockdale v*

⁹⁰ Privileges Committee above n14..

⁹¹ Supreme Court Act 2003, s 24.

⁹² Law Commission *Evidence Law: Documentary Evidence and Judicial Notice* (NZLC PP22, 1994) at 96.

⁹³ Above n92 at 96.

⁹⁴ Above n92 at 102.

⁹⁵ Above n87, at 102.

⁹⁶ Defamation Act 1992, s 19; common law precedents from *Chaytor* above n16 and *Vaid* above n17 amongst other cases that are referred to in this paper.

⁹⁷ Leigh above n1, at [5].

⁹⁸ Geddis above n26.

⁹⁹ UK Joint Report 2014 above n 55 [116].

*Hansard*¹⁰⁰ to an “almost exaggeratedly respect for parliamentary cognizance in *Bradlaugh v Gosset*”¹⁰¹ is an illustration of the changing trend in the relationship between the institutions of the judiciary and the legislature. This is in contrast to the proposition that comity is a settled area, with which the Court in *Leigh* was accused of having failed to observe by introducing an untested technique into “areas that were once thought settled”.¹⁰²

B Exclusive Cognizance

Exclusive cognizance is parliament’s freedom or sovereignty to regulate its own proceedings without having to account to anyone. The case of *Bradlaugh v Gosset*¹⁰³ recognised the supremacy of parliament’s exclusive cognizance. There, the court held that the resolution of the House of Commons not to allow an elected member to enter the House was subject to the House’s sole jurisdiction although the member was under a statutory obligation to enter the House in order to take his oath.¹⁰⁴ Additionally, the Privy Council in *Prebble* ruled that the right vested in parliament for the protection of public interests was overriding.

Contrary to the popular view that art 9 of the Bill of Rights 1688 is the foundation of parliamentary privilege¹⁰⁵, there exists a proposition that parliament’s “exclusive cognizance—the right for parliament to self-regulate is the foundation of parliamentary privilege.”¹⁰⁶ Hence, the privilege only exists to protect parliament’s right to self-regulate.¹⁰⁷ Yet, parliament in its exclusive cognizance can overrule or elevate this protection even to the point that parliamentarians could be seen to be above the law.¹⁰⁸

3 Waiver

Parliament¹⁰⁹ is of the view that privilege cannot be waived without legislation.¹¹⁰ However, concern is raised about the ability of the House to waive its privilege as this would allow the “majority to use their voting power to affect the rights of individual members of parliament who are not members of that majority.”¹¹¹ The Privy Council in *Prebble* opposed any right for a

¹⁰⁰ *Stockdale* above n51..

¹⁰¹ *Bradlaugh v Gosset* (1884) 12 QBD 271.

¹⁰² Joseph, above n 53 at 465.

¹⁰³ *Bradlaugh* above n 101.

¹⁰⁴ *Bradlaugh* above n 101.

¹⁰⁵ McGee above n 28 at 618.

¹⁰⁶ Tucker above n 46.

¹⁰⁷ Privileges Committee Report on *Leigh* above n14.

¹⁰⁸ UK Joint Report 2014 above n 55.

¹⁰⁹ The House of Representatives of the Parliament of New Zealand.

¹¹⁰ McGee above n 28 at 612.

¹¹¹ *Chaytor* above n16.

member to waive privilege to allow judicial review of privileged material, even to the benefit of a member in a legal action that has been initiated by the member.¹¹² Initiating a legal action does not mean that the member implicitly waives the protection of privilege.¹¹³ The Court in *Chaytor*, though, was more certain that art 9 was incapable of waiver even by parliamentary resolution¹¹⁴ unless by legislation.

C Competing Conceptions of Parliamentary Privilege

There are claims that the decision in *Leigh* was flawed in that the Supreme Court wrongly applied *Chaytor*¹¹⁵ because that case involved the question of exclusive cognizance while the issue in *Leigh* was that of parliamentary freedom of speech.¹¹⁶ Central to these claims, is the misconceived ideal that freedom of speech operates separately from exclusive cognizance.¹¹⁷ However, it is submitted that there is no free-standing freedom of speech; that “conduct which is protected by parliamentary privilege is not protected absolutely”.¹¹⁸ Rather, freedom of speech and parliamentary privilege are subject to the House’s internal rules and procedures.¹¹⁹ Freedom of speech can also be disallowed or abrogated by the criminal laws.¹²⁰

Lord Roger’s ruling in *Chaytor* supports this view.¹²¹ In this case, two members of the House of Commons were charged with fraud for submitting false expense claims albeit such claims were set into process by a parliament resolution.¹²² The members claimed that by either art 9 or exclusive cognizance they were immune from arrest. Lord Rogers concluded that the sole question that needed to be asked was whether the members’ conducts fell within exclusive cognizance. To tackle the issue by “reading the conduct into article 9”¹²³ as distinct from exclusive cognizance would be the wrong “choice of conception” as this would suggest that art 9 was the source of the parliamentary privilege whose protection the two members were seeking.

¹¹² *Prebble* above n5.

¹¹³ *Prebble* above n 5.

¹¹⁴ *Chaytor* above n 16.

¹¹⁵ *Chaytor*, above n 16.

¹¹⁶ Joseph above n 53 at 464-465.

¹¹⁷ Joseph above n 53 at 464-465; *Prebble* above n 5.

¹¹⁸ Tucker above n53.

¹¹⁹ Speaker controls language used in the proceedings in the House. Standing Orders 156-159 provides a person who has been referred to in the House an opportunity to make submission to the Speaker and request that her response to be incorporated into the parliamentary record. Additionally, the Speaker deals with insulting and disrespectful language and if his orders are not followed, these could result in contempt proceedings.

¹²⁰ Parliamentary Privilege Act 2014 s9; see McGee above 28 at 619.

¹²¹ *Chaytor* above n16.

¹²² The Court found that although the scheme was established by parliamentary resolution which attracted parliamentary privilege, the administration of the scheme was not part of the proceedings of parliament so as not to attract privilege.

¹²³ Tucker above n 53at [7].

Instead, the correct conception was; the foundation of parliamentary privilege is parliament's right to self-regulate.¹²⁴ The members' appeal in *Chaytor* consequently failed because their conducts were of a criminal nature which parliament's exclusive cognizance did not regulate.

The concept of exclusive cognizance is at odds with the principle of the rule of law; that is, that the law be general and that no one should be above the law.¹²⁵ Consequently, the powers, immunities and rights – collectively called “parliamentary privilege” – that fall to be regulated by parliamentary exclusive cognizance alone excludes the courts from reviewing those privileges.¹²⁶ Hence, parliament internal procedures are not reviewable by the courts unless parliament legislates to allow it.

