Sharing the Privilege: Parliamentarians, Defamation, and Bills of Rights

Matthew Harris*

I: INTRODUCTION

On March 22, 1994, Mr Winston Peters, Member of Parliament for Tauranga, stood in the House of Representatives and began a speech he had been threatening to deliver for some time.[1]

> In the past week we have witnessed the most telling example of political and big business corruption ever to rear its vile head in this country. I am talking about the activities of the European Pacific group and people in positions of power to aid and abet international money-laundering criminals in a massive cover-up of crimes.

Mr Peters went on to implicate more than twenty individuals and the most sensational excerpts of his speech were broadcast to the nation. Such episodes were a dominant feature of New Zealand politics in the early 1990s. Mr Peters appeared frequently on prime-time television news, denouncing the activities of public officials and leading businessmen from his Parliamentary seat. Those in his firing line he accused variously of criminal conspiracy, large-scale tax fraud and other improprieties. Crucial to Mr Peters' crusade was the protection of parliamentary privilege. In the House of Representatives an MP may accuse

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1 539 NZPD 567 (22 March 1994).

whomsoever he or she pleases, secure from the threat of defamation actions.

In 1994, litigation instigated by another former Minister of the Crown, Mr Richard Prebble, established that the protection of parliamentary privilege reaches further still. Television New Zealand had broadcast a programme which alleged that he had abused his position as a cabinet minister by selling state assets cheaply in exchange for political donations. In its defence to Mr Prebble's defamation proceedings TVNZ wished to rely in part on certain speeches in the House of Representatives by Mr Prebble and other ministers. The Privy Council held that Mr Prebble could proceed with his action and ruled out any use of parliamentary speeches by Television New Zealand to support its defence.

Mr Prebble's successful action against TVNZ and Mr Peters' high profile campaign against big business improprieties have highlighted the protection which the law of parliamentary privilege confers on parliamentarians. Many would agree with Attorney-General Paul East's comment "that the last few years have been a black period for the proper and appropriate use of the privilege of freedom of speech in [the] House."[2] Some have called for restrictions on Members' freedom of speech to stop "abuse" of privilege; others have argued that Members' immunity from defamation is too broad.

In an attempt to address such criticisms, the Hon David Caygill MP introduced a Bill to reform and codify the law of parliamentary privilege. The Parliamentary Privilege Bill targeted "recent abuse" of privilege by proposing restrictions on parliamentarians' freedom of speech. If it becomes law, a Member who wishes to make an allegation against someone must first satisfy the Speaker that there are "grounds" for the allegation; and any person against whom an allegation is made will be given the opportunity to have a response tabled in the House. The Bill's proponents have not examined parliamentarians' freedom of speech in the wider context of defamation law. Under Mr Caygill's proposal, all reform will be effected within the walls of Parliament.

The purpose of this article is to critically examine the relationship of freedom of speech in Parliament to the law of defamation. In light of recent events it is timely to consider whether a fair balance has been struck between freedom of speech for parliamentarians and the right of ordinary citizens to defend their reputations. This issue raises another, more fundamental question: where is it appropriate to draw the line between protecting free speech and defending individual reputation? There has been a general failure to acknowledge that many of the issues being debated in the area of parliamentary privilege are conceptually linked to this wider question.

The structure of this article is three-fold. There is an overview of the scope of parliamentary freedom of speech, with particular attention focused on the implications of *Prebble v TVNZ.* Next, the purposes and potential impact of the Parliamentary Privilege Bill in this area are examined. Finally, the issue of whether it is appropriate to introduce an expanded defence to defamation actions, to enable all citizens to speak more freely about public officials is discussed. The advantage of bringing together the law of parliamentary privilege and defamation is to increase understanding of common principles which, in turn, points to principled reform.

2 543 NZPD 4461 (19 October 1994).

II: FREEDOM OF SPEECH AND DEFAMATION

[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lost what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

J. S. Mill, *On Liberty* Ch. 2.

O! I have lost my reputation. I have lost the immortal part of myself, and what remains is bestial.

Shakespeare, *Othello*, II. iii.

John Stuart Mill and Shakespeare's Iago give powerful voice to two fundamental yet incompatible principles. The extract from J S Mill's essay *On Liberty* is well worn by quotation but few have managed a more forceful justification for valuing free speech. In a liberal democracy the right of an individual to free expression derives from the interest inherent in all citizens to participate in the democratic process. Mill considers that the relationship of political liberty to free expression is inextricable.[3] Yet, for all their value to the free-working of a democratic society, words and other forms of expression may also injure reputations and invade privacy. For centuries English law has attempted to protect reputation and character against harmful falsehood through the action of libel or defamation. Indeed, some have come to see this protection as an important constitutional principle. A useful insight is offered by journalist Donald Wood who was forced to flee South Africa in the 1970's for expressing opinions intolerable to the authorities. In his view, "sound defamation law is one of the most important guarantees of civil liberties." [4]

In English law the value of personal reputation is accorded positive status through the availability of defamation proceedings. By contrast, freedom of expression, like many other fundamental freedoms in English law, is residual. The great 19th century legal theorist A.V. Dicey captured the English perspective well when he wrote, "Freedom of discussion is ... in England little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written." [5] In both England and New Zealand, Dicey's shopkeepers have historically valued reputation more highly than free speech.

American constitutional law has developed differently. The United States Constitution guarantees freedom of speech for all Americans and the courts recognise that the threat of defamation proceedings "chills" that freedom. [6] The

3 For a fuller discussion see Raz, "Free Expression and Personal Identification" in Waluchow (ed), *Free Expression: Essays in Law and Philosophy* (1994) 1.

4 Donald Wood, "Canberra Press Club Address", March 1978, quoted in Davies, "The 'Public Figures' Defence: A Subversion of Democracy - The Lesson of *Rose v Koch*" in Turner & Williams (eds), *The Happy Couple: Law and Literature* (1994) 204.

5 A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed 1959) 246.

6 First Amendment of the Constitution of the United States of America. See text, infra at p 954f.

importance of uninhibited criticism of public figures and officials takes precedence over those individuals' right to sue for defamation. To date, English and New Zealand law has failed to recognise the importance of uninhibited political debate. Parliament is the only forum where truly unrestricted speech is permitted. This protection of parliamentary speech is not founded on the awareness of a fundamental right which characterises American law; rather, it sits anomalously within our legal system, the product of political pragmatism and history.

III: PARLIAMENTARY PRIVILEGE

Members' immunity from civil and criminal liability for words spoken in the course of parliamentary proceedings is part of the law of parliamentary privilege. The privileges enjoyed by the New Zealand Parliament derive from those of the House of Commons. They are "historical and egocentric, yet vital to its functions and authority."[7] The authoritative definition of parliamentary privilege may be found in Erskine May's *Treatise*:[8]

> Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, 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.

Privileges are thus those immunities and powers enjoyed by the House and its Members which exceed those possessed by other bodies or individuals. They are designed to achieve an effective and efficiently functioning legislature.[9]

Parliamentary privilege in New Zealand was secured by statutory adoption of the same privileges possessed by the House of Commons on the 1st day of January, 1865.[10] They include:

(i) freedom of speech for proceedings and debate in parliament;
(ii) freedom of the House of Representatives to control its own proceedings;
(iii) privileges connected with the administration of justice, including freedom from arrest in civil proceedings; and
(iv) the right of the House of Representatives to regulate its own composition (subject to the provisions of the Electoral Act 1993).[11]

7 Joseph, *Constitutional and Administrative Law in New Zealand* (1993) 353.
8 Erskine May, *Treatise on The Law, Privileges, Proceedings and Usage of Parliament* 21st ed (1989) 69.
9 McGee, *Parliamentary Practice in New Zealand* 2nd ed (1994) 468.
10 Legislature Act 1908, s 242(1).
11 Parliamentary Privilege Bill 1994, para 98.