D Proceedings in Parliament

The ambiguity arising from what constitutes “proceedings in parliament” in art 9 of the 1688 Bill of Rights is often cause for contention between the courts and parliament.¹²⁷ The phrase commonly falls to be interpreted by the courts when determining the scope of parliamentary privilege.¹²⁸ The phrase “proceedings in parliament” is now defined in the 2014 Act.¹²⁹ It is verbatim of the definition of the phrase in the Parliamentary Privileges Act 1987 of the Commonwealth of Australia.¹³⁰

Words spoken in “proceedings in parliament” on the floor of the House and its committees fall to be regulated by parliamentary exclusive cognizance.¹³¹ Whether absolute privilege applies to words that have their origin outside of the absolutely privileged sphere of parliament and its committees sometimes has not been so clear cut¹³². The grey area in *Leigh*¹³³ was whether the defamatory information conferred by a public officer to his Minister at the latter's request to enable the Minister to answer a parliamentary question, which he repeated on the floor of the House, was part of the proceedings in Parliament and therefore protected from scrutiny by the court.

¹²⁴ Tucker above n 46 [9].

¹²⁵ Tucker above n 46 at [9].

¹²⁶ Tucker above n 46 at [9].

¹²⁷ Enid Campbell above n 44.

¹²⁸ McGee above n 28 at 608.

¹²⁹ Parliamentary Privilege Act 2014.

¹³⁰ Parliamentary Privileges Act 1987 (Cth).

¹³¹ Bill of Rights 1688, art 9.

¹³² *Prebble* above n 5.

¹³³ *Leigh* above n 1.

The *Leigh* decision concluded that proceedings in parliament were limited by necessity.¹³⁴ This demanded that Parliament's "claim to exclusive cognizance should be strictly limited to those areas where immunity from normal legal oversight is necessary in order to safeguard the effective functioning of Parliament".¹³⁵ The corollary to *Leigh's* "necessity" limitation on privilege is the notion that the rights of harmed citizens to have access to remedy should include some degree of leverage against an adverse statement that not only originated outside of parliament but was not necessary to the core functioning of the House.

Determining the scope of "proceedings in parliament" (the sphere within which absolute privilege exists) is within the jurisdiction of the courts.¹³⁶ Parliament and the courts' understanding of the scope of "proceedings in parliament" has largely been mutual and governed by comity. For instance, Parliament's decision to update its rules to take account of "natural justice"¹³⁷ procedures to allow a right of response for citizens who are targets of adverse comments in the House or its committees, arose from the decision in *Prebble*.¹³⁸

However, tension would often arise, as has occurred in the *Leigh* decision. The situation in *Leigh* is perhaps best expressed in the Clerk's words:¹³⁹

We have got to the point that the Australians perhaps got to in the 1980s with the Murphy case, where the courts had taken a direction that was starting to impinge potentially on the way the House might operate and, therefore at the very least proceedings in Parliament need to be defined.

III SOURCES OF PARLIAMENTARY PRIVILEGE IN NEW ZEALAND

The source of parliamentary privilege in New Zealand is a mixture of legislation, common law and the practices of Parliament.¹⁴⁰ The country's Westminster type of Government derives from the United Kingdom as a legacy of its colonial past. Initially, the New Zealand colonial legislature did not possess all the powers of the Houses of Parliament of Great Britain. The *Keilly v Carson*¹⁴¹ established that all colonial legislatures enjoyed only those

¹³⁴ UK Joint Report 2014 above n 55 at [8].

¹³⁵ UK Joint Report 2014 above n 55 at [10].

¹³⁶ *Stockdale* above n 51.

¹³⁷ Standing Orders 233-235

¹³⁸ *Prebble* above n5.

¹³⁹ Mary Harris, above n 86.

¹⁴⁰ *May* above n 29.

¹⁴¹ *Keilly v Carson* (1842) 4 Moo PC 63, 13 ER 225 (PC) [88-90].

privileges of the British House of Commons that were *necessary* for the efficient functioning of those legislatures, which did not include the power to punish for contempt.¹⁴²

A Legislative source

Under the Privileges Act 1865¹⁴³, the New Zealand General Assembly “arrogated to itself all the powers and privilege of the House of Commons as at 1st January, 1865”¹⁴⁴. This was later incorporated into the Legislature Act 1908 s242 (1) which provided:¹⁴⁵

The Legislative Council and House of Representatives respectively, and the Committees and members thereof respectively, shall hold, enjoy, and exercise such and the like privileges, immunities, and powers as on the first day of January, on thousand eight hundred and sixty-five, were held, enjoyed, and exercised by the Commons House of Parliament of Great Britain and Ireland, and by the Committees and members thereof, so far as the same are not inconsistent with or repugnant to such of the provisions of the Constitution Act as on the twenty-sixth of September, one thousand eight hundred and sixty five.

The Legislature Act 1908 has recently been replaced by the Parliamentary Privilege Act 2014.¹⁴⁶ However, section 8(1) of the new Act¹⁴⁷ expressly provides for the continuance of the privilege “exercisable by the House of Commons...its committees, or its members” as it was on 1 January 1865 subject to the New Zealand Constitution Act 1852 on the date of the coming into operation of that Act on 26 September 1865.¹⁴⁸

B Common Law Source

The case of *Keilly v Carson*¹⁴⁹ established that colonial parliaments did not inherit certain privileges that were only inherent in the High Court of Parliament of the British House of Commons.¹⁵⁰

Keilly was an appeal from the British colony of Newfoundland against punishment for contempt of Parliament exacted on the appellant Keilly. The Privy Council held that colonial legislatures did not have the power to punish for contempt. Such power was only inherent in the

¹⁴² *Keilly*, above n 141.

¹⁴³ Privileges Act 1865.

¹⁴⁴ McGee above at 28.

¹⁴⁵ The Legislature Act 1908 has been repealed by the Parliamentary Privilege Act 2014.

¹⁴⁶ The explanatory notes to the Parliamentary Privilege Act 2014 explains that it repeals and replaces the Legislature Act 1908. The Defamatory Act 1992 is also updated to be consistent with the new provisions relating to parliamentary privilege in the 2014 Act.

¹⁴⁷ Parliamentary Privilege Act 2014 s8.

¹⁴⁸ Parliamentary Privilege Act 2014 s8(1).

¹⁴⁹ *Keilly* above n 141.

¹⁵⁰ John Courage “Parliamentary Privilege in Newfoundland: The strange case of *Keilly v Carson*” (1981) 4.3 Canadian Parliamentary Review.

British House of Commons “on the ground that that House was part of a court of law, the High Court of Parliament”¹⁵¹. A colonial legislature however only possessed “the right of protecting itself from all the impediments to the due course of its proceedings.”¹⁵² To be able to secure the exercise of their legislative functions, colonial legislatures “are justified in acting by the principle of the common law.”¹⁵³ In other words, colonial legislatures were allowed to apply common law as was *necessary* to protect its procedures but they could not punish for contempt of parliament. That power was exclusive only to the House of Lords because of its judicial legacy of once being a High Court of Parliament.

Essentially, the “necessity” test in *Keilly* was whether any of the powers, immunities and privileges of the House of Commons could be adapted as necessary for the effective functioning of colonial legislatures.¹⁵⁴ McGee warns that the *Keilly* “necessity” is not the legal foundation of parliamentary privilege in New Zealand although *necessity* can help determine its scope:¹⁵⁵

While necessity can help to elucidate the existence and extent of a particular privilege...it is not the legal foundation of parliamentary privilege in New Zealand. That foundation has, since 1865, been firmly rooted in New Zealand’s own statute law.

The Supreme Court, is claimed to have failed to apply the *Keilly necessity* to ensure that privilege is adapted as necessary for the effective functioning of Parliament. Contrary to the *Keilly necessity*, Supreme Court used a novel and misguided¹⁵⁶ *necessity* test which instead sought to “affix the scope of parliamentary privilege”¹⁵⁷ as to whether or not parliament could operate without it.

C Practice of Parliament

In the House of Representatives and its committees, speeches – including slander that would otherwise be unlawful or criminal outside of these occasions of absolute privilege, but excluding criminal acts “taken in the face of parliament and its committees”¹⁵⁸ – are protected by parliamentary privilege.

¹⁵¹ McGee above n 28 at 606.

¹⁵² *Keilly* above n141

¹⁵³ *Keilly* above n 141.

¹⁵⁴ Joseph above n53 at 427.

¹⁵⁵ McGee above n 28 at 606

¹⁵⁶ Joseph above n 53 at 464.

¹⁵⁷ Joseph, above n 53

¹⁵⁸ Mary Harris above n 86; Parliamentary Privilege Act 2014 s9.

1 Speeches on floor of the House

The floor of the House is exclusively the domain of members of Parliament. Slander or defamatory language made in such a way as to readily identify a person is not listed in the contempt list in the Standing Orders.¹⁵⁹ To make it a contempt would inhibit the member's constitutional right to freely speak in debates without fear that their words might subsequently be reviewed by the courts. Speeches in debates are subject solely to the Speaker's control. In most cases, one cannot expect any remedy other than an apology which the Speaker would demand of the maker. The maker of the comment would only be subject to contempt when he or she fails to obey the Speaker's order for eg, to retract such comments, but such incidents are rare.¹⁶⁰ Adverse comments on the floor of the House can cause irreparable harm and can go unchecked unless the person has a "hero" in the House to speak in his or her defence.¹⁶¹

2 Statements in Select Committees

Statements in Select Committees are much more subject to control. Members of the public can attend the committees. Standing Orders 233 to 235¹⁶² relate to written documents submitted in committee meetings. "Natural justice" procedures are in place to provide any person including members, "against whom an allegation has been made that may seriously damage the reputation of that person"¹⁶³ with a right to respond to anything said or act done by a member or a witness to a committee that might damage the person's reputation.¹⁶⁴ Complaints against apparent bias, or in regard to any evidence produced that could pose a risk of serious damage to someone's reputation, are also provided for. One of the remedies available is for responses to be incorporated in the committee records. A committee chairman may order the alleged offending evidence to be returned, resubmitted or expunged from parliamentary records.¹⁶⁵

¹⁵⁹ Standing Orders 104.

¹⁶⁰ Mary Harris, above n 86.

¹⁶¹ The writer speaks from personal observation here.

¹⁶² Standing Orders edition 2011.

¹⁶³ Standing Order 235.

¹⁶⁴ Standing Order 235.

¹⁶⁵ Standing Orders 234 & 235.

IV DISCUSSION OF CASES

*A R v Chaytor*¹⁶⁶

The case of *Chaytor* is one of the landmark authorities for the necessity test used in *Leigh*. The case of *R v Chaytor*¹⁶⁷ concerned whether or not an occasion fell to be regulated solely within the House's exclusive cognizance ie, the House's right to self-regulate. In this case, two members of the House of Commons were charged under the Theft Act¹⁶⁸ for submitting dishonest claims for allowances made whilst they were ministers. The defendants contended that either "under art 9 or under the exclusive cognizance they had absolute privilege and could not be prosecuted in the ordinary courts".¹⁶⁹ Lord Phillips puts the test as follows:¹⁷⁰

It supports the proposition however, that the principal matter to which article 9 is directed is freedom of speech and debate in the Houses of Parliament and in parliamentary committees. This is where the core or essential business of Parliament takes place. In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it is *necessary* to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament. [emphasis added].

The Court rejected the defendants' appeals by finding it was not essential to the core function of the House that their acts be clothed with absolute privilege.

In regard art 9, *Chaytor* concluded that that article was primarily directed to freedom of speech and debate in the Houses of Parliament and its committees. Effectively, art 9 protection though would only "apply to parliamentary proceedings which were recognisable as part of the formal collegiate activities of Parliament".¹⁷¹ The incidents at issue were of criminal nature. Even though these occurred within parliament's own precincts and the process was approved by the House's resolution, they were not *necessary* to forming the formal collegiate activities of the House.¹⁷²

¹⁶⁶ *Chaytor* above n 16.

¹⁶⁷ *Chaytor* above n16.

¹⁶⁸ Theft Act 1968 (UK) s17(1)(b).

¹⁶⁹ *Leigh* above n 1 at [4].

¹⁷⁰ *Chaytor* above n 16.

¹⁷¹ ANZACATT Briefing Paper No.2 6 December, 2012. <www.aph.gov.au/~media/.../Parliamentary-Briefing-No-2.pdf>

¹⁷² The Court found that although the scheme was established by parliamentary resolution which attracted parliamentary privilege, the administration of the scheme was not part of the proceedings of parliament so as not to attract privilege.

The Court in *Chaytor* found that the decisions taken by Parliament relating to administrative matters were immune from challenge in the courts but the implementation of the decisions to make the payments the subject to the charges, were not so protected.

Parliament did not assert its exclusive cognizance to deal with the fraudulent conduct even where the conduct interfered with the proceedings of the House or its committees.¹⁷³ Further, the House invited the police to investigate the matter in its precincts.¹⁷⁴

The ruling in *Chaytor* affirms the aspect of the rule of law for the courts in the United Kingdom that exclusive cognizance does not extend to the operation of criminal law.

B Canada (House of Commons) v Vaid¹⁷⁵

The second case authority for the necessity test in *Leigh* is the *Vaid* case. A former employee of Parliament filed an action against the Speaker for constructive dismissal on the ground of discrimination, contrary to the Canadian Human Rights Act¹⁷⁶. The Canadian parliament pleaded parliamentary privilege, under which exclusive cognizance would prevent the court from questioning the Speaker about the employment decisions that he made. The court, applied the test of *necessity* to assess whether or not Parliament's exclusive cognizance applied.¹⁷⁷

Binnie J encapsulated the same principle in *Chaytor*, but he elevated the test to a “doctrine of necessity”; that is, “whether it is necessary for the proper and efficient conduct of the business of the House for an occasion in question to be classified as one of absolute privilege”.¹⁷⁸ The court found that Parliament's exclusive cognizance was limited to matters closely and directly connected with its core functions as a legislative and deliberative body, and did not extend to matters such as the employment rights enjoyed by ancillary staff.¹⁷⁹

C Discussion of Leigh¹⁸⁰

1 Connectivity with “proceedings in Parliament”

In order to qualify Gow's adverse statement for absolute privilege, there had to be connection between the occasion in which it occurred with the proceedings in Parliament.

¹⁷³ Above n 172.

¹⁷⁴ *Chaytor* above n 16.

¹⁷⁵ *Vaid* above n 24.

¹⁷⁶ Canada Human Rights Act.

¹⁷⁷ *Vaid*, above n 24.

¹⁷⁸ *Vaid*, above n 24.