Some privileges are more obviously directed at providing the House with the unimpeded services of its Members. Others belong to the House as a collective body to ensure the protection of its Members and the vindication of its own authority and dignity. They are considered to be in the interests of all citizens and it is only as a means to the effective discharge of the collective functions of the House that privileges are enjoyed by individual Members.[12] Violating any of these rights and immunities is a breach of privilege, punishable under the law of Parliament. Actions which obstruct or impede the House in discharging its functions, or constitute offences against its authority and dignity, are punishable as contempts.

At the commencement of every Parliament the Speaker must lay claim before the Governor-General to the House's rights and privileges, particularly to freedom of speech in debate.[13] This is ceremonial and symbolic only. In King James I's Parliament, the Commons claimed it was an act "only of manners" to request the enjoyment of their privileges.[14]

Privilege and the Courts

Major jurisdictional clashes have arisen over the application of privileges to non-Members. In 1839, the case of *Stockdale v Hansard*[15] produced a stand-off between the Court and the House of Commons over whether a paper published by order of the Commons was protected by the law of privilege. Court and Commons both claimed to be the ultimate arbiters over matters of privilege. The Court held itself able to decide the existence of particular privileges and conceded to Parliament the manner of their application. The House however has never relinquished its claim to decide whether a privilege exists, although it has not since refused to admit the jurisdiction of the courts.[16] Today the courts refer to the deference that characterises their relationship to Parliament. As the House of Lords has observed, "Parliament and the courts have each been astute to respect the sphere of action and the privileges of the other...".[17]

IV: FREEDOM OF SPEECH IN DEBATE

It has already been noted that truly open debate is not possible without uninhibited free speech. Today, the constitutions of the United Kingdom, Australia, Canada, the United States and New Zealand recognise this by conferring

12 *Prebble v TVNZ* [1993] 3 NZLR 513, 541 per McKay J.

13 *Standing Orders of the House of Representatives*, S.O. 22. These privileges are undoubtedly part of the body of privileges secured by the Legislature Act 1908. Failure by the Speaker to lay claim to any of them would be a breach of Standing Orders but would not affect their operation.

14 Erskine May, *Treatise on The Law, Privileges, Proceedings and Usage of Parliament* 19th ed (1976) 70.

15 (1839) 9 Ad & El 1; 112 ER 1112.

16 Compare the views expressed by Attorney-General Paul East in his paper "The Role of the Attorney-General" in Joseph (ed), *Essays on the Constitution* (1995) 184, 197.

17 *British Railways Board v Pickin* [1974] AC 765, 799 per Lord Simon of Glaisdale.

absolute freedom of speech in debate on the members of their legislative bodies.

In England, the House of Commons enjoyed customary rights of freedom of speech from at least the 15th century,[18] but in 1688 declared this freedom in Article 9 of the Bill of Rights:

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

The declarations in the Bill of Rights had much to do with the troubled history of 17th century England. The original purpose of Article 9 may be found in the preamble to the Bill of Rights where it is declared, "the late King did endeavour to subvert ... the law and liberties of the people by prosecutions in the Court of King's Bench for matters and causes cognisable only in Parliament." In Tudor and Stuart England the risk of prosecution for seditious libel or of victimisation by the Crown was very real.[19] Article 9 established the broad privilege clearly and protected it from interference by the Crown or the courts. For practical purposes this is the modern foundation in New Zealand of parliamentarians' freedom of speech in debate.

V: THE SCOPE OF ARTICLE 9 OF THE BILL OF RIGHTS 1688

The danger of victimisation from a monarch intent on stifling political initiatives or criticism has passed, but the privilege is no less relevant today. It serves a different purpose by protecting parliamentarians against civil actions being brought against them by individuals, the police or the Attorney-General. Those few who have attempted to hold Members liable for speeches in parliament have been consistently unsuccessful.[20] A Member may say in debate whatever he or she thinks fit, however offensive or injurious it may be to others. Only the rules of order of the House control parliamentary speech. In modern practice it is more common for the Speaker to deal with offensive words by exercising the summary powers conferred by Standing Orders.[21] The House's disciplinary powers are not normally resorted to.[22]

All "proceedings in Parliament" fall within the scope of Article 9. Included are sittings of parliamentary select committees, questions to responsible ministers, and

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18 Erskine May, supra at note 8, at 71.