¹⁷⁹ *Vaid*, above n 24.

¹⁸⁰ *Leigh*, above n 1.

Gow contended that the degree of closeness or incidentality of the making of the statement to the Minister was such that it was implicit in the Minister's obligation to answer the parliamentary question, thus making it part of the proceedings in parliament for the purposes of art 9. Gow's argument was worded on the test of "reasonable incidentality" based on s 16(2) of the Parliamentary Privileges Act 1987 (Cth). The Supreme Court dismissed this argument holding that the statement made by a public officer "to a Minister for the purposes of replying to questions for oral answer were not themselves parliamentary proceedings"¹⁸¹ but that of qualified privilege. The test of necessity did not find it necessary for the core function of the House for the statement to be classified as one of absolute privilege.

To determine whether the statement was sufficiently connected to the business of the House to be classified as part of parliament proceedings, the Court adopted the "necessity test" from *Chaytor* and *Vaid* which asked whether it was essential for an act or word that originated outside of where the core function of parliament takes place, to be protected by absolute privilege without which the core functions of the House would be impaired. The onus is on the party claiming the protection to prove that it was essential or necessary for the statement or the occasion to be given more protection than qualified privilege without which the House would adversely be deprived of its ability to conduct its core function. The Supreme Court found that it was not necessary or essential for the proper functioning of the House for the adverse statement to be classified as an occasion other than qualified privilege:¹⁸²

Where the claim for absolute privilege would result, if successful in depriving citizens of their common law rights, the courts will be astute to ensure that the claimed absolute privilege is truly necessary for the proper and effective functioning of Parliament... .Necessity has a sharper focus and involves significantly less uncertainty than closeness of connection. Furthermore, any test involving less than necessity would impinge too much on common law rights. Necessity is the appropriate test.

¹⁸¹ Leigh above n1.

¹⁸² Leigh above n1 at [7].

The Court was also unpersuaded by McGee's proposition that parliamentary privilege in New Zealand was based on statute and that "necessity" played only a subordinate role in determining its scope. It believed that McGee presupposed that the statutes¹⁸³ dictated that necessity was not a substantive part of the UK law adopted by New Zealand.¹⁸⁴ It found that "necessity was and remains an essential underpinning and test for parliamentary privilege in the United Kingdom." Hence, the adoption of the common law and practices of the House of Commons in New Zealand by statute, does not mean that the statute requires some different approach.¹⁸⁵

2 *The two approaches to necessity*

There are two concepts of necessity that can be identified from these cases. The first is the *Keilly necessity* which derives from the case of *Keilly v Carson*¹⁸⁶. The second is an *underpinning necessity*, derived from the "necessity" test in *R v Chaytor*¹⁸⁷, the Canadian case of *Vaid*¹⁸⁸ and *Stockdale v Hansard*¹⁸⁹. The necessity test based on these cases is the underpinning test for the scope of parliamentary privilege. Its nature defied the suggestions that necessity test was not part of the common law that governs parliamentary privilege that was arrogated by New Zealand through Parliamentary Privileges Act 1865.¹⁹⁰ For the sake of brevity, the two concepts are referred to in shortened forms, the "*Keilly necessity*" and the "*Leigh underpinning necessity*" respectively.

(a) *Keilly necessity*

McGee contends that this is the only necessity recognised by law for the purpose of parliamentary privilege; yet, even if it were to be adopted, it would play only a subordinate role of elucidating art 9, but it should not be treated as the basis of parliamentary privilege.¹⁹¹ As has been seen in the discussion of the *Keilly* case above, *Keilly necessity* allows for the privileges, powers and immunities to be adapted to the needs and purposes of the functions of parliament. It is not the

¹⁸³ Privileges Act 1865 which was later incorporated into the Legislature Act 1908, s242.

¹⁸⁴ McGee above n28, at 606.

¹⁸⁵ See above the legislative sources of parliamentary privileges in New Zealand; *Leigh* above n1 at [13].

¹⁸⁶ *Keilly* above n141

¹⁸⁷ *Chaytor* above n16.

¹⁸⁸ *Vaid* above n 17.

¹⁸⁹ *Stockdale* above n 51.

¹⁹⁰ *Keilly* above n 141, at [13].

¹⁹¹ McGee above n28.

basis of the parliamentary privilege and should not be used as a test to determine whether parliament can or cannot function without a particular occasion.¹⁹²

(b) *Leigh* underpinning necessity

The second is what *Leigh* identified as the concept of “underpinning necessity” based on the UK case of *Stockdale v Hansard*¹⁹³ and *Chaytor and Vaid*. The concept of the underpinning necessity can be identified in Pattenon J’s ruling in *Stockdale v Hansard*.¹⁹⁴

All persons ought to be very tender in preserving to the House all privileges which may be *necessary* for their exercise, and to place the most implicit confidence in their representatives as to the due exercise of those privileges. But power and especially power of invading the rights of others, is a very different thing: it is to be regarded, not with tenderness, but *with jealousy*; and unless the legality of it be most clearly established, those who act under it must be answerable for the consequences. [emphasis added].

The “underpinning necessity” in *Stockdale*¹⁹⁵ seems to require two things. The first is that everyone including the courts must with tenderness preserve to the House all privileges that may be necessary to its business. The second suggests a human rights element, which requires a more solemn obligation to the extent that an individual’s right must be “regarded with jealousy”.

The second obligation amplifies the court’s role in the contemporary legal context¹⁹⁶ when tasked with identifying the scope of parliamentary privilege. Section 6 of the Bill of Rights Act provides:¹⁹⁷

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

The art 9 of the Bill of Right 1688 fell to be interpreted by the court when determining the scope of parliamentary privilege. In undertaking this task, the court has an obligation to take account of the rights of individuals under the Bill of Rights 1990 specifically, the right not to have their reputations harmed and the right to have access to remedies for such harm.

However, the Court in *Leigh* is being criticised for failing to base its decision on art 9 which would have required it to use the accepted interpretation techniques¹⁹⁸ to interpret art 9. It

¹⁹² McGee above n 28; Marry Harris above n 86.

¹⁹³ *Leigh* above n 1.

¹⁹⁴ *Stockdale* above n 51.

¹⁹⁵ *Stockdale* above n 51.

¹⁹⁶ Bill of Rights, 1990.

¹⁹⁷ Bill of Rights, 1990 s6.

¹⁹⁸ Joseph above n 53 at 465.

is argued that such criticism is without basis because s 6 is not concerned with a particular interpretation approach, apart from the requirement that such interpretation must be consistent with the rights and freedoms contained in the BORA.¹⁹⁹ The use by the Supreme Court of the *underlying* necessity test to interpret the scope of parliamentary privilege was open to it in observing its obligation under s 6 of BORA.²⁰⁰ At this juncture, where the constitutional role of the court comes into opposition with parliamentary exclusive cognizance, ie the right not to interfere with parliamentary privilege, one has to give way to the other. The situation is not helped by the non-entrenching character of the Bill of Rights, which does not allow it to abrogate inconsistent laws. Tucker explains the situation as follows:²⁰¹

The basic constitutional roles of the court, those of applying and interpreting legislation, would oblige the court to insist upon the general application of the law which therefore risks causing the judiciary or the executive to interfere with the proper operation of Parliament.

The situation reflects the stark reality “that the rights of an individual cannot be more important than the preservation of New Zealand’s system of representative parliamentary democracy”²⁰², even to the extent that no “judicial remedy is available for those outside who are adversely affected by statements made or things done in the proceedings of Parliament even in relation to their rights protected by the New Zealand Bill of Rights Act”.²⁰³ *Prebble*²⁰⁴ points out that in the interplay between these interests, the legislature’s role of representing public interest is overriding.

D Qualified Privilege

The significance of art 9 is that, whilst participating in the proceedings in parliament, members of parliament are not liable for communicating material which would otherwise be defamatory. Such communications are absolutely privileged for the purposes of defamation actions.²⁰⁵

Statements that are not absolutely protected can be qualified. This means that a defence of qualified privilege can be invoked by a person who has a moral or legal duty to report or communicate a matter that would otherwise be defamatory, to a receiver who also has a legal duty

¹⁹⁹ Bill of Rights Act, 1990.

²⁰⁰ Above n 199.

²⁰¹ Tucker above n46.

²⁰² Privileges Committee above n 20 at [17].

²⁰³ Attorney-General’s advice to Privileges Committee on Parliamentary Privilege Bill, 2013.

²⁰⁴ *Prebble* above n 5.

²⁰⁵ Defamation Act 1992 s13.

or right to receive such statement.²⁰⁶ The reporter would lose the protection if his or her act was actuated by ill will or he or she took improper advantage of the occasion; that is, he or she knowingly used the privileged occasion to defame.²⁰⁷ A defence of qualified privilege is effectively the same as a defence of absolute privilege so long as this not rebutted. This rule places a doubly heavy burden on the harmed person who, in order to be successful in a defamation suit, must not only prove that the comments had been defamatory, but that they had been actuated by ill will or the privileged occasion had been improperly taken advantage of.

However, it is not entirely clear which parliamentary communications attract privilege and which do not. Certain statements that would normally be seen as absolutely privileged because they occur within parliamentary precincts or between key participants in the parliamentary process – such as between members, parliamentary staff and constituents – may not be.

Communications between members and their constituents enjoy qualified privilege only. In a defamation suit, *Rivlin v Bilainkin*,²⁰⁸ the court in England did not accept that absolute privilege applied to covered letters from constituents that were delivered to members' individual mail boxes in the parliament precinct. Additionally, in the case of Mr Strauss,²⁰⁹ a member of parliament who sent an allegedly defamatory letter of complaint to a Minister on a matter he might later have wished to raise in the House was held to be covered by qualified privilege. This decision seems to settle that communications between members of parliament are not absolutely privileged. In contrast, a letter of complaint sent to the Speaker by a member, about the conduct of another member, was absolutely privileged in *Rost v Edwards*.²¹⁰ The situation has not been clear in New Zealand either. In *Hyams v Peterson*,²¹¹ the question of privilege could arise in proceedings where no member of parliament was involved in the alleged communication. In *Cushing v Peters*,²¹² statements in the House were initially admitted as evidence to prove historical events, but this was overturned on appeal.

Meetings of party caucus are not protected by absolute privilege as they are not proceedings in Parliament.²¹³ McGee is adamant that parliamentary documentations – such as

²⁰⁶ Leigh above n 1.

²⁰⁷ Defamation Act 1992.

²⁰⁸ *Rivlin v Bilainkin* [1953] 1 QB 584.

²⁰⁹ House of Lords House of Commons *Joint Committee on Parliamentary Privilege Report of Session 1998-99*, at 55 as cited in Enid Campbell *Parliamentary Privilege* (The Federation Press, Sydney, 2003) at 41.

²¹⁰ *Rost v Edwards* [1990] 2 QB 460.

²¹¹ *Hyams v Peterson* [1991] 3 NZLR 648.

²¹² *Cushing v Peters* [1996] NZLJ 287; [1994] 3 NZLR 30.

²¹³ McGee above n 28 at 623.

those lodged by ministers in the form of draft questions, petitions, notices of motions and Bills and amendments – are absolutely privileged despite being processed outside the floor of the House.²¹⁴ This assertion however is doubted according to *Leigh*, where the courts would only allow absolute privilege for communications processed outside the privileged parliamentary proceedings if the claimant of absolute privilege would satisfy the courts that the communication was necessary for the core function of the House where the claim would have resulted in depriving individuals of their basic rights.

E Behaviour of public servants

The professional conduct of public officials is regulated by the States Services Commission²¹⁵. In his submission to the Privileges Committee, the Commissioner of States Services acknowledged that the decision in *Leigh* did not pose any “management difficulties for the Public Service, as it is consistent with obligations that apply generally to public servants”.²¹⁶ The Commissioner’s submission reflects the underlying public service culture of ethical responsibility not to communicate untruths and maligning advice to Ministers. The submission also implies that civil servants who do not act ethically or responsibly would be subject to the Service’s disciplinary mechanisms which act as a deterrent to such behaviour. There is nothing in the Commissioner’s submission to suggest that public servants’ communications with their Ministers would be better protected by absolute privilege. The Commissioner’s submission indicates that qualified privilege is the appropriate protection for public service communications, whether with the Minister or otherwise.

From the Service’s point of view, the definition of “proceedings in parliament” in the new Act²¹⁷ might have an adverse implication not only for the civil service institution but for parliament as well. Under the new definition of “proceedings in parliament”, any communication that is made “in the preparation of a document for the purpose of or incidental to the transacting of the business”²¹⁸ of the House is absolutely privileged. The obvious risk there is the wider opportunity for an errant civil servant to take improper advantage under the pretext of “preparation of a document for the purpose of or incidental to the transacting of the business of

²¹⁴ McGee above n 28 at 623- 624.

²¹⁵ Submission by the New Zealand State Services Commissioner to Parliamentary Privileges Committee 23 November 2012.

²¹⁶ State Services Commissioner above n 215.

²¹⁷ Parliamentary Privilege Act 2014.

²¹⁸ s10(1) & (2).

the House”²¹⁹ to communicate with impunity untruths to their Ministers or any other parliamentarian in the pretext of conducting their official duties. Additionally, the Services Commission would be barred from investigating the officer for misconduct because according to the definition, the officer’s adverse statement would be protected by immunity. For the Services to investigate the officer would amount to impinging on parliamentary privilege²²⁰ The House, on the other hand, has nothing to gain from relying on besmeared statements in conducting its business.²²¹

The case of *De Maria*²²² clarifies this situation. De Maria was a member of the state of Queensland’s university academic staff. He supplied documents to a senator who tabled them in the Senate committee without first reading their contents. Some of the documents contained adverse comments by De Maria against his university colleagues, who then launched a misconduct investigation of De Maria.

The issue was whether the adverse documents supplied by De Maria, part of the “proceedings in parliament” and if so, the disciplinary proceedings against De Maria on the basis of those documents (that were now before the senate and protected by absolute privilege) which the University Disciplinary Committee was conducting at the time, would constitute contempt of the Senate.