19 As *Sir John Eliot's case* (1629) 3 St. Tr. 294 illustrates; Erskine May, supra at note 8, at 72-73.

20 See eg. *Dillon v Balfour* (1887) 20 LR Ir 600.

21 Standing Orders 50, 82 - 94 empower the Speaker to intervene to stop highly disorderly conduct. The powers include ordering the member to withdraw from the House, having the member removed by force and, in the most serious cases, adjourning the House for such period as he or she names.

22 However, in 1987 former Prime Minister Sir Robert Muldoon was suspended for three days by the House for alleging that the Speaker had acted with prejudice and bias against the Opposition: (1986-87) AJHR I.15, 8 - 13. See the appendix to the Parliamentary Privilege Bill 1994 for a list of Privilege Proceedings in the New Zealand Parliament between 1982 and October 1994.

the gathering and presenting of petitions to Parliament. Because the privilege only protects those who are participating in *parliamentary* proceedings, Article 9 does not protect the publication of speeches or other proceedings outside Parliament.[23] Anyone - including a Member - who independently publishes a speech delivered in the House, publishes without the protection of privilege,[24] and any defamatory statements may be actionable. Publishers of parliamentary proceedings may claim absolute privilege only where the whole of the proceeding is reported. However, a fair and accurate account of a debate in the House is protected by the same principle as that which protects fair and accurate reports of court proceedings; the advantage to the public is considered to outweigh any disadvantage to the individual unless malice is proved. This is a matter of substantive law rather than of parliamentary privilege.[25]

The scope of Article 9 is most controversial when a party to court action wishes to adduce parliamentary records as evidence. *Hansard* and other House records are only admissible when the purpose is to establish, as a matter of fact, that something was said or done in the House on a particular day. [26] The New Zealand courts initially attracted criticism for examining *Hansard* as an aid to interpreting statutes, because this practice requires a court to draw inferences or conclusions from parliamentary proceedings.[27] All doubts,[28] however, appear to have been removed since the House of Lords approved such "questioning" of parliamentary proceedings.[29]

Since *Church of Scientology of California v Johnson-Smith* [30] the privilege has extended beyond court actions directed against Members in respect of words spoken in the House. Browne J accepted the Attorney-General's submissions that parliamentary privilege prohibited *any* examination of proceedings in the House for the purpose of supporting a cause of action. This is so even when the cause of action arises out of something said or done outside the House.

In the very recent case of *Cushing v Peters*,[31] Dalmer DCJ held that Article 9 is not infringed where a statement made in the House is relied upon only as evidence to identify a plaintiff defamed outside the House. His Honour drew a fundamental distinction[32] between reliance on matters spoken in the House for the purpose of calling those matters into question and merely wishing to prove that a statement has been made as a matter of historical record. In this case, Mr Peters' liability arose "solely from statements made by him outside the House of Representatives." [33]

23 For a fuller treatment of what is presently understood to be included in "proceedings in Parliament" see Joseph supra at note 7, at 365.

24 *R v Abingdon* (1795) 1 Esp 226; 170 ER 337.

25 Defamation Act 1992.

26 *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522; approved by the Privy Council in *Prebble v Television New Zealand* [1994] 3 All ER 407.

27 See eg. *Collector of Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404.

28 See eg. Joseph, supra at note 7, at 372; McGee, "The Application of Article 9 of the Bill of Rights 1688" [1990] NZLJ 346.

29 *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, Lord Mackay LC dissenting.

30 [1972] 1 QB 522; approved in *Pepper v Hart* supra at note 29, 68 per Lord Browne-Wilkinson.

31 District Court, 3 July 1996; Dalmer DCJ, Wellington, WP 1340/92.

32 For which he drew support from Lord Browne-Wilkinson's speech in *Prebble v TVNZ* infra at note 51, 418.

33 Supra at note 31, 38.

It is not clear that the decision will survive appeal. If Mr Cushing could not establish his claim without resorting to Hansard then clearly Mr Peters' liability did not arise "solely" from statements made outside the House. It is suggested that the *Church of Scientology* case, not cited in the judgment, represents the orthodox position.