It should be noted that the controversial scope of parliamentary privilege in De Maria arose from the definition of “proceedings in Parliament” in the Parliamentary Privileges Act 1987 (Cth) s 16(2), which is verbatim of New Zealand’s definition of “proceedings in Parliament” in s 10(1) and s 10(2) in New Zealand’s Parliamentary Privilege Act, 2014.

Because the Act replaces the law in *Leigh*,²²³ the potential for outsiders to “manufacture Parliamentary privilege for a document by the artifice of planting the document upon a Parliamentarian”²²⁴, can only be imagined.

²¹⁹ s10(1) & (2).

²²⁰ s10(1) & (2).

²²¹ Geddis above n26.

²²² Parliament of Australia *Possible Improper Action Against a Person (De Maria)* (The Senate, Parliament House, Canberra, 72nd Report, June 1998).

<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Completed%20inquiries/1996-99/report_72/index>

²²³ Parliamentary Privilege Act 2014, s 3(2)(c)

²²⁴ Parliament of Australia *Possible Improper Action Against a Person (De Maria)* (The Senate, Parliament House, Canberra, 72nd Report, June 1998) at [2.10].

One of the reasons given for extending absolute privilege to officers such as Gow was to avoid the risk of a “chilling effect”. It is claimed that under a protection of qualified privilege, the officer is always faced with a “looming risk of possibility of prosecution or legal action”.²²⁵ Consequently, the officer would be so risk averse as to prevent him or her from fully communicating to the Minister what the latter needs for his or her parliamentary functions.²²⁶ Absolute privilege would rid the officer of the threat.

This claim of the likelihood for the officers to be risk averse because of fear of not being protected by absolute privilege is doubted. As the Commissioner of State Services suggested, the Service’s communications had been operating satisfactorily on the underlying qualified privilege protection and the *Leigh* decision was in line with the Service’s policy.²²⁷ The decision in *Leigh* did not pose any “management difficulties for the Public Service, as it is consistent with obligations that apply generally to public servants”.²²⁸

V THE LEGISLATIVE RESPONSE – PARLIAMENTARY PRIVILEGE ACT 2014

A Introduction

The conclusion reached by Parliament,²²⁹ was that *Leigh* represented a significant shift in the interpretation of the scope of privilege “mov[ing] New Zealand away from the position of other Commonwealth countries”.²³⁰ It is submitted that this affirmation cannot be correct because the law of necessity in the “underlying necessity” sense now exists as a test in Canada as established in the *Vaid*²³¹ case as well as in the United Kingdom in *Chaytor*²³².

The explanatory notes to the Parliamentary Privilege Bill 2013²³³ when the Bill was first introduced stated the Bill’s three main purposes.²³⁴ First, it was to clarify “for the avoidance of doubt” aspects of the scope of parliamentary privilege by overriding the decision in *Leigh*; second

²²⁵ Above n 20 at 27.

²²⁶ Geddis above n26.

²²⁷ States Services Commissioner above n215.

²²⁸ States Services Commissioner above n

²²⁹ Privileges Committee Report on *Leigh* above n20.

²³⁰ Above n20.

²³¹ *Vaid* above n17.

²³² *Chaytor* above n 16.

²³³ Parliamentary Privilege Bill 2013(179-2).

²³⁴ Parliamentary Privilege Bill 2013(179-2) (explanatory note).

it was to override the principle of “effective repetition” in the decision in *Jennings v Buchanan*,²³⁵ and third, it was to modernise related pieces of legislation.

This was not the first time in the recent past that legislation has been recommended for clarification of the scope of parliamentary privilege as a result of the outcome of a defamation action. In July 1998, the Privileges Select Committee concerned with the decision in *Buchanan v Jennings*²³⁶ recommended amending the Legislature Act²³⁷ to override it. In the *Jennings* decision, a person was liable for “effective repetition” when “affirming or endorsing words written or spoken in [parliamentary] proceedings where the statement would not, but for the proceedings in parliament, give rise to criminal or civil liability”.²³⁸ The main concern was the “effective repetition” rule exposed parliamentary statements directly for scrutiny by the courts which could lead to a break down in comity.²³⁹ The 1998 referral for legislation did not materialise due to stalled developments.²⁴⁰ It was not until the 2012 inquiry into the *Leigh* decision that these matters were reviewed and recommended to be all addressed in the 2014 Act.²⁴¹

This part of the discussion focuses on the relevant provisions of the Parliamentary Privilege Act 2014 and their implications on the scope of parliamentary privilege.²⁴²

B Codification – A Choice within Parliament’s Exclusive Cognizance

It is trite law that the courts determine the scope of privilege.²⁴³ Once identified, the administration of a privilege is a subjective exercise in which parliament in its exclusive cognizance solely decides how best such privilege should be used.²⁴⁴

In building the case for legislating, Joseph,²⁴⁵ in his submission to the Privileges Committee, makes an alarming revelation regarding the *Leigh* decision:

²³⁵ *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577.

²³⁶ Report of the Privileges Committee on *Question of Privilege Concerning Buchanan v Jennings* (I.17G), New Zealand Parliament, Report of the Privileges Committee, reported 31 May 2005 Document type – Privilege – SC report.

²³⁷ Legislature Act 1908.

²³⁸ Report of the Privileges Committee on *Buchanan v Jennings*, above n 236.

²³⁹ Privileges Committee, above n 20 at 17.

²⁴⁰ Privileges Committee above n20, at 33

²⁴¹ Privileges Committee above n20.

²⁴² *Leigh* above n 1.

²⁴³ *Stockdale* above 51.

²⁴⁴ McGee above n 28, at 608.

²⁴⁵ Professor Philip Joseph submission to the Privileges Committee 19 October, 2012.

The damage that *Leigh* inflicts on Parliament is incalculable... It can no longer be assumed, for example that members of the public when giving evidence or submissions before select committees, will be covered by parliamentary privilege. If *Leigh* is our exemplar, the Supreme Court would say that it suffices in defamation actions that persons who appear before select committees have the defence of qualified privilege.

This paper contends that there is no basis for such alarm. The Court in *Leigh* makes it clear that absolute privilege protects the core functions of parliament—those that are transacted on the floor of the House and its committees.²⁴⁶ The “necessity” test in *Leigh* applies to communications that are processed outside absolutely privileged spheres ie, Parliament and its committees.

1 Codified definition of “Proceedings in Parliament”

Section 10(1) and 10(2) of the Act²⁴⁷ defines “proceedings in Parliament”:²⁴⁸

- (1) **Proceedings in Parliament**, for the purposes of Art 9 of the Bill of Rights 1688, ... means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of the House or a committee.
- (2) The definition in subsection (1) must be taken to include the following:
 - ...
 - (b) the preparation of a document for purposes of or incidental to the transacting of any business of the House or a committee.
 - ...

The explanatory notes to the Parliamentary Privilege Bill 2013 state that s10 of the Act clarifies proceedings in parliament for the purpose of art 9, but is not an exhaustive definition of the term.²⁴⁹ Adoption of the definition of the meaning of “proceedings in parliament” from the Australian Privileges Act 1987 (Cth) was recommended.²⁵⁰ Consequently, section 10(1) and (2) are verbatim of s16(2) of the Commonwealth of Australia Act. The rest of s10 and other provisions bear close similarities to the Australian provisions.

²⁴⁶ *Leigh* above n 1 at [4].

²⁴⁷ Parliamentary Privilege Act 2014 s10.

²⁴⁸ Parliamentary Privilege Act 2014 s10.

²⁴⁹ *O’Chee v Rowley* (1997) 150 ALR 199.

²⁵⁰ Privileges Committee Report on *Leigh* above n 20.

2 *The United Kingdom position*

The United Kingdom Parliament has expressed its reluctance to define “proceedings in parliament”. Lord Sewell’s²⁵¹ submission to the Committee²⁵² voices the recommendations of the UK Joint Committee Report²⁵³. The UK Joint Committee did not believe “at this stage that the problem...is sufficient to justify legislation”.²⁵⁴ However, the option is open if Parliament should consider it necessary. He also referred to the UK Government’s response to the Joint Committee in which it observed that the issue of privilege covering communications between officers and their ministers was a matter for the courts”.²⁵⁵ On the same footing, the Joint Report²⁵⁶ acknowledges that the UK courts have satisfactorily dealt with the contentious issues involving parliamentary privilege in the *Chaytor* case and the UK Parliament did not consider it necessary to define the meaning of “proceedings in parliament”.²⁵⁷

The UK 2014 Joint Report²⁵⁸ recommendations, however, differ from its earlier recommendations in the 1999 Joint Report²⁵⁹ where it recommended defining “proceedings in parliament” but with certain alterations to the definition in s 16(2) of the Commonwealth of Australia Act.²⁶⁰ The 1999 Committee no doubt realised the adverse implications of extending privilege outside of the core functions of the House. It recommended instead that any definition of “proceedings in parliament” under art 9, should not be extended to include statements between members and ministers, and recommended a proviso that the preparatory drafts and notes similar to s 16(2),²⁶¹ “do not circulate more widely than is reasonable for the member to obtain assistance and advice”.²⁶²

Importantly, the 1999 Joint Committee²⁶³ did not think it was reasonable to distinguish between statements between members themselves, between members with a local authority or public official, or between members with their constituents²⁶⁴. That Report recommended that the

²⁵¹ Lord Sewell House of Lords, Chairman of Committees, submission to New Zealand Privileges Committee, 27 February 2014.

²⁵² Privileges Committee Report on *Leigh* above n 20.

²⁵³ UK Joint Report 2014 above n 55.

²⁵⁴ Lord Sewell above n 251.

²⁵⁵ Lord Sewell above n 251.

²⁵⁶ UK Joint Report 2014 above n 55.

²⁵⁷ Lord Sewell above n 251.

²⁵⁸ UK Joint Report 2014 above n 55.

²⁵⁹ UK Joint Report 1999 above n 81.

²⁶⁰ Parliamentary Privileges Act 1987 (Cth).

²⁶¹ Parliamentary Privileges Act 1987 (Cth) s 16(2).

²⁶² UK Joint Report 1999 above n 81 at [113].

²⁶³ UK Joint Report 1999 above n 81.

²⁶⁴ UK Joint Report 1999 above n 81.

protection in art 9 “should remain confined to the core activities of Parliament, unless a pressing need is shown for an extension”.²⁶⁵ In 1999, the House of Commons did not approve the recommendations for an enactment and still retains that position after the 2014 Joint Report.

C The Australian experience

It is important to examine some of the experiences of the Australian courts and parliaments in relation to the definition of “proceedings in parliament” in their respective statute laws, for lessons to be learned about the possible implications of the definition, on the scope of parliamentary privilege in New Zealand under the 2014 Act.

*1 O’Chee v Rowley*²⁶⁶

The distinguished scholar, Enid Campbell was concerned that at in formulating the definition of “proceedings in parliament” the Australian Parliament gave insufficient consideration to how privilege might be affected “in an occasion where documents are sent to members of parliament by members of public, in the expectation that the documents would be used by the member in the transaction of parliamentary business”²⁶⁷.

This perceived mischief in s 16(2) of the Parliamentary Privileges Act (Cth)²⁶⁸ (which is verbatim of s 10(1) and s 10(2) of the Parliamentary Privilege Act, 2014),²⁶⁹ came to light in the case of *O’Chee v Rowley*.²⁷⁰ Senator O’Chee made defamatory comments against Mr Rowley in a radio interview. Rowley then sought a discovery order of the constituency files that were in the possession of the senator on which the latter based his allegations against Rowley. The senator refused to hand over the documents.

The court held that a document or communication was protected by absolute privilege under the “incidental test” in s 16(2) if it was shown that the member retained it in his or her possession with a view to using it in his or her parliamentary role, as it would constitute an act done “for the purposes of or incidental to” the transacting of the business of the House.²⁷¹ Additionally the court held, that s 16(2) allows for the absolute privilege to continue to apply to the any documents that are prepared for the purpose of transacting the business of the House and

²⁶⁵ UK Joint Report 1999 above n 81 at [110].

²⁶⁶ *O’Chee v Rowley* (1997) 150 ALR 1999; ANZACATT Briefing Paper No.2 6 December, 2012.
www.aph.gov.au/~media/.../Parliamentary-Briefing-No-2.pdf

²⁶⁷ Campbell above n 44 at 45.

²⁶⁸ Parliamentary Privileges Act 1987 (Cth).

²⁶⁹ Parliamentary Privilege Act, 2014.

²⁷⁰ *O’Chee* above n 249.

²⁷¹ Campbell above n 44.

after the transaction has been completed in case they may be raised again in parliament”²⁷². The court, however, noted that there should come a time when such materials would cease being retained for the purposes of s 16(2).

The *O’Chee*²⁷³ decision may have implications how the Parliament might deal with communications from constituents or any member of the public in an occasion of “incidental” under the new definition in s 10(1).

Parliament, though, has acknowledged that although legislation can provide clarity, “it does not remove all ambiguity....either way the courts have a role to determine the boundaries of parliamentary privilege”.²⁷⁴

2 *De Maria*²⁷⁵—parliamentary case

As has been seen earlier in *De Maria*, once documents are supplied to the senator, they become part of the “proceedings in parliament” within the meaning of s 16(2) of the Act.²⁷⁶ The Senate committee, found that the “university had taken disciplinary action against De Maria “as a direct consequence of his communication with the Senate ...and the senator’s tabling of such material in the Senate conferred absolute privilege on that material...the university in taking action against De Maria...committed a contempt of the senate”.²⁷⁷ The disciplinary proceedings against De Maria subsequently dissolved because of the threat of contempt.

The senate committee, though, had misgivings that the senate should be put through much trouble that arose from “the tabling of public records under privilege...documents on behalf of or authored by other persons”.²⁷⁸

4 *Risk of Misuse of Privilege*

The *O’Chee* and *De Maria* cases suggest that the definition in s 10(1) of the Parliamentary Privilege Act, 2014 is sufficiently wide to afford absolute privilege to communications that are otherwise not normally protected by parliamentary privilege. For example, communications

²⁷² *O’Chee* above n 249.

²⁷³ *O’Chee* above n 249.

²⁷⁴ Mary Harris above n 86.

²⁷⁵ *De Maria* above n222

²⁷⁶ Parliamentary Privileges Act 1987 (Cth).