In *Prebble v Television New Zealand Ltd* the courts were asked to push the boundaries further. At issue in this case was whether a Member of Parliament could sue for defamation and yet rely on parliamentary privilege to deny the defendant evidence to support its case.

VI: *PREBBLE v TELEVISION NEW ZEALAND LTD*

In 1990, Television New Zealand screened a documentary called "For the Public Good" which criticised the Government's policy of selling state-owned assets. Mr Prebble alleged that the programme accused him of conspiring with business leaders to sell state assets on unduly favourable terms in exchange for donations to the New Zealand Labour Party. In its defence TVNZ denied that the programme conveyed the alleged meaning, but argued that if it did, it was true and fair comment on a matter of public interest. To support this alternative defence it wished to produce *Hansard* as evidence that Mr Prebble was "saying one thing in the House and doing another" and that he aided the speedy enactment of legislation to implement this conspiracy.

The action which came before the High Court, the Court of Appeal and eventually the Privy Council arose from an interlocutory application by Mr Prebble to strike out the defence pleadings which relied on parliamentary speeches, on the grounds that they breached parliamentary privilege.

Although parliamentary privilege was relevant to these proceedings, it is clear that there was no question of Mr Prebble being liable for words he had spoken in Parliament; the most he stood to lose was political credibility. Of greater constitutional concern was whether a MP could tactically use privilege to advance his defamation action against an outsider who criticised his conduct as a Member. In the High Court, Smellie J accepted Mr Prebble's submission that privilege prohibited TVNZ from using any parliamentary material in its defence.[34] The case then proceeded to the Court of Appeal.

1. Court of Appeal

All judges began by identifying Article 9 as the source of a Member's privilege.[35] Cooke P also considered that the setting up of a legislative assembly necessarily implies the creation of such an immunity and that this is further supported by the convention of mutual restraint which exists in the relationship

34 (1992) 8 CRNZ 439.

35 [1993] 3 NZLR 513.

between the courts and Parliament. In his Honour's view both principles are further legal sources of the privilege concomitant with Article 9.[36]

The Court ruled that TVNZ was necessarily questioning whether Mr Prebble acted properly in Parliament by alleging inconsistency between what was said in the House and what was said and done outside Parliament.[37] For Cooke P, "any scrutiny of a member's motives for speaking or voting in a certain way has to be seen as contrary to the privilege, whether or not the motives are suggested to be improper".[38] The Court observed that a long line of authority in England established the wide principle that "whatever is done within the walls of a House of Parliament must pass without question in the Courts".[39] These dicta envisage a wider role for Article 9 than protecting speech in Parliament from potential civil liability. It appears that the Court was also concerned to use Article 9 to uphold the principle of mutual restraint by which neither the courts nor Parliament trespass upon the functions of the other. This reasoning blurs two quite distinct constitutional principles. It is at least arguable that in this case there was no danger of the courts trespassing on the functions of the legislature.

Only the President of the Court appeared to feel constrained by the large body of precedent which supported this wide interpretation of Article 9; "Perhaps the parliamentary privilege from "questioning" of debates and proceedings has come to be established on an unnecessarily wide basis .... [b]ut established on a wide basis I think it is."[40] Despite expressing this sentiment his Honour considered and rejected an Australian case which had narrowed Article 9.

In *R v Murphy*[41] a judge of the High Court of Australia had been prosecuted on charges of attempting to pervert the course of justice. One issue before the court was whether Murphy could be cross-examined on the basis of evidence he had given before a Senate select committee. Hunt J considered the purpose of Article 9 was to remove the availability of legal proceedings against MPs for what they had said and done in Parliament. In his Honour's view this was as far as Article 9 protected Members. It did not prevent what was said in Parliament from being used as evidence of an offence committed elsewhere. The Judge attacked Browne J's reasoning in *Church of Scientology* which he considered had confused the use of what was said in Parliament as the *foundation* of curial proceedings, with using it as evidence of a Member's state of mind at some other time and place.