²⁷⁷ Campbell above n 44 at 23. The Senate warned that it was the senator’s duty to familiarise themselves with all aspects of the material before tabling it and to take responsibility for it.

²⁷⁸ Campbell above n 44 at 23. It should be noted that De Maria’s lawyers were actively communicating with the senate as well.

between constituents and their representatives are currently protected by qualified privilege.²⁷⁹ This might no longer be the case under the new Parliamentary Privilege Act, 2014.

Additionally, there is a perception of “inappropriateness” for parliament to have to deal with communications that are not *per se* in their core functions as seen in *De Maria*. This indicates that there would be unnecessary additional administrative burden to parliament in such situations.

The wide scope of the definition of “proceedings in parliament” could possibly be used as a license to harm individuals.²⁸⁰ In the case of *Grassby*²⁸¹ the New South Wales Supreme Court held that a letter containing defamatory comments that was sent to a member, and was intended to be used by the member in committee proceedings, was not protected by art 9 of the Bill of Rights but was merely protected by qualified privilege. Allen J was not to be swayed by the defendant’s arguments “that members would be deterred from making use of information supplied to them by constituents because of a possibility of a ‘chilling effect’” if their informants are to be sued for supplying such information. New South Wales is the only Australian state that does not have in place a codified definition of “proceedings in parliament”.

Apart from the case of an errant constituent who might seek absolute privilege for their adverse documents by planting them in the possession of their representatives, members themselves might choose to hand over to the court any communication which they would otherwise be obliged to protect. For example, a member in receipt of a letter of complaint from a constituent he or she does not particularly like could hand it over to the police or the courts to be used against the constituent on the pretext that it was not “incidental’ to the member’s work in Parliament.

In light of the above problems relating to the application of the definition of “proceedings in Parliament”, the test the Supreme Court in *Leigh* described the necessity test as having a “sharper focus and involves significantly less uncertainty than closeness of connection”.²⁸² However, it remains to be seen how the New Zealand courts and parliament would decide any situations similar to those in the Australian jurisdictions, should they arise under the Parliamentary Privilege Act 2014.

²⁷⁹ McGee above n 28 at 623.

²⁸⁰ The court in *O’Chee* above n 249 observed s 16(2) extended privilege.

²⁸¹ *Grassby* (1991) 55 A Crim R 419.

²⁸² *Leigh* above n1 at 11.

VI RECOMMENDATIONS FOR REFORM

The Parliamentary Privilege Act 2014 has just come into effect and the courts have not yet the opportunity to review its provisions. Although the substantive provisions similar to the Australian Act,²⁸³ have been tested in the Australian courts, it cannot be said with certainty that the New Zealand courts would adopt the approaches taken by their Australian counterparts. Their rulings are not binding in New Zealand—although the relevant legislative provisions are the same.

This paper finds that the underlying contention relating to the decision in *Leigh* and Parliament’s response by enacting the Parliamentary Privilege Act 2014, is an issue of comity; the mutual restraint and respect that parliaments and the courts have for each other to be able to operate effectively for the interest of their citizens. Far from limiting the options of harmed individuals to seek remedies in the courts, these recommendations are made on a comity “best practice” approach. It seems that the most appropriate measures would be for the House to strengthen its control of its members. Thus the following proposals recommend changes to the House’s Standing Orders and the 2014 Act.

It is agreed that the House’s Standing Orders already have in place in relation to the House’s select committees and their procedures,²⁸⁴ a number natural justice measures. However uttering slanderous or adverse comments on the floor of the House cannot be avoided and are not subject to contempt.²⁸⁵ This is consistent with the member’s constitutional “freedom of speech” enshrined art 9 of the Bill of Rights 1688. The debates in the House are subject to the Speakers control, who is at liberty to order the maker of the statement to apologise or make such other amends. Contempt is invoked only for disobeying the Speaker’s Orders. Apparently the Speaker cannot stop the member before they make any adverse comments in the House. To do so might require the member to advise the Speaker before the debates, about what he or she would be saying . To adopt such a procedure would infringe the member’s freedom of speech.

It is suggested that on the ground of the instantaneous and irreparable damage caused by comments made during debates on the floor of the House,²⁸⁶ a member who disobeys an Order by the Speaker to remedy the damage that their comments might have caused, must be subject to a more stringent contempt punishment than for those that occur in the Select Committees.

²⁸³ Parliamentary Privileges Act 1987 (Cth).

²⁸⁴ Standing Orders 233-235..

²⁸⁵ Standing Orders, SO 104.

²⁸⁶ Live broadcast both on television and radio of Parliament debates exacerbates the harm done to targeted individuals.

This more stringent contempt discipline is justified on the grounds that the existing comprehensive natural justice procedures for the Select Committees alleviate the harm caused to individuals during the committee's proceedings. No such prevention is available for the debates on the floor of the House. Again, it is the constitutional rights of members not to have such preventative measures imposed on them when they speak on the floor of the House. The contempt is invoked only when the member fails to obey the Speaker's Order in relation to the comment for eg, to retract such comment.

The first step is to have a new Standing Order inserted to expressly create a new species of contempt for disobeying an Order of the Speaker that arises from a defamatory or adverse statement on the floor of the House that targets a named person or is made in a way to readily identify a person.

The second recommendation is to impose a higher fine threshold for contempt that arises from the new species of contempt set out above. Section 22(1) of the Act sets the fine for contempt of Parliament at no more than \$1,000. It is recommended that the fine for the recommended new species of contempt be significantly higher.²⁸⁷

Far from limiting the options to resort to the courts for remedy, these comity best practice recommendations are aimed to settle matters within Parliament's internal practices, to reduce the need for the courts to have to intervene.

VII CONCLUSION

The decision in *Leigh* and the response from Parliament in enacting the Parliamentary Privileges Act 2014 touch on the value of comity; the mutual restraint and respect that the legislature and the judiciary have for each other to be able to impart those constitutional rights for which citizens look to them to protect on their behalf.

Parliament had the opportunity in *Leigh* to balance political needs and respect for individual rights rather than to treat its lawmaking power as an opportunity to make a statement of supremacy. A more restrained approach would involve a closer assessment of the competing values of protecting the citizen's basic rights and the public interest that is vested in the member's freedom of speech. This would involve a closer examination and comparison of the efficacy of the "necessity test" in *Leigh* and the experiences of the Australian jurisdictions which should

²⁸⁷ Parliamentary Privilege Act 2014, s 22(1)

inform the lawmakers of the implication of codifying “proceedings in parliament” on the scope of its privilege. More importantly, it would involve taking account of the human rights obligations that New Zealand has under its BORA as well as its international human rights commitments. Such considerations if taken on board would have placed less strain on comity as Parliament would have been informed that the court’s obligations under t s 6 of the BORA²⁸⁸ might result in the Act being interpreted in ways the lawmakers might not have intended.

To maintain comity, a number of “best practice” amendments are recommended to be inserted in the Standing Orders and the 2014 Act to ensure that matters are appropriately and timely resolved before a situation reaches a stage that will require the intervention of the courts.

²⁸⁸ Bill of Rights 1990, s 6.

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