Hunt J's decision has certainly been controversial. It appears to have been responsible for the Commonwealth Parliament of Australia passing the Parliamentary Privileges Act 1987, which now prevents any such interpretation of Article 9 in Australia. It has been expressly disapproved of in the New Zealand Court of Appeal and the Privy Council.[42] Nevertheless, *Murphy* is a rare example of a court examining whether a wide interpretation of Article 9 is still justified.

36 Ibid at 517.

37 Ibid at 539 per Gault J.

38 Ibid at 519 per Cooke P. His Honour rejected the statements of Popplewell J in *Rost v Edwards* [1990] 2 QB 460, 475 that privilege is violated only where improper motives are alleged.

39 Ibid at 517 per Cooke P quoting from *Stockdale v Hansard* (1839) 9 Ad & El 1, 193, 243.

40 Ibid at 518 - 519.

41 (1986) 64 ALR 498. See for comment, Marshall, "Impugning Parliamentary Impunity" [1994] PL 509.

42 In the Court of Appeal, supra at note 35, 517 per Cooke P; Privy Council, infra at note 51, at 414.

Despite declining the invitation of TVNZ to narrow Article 9, the Court was concerned whether justice could be done if the defendant had "one hand tied behind his back".[43] The majority seized on the concept of waiver as an answer to TVNZ's predicament: TVNZ could call *Hansard* in evidence if Mr Prebble and the House both waived their privilege. However, their Honours could not agree how or even whether this might be possible. The solution is as novel as it is problematic, for, as the court recognised, privilege belongs both to the House in its corporate capacity and to each Member individually.

Cooke P and Casey J held that a Member who initiates proceedings knowing the defendant will reasonably wish to rely on privileged material must be held to waive his or her personal privilege. Richardson and McKay JJ held, in accordance with Australian precedent,[44] that where it is the Member who brings the action, the defence's reliance on privileged material cannot be regarded as questioning the proceedings of Parliament in any real sense. With respect, the reasoning of Cooke P and Gault J is preferable, for the scope of "questioning" in Article 9 cannot turn in each case on whether or not it is the Member who initiates proceedings.

Waiver by the House corporately poses further problems. The privilege has a statutory foundation and, as the Clerk of the House has observed, "[i]t is trite law that a House of the legislature cannot by resolution change the law of the land."[45] Waiver by resolution of the House would be such an act and could be overruled.[46] Cooke P was the only judge to hold affirmatively that waiver was possible by resolution. His Honour did not address how the statutory foundation of the privilege might be overcome, but was careful to source Members' immunity in 'rules' of logical necessity and judicial restraint, as well as in Article 9. It is difficult, however, to see how a tripartite sourcing of privilege can answer the criticism of the Clerk of the House.[47] Richardson and Casey JJ left the matter for the House to decide, and McKay J doubted that waiver was possible. (Although McKay J examined the issue of waiver he dissented from the majority's ruling on the basis that "[a]n experienced publisher should be aware of the danger of making defamatory statements or seeking to justify them in circumstances where it cannot prove that its statements are true."[48])

The majority ordered a stay of proceedings unless or until Mr Prebble could obtain a waiver of privilege from the House. As noted by Professor Brookfield,[49] the waiver or stay rule is unlikely to survive because the House has considered the issue and accepted the resolution of the Privileges Committee that "it is not competent for this House to waive, or otherwise [to] absolve anyone from compliance with, Article 9 of the Bill of Rights 1688."[50] In these circumstances Mr Prebble faced the prospect of a permanent stay of proceedings and so appealed to the Privy Council.

43 Sir R. Cooke, "A Sketch from the Blue Train" [1994] NZLJ 10, 13.

44 *Wright v Advertiser Newspapers Ltd v Lewis* (1990) 53 SASR 416.

45 McGee, "The Application of Article 9 of the Bill of Rights 1688" [1990] NZLJ 346, 348 quoting *Bowles v Bank of England* 1 Ch 57.

46 See *Fitzgerald v Muldoon* [1976] 2 NZLR 615.

47 See also *Hamsher v Swift* (1992) 33 FCR 545 where the Court upheld this argument.

48 Supra at note 35, at 546.

49 [1993] NZ Recent Law Review 278, 284.

50 Ibid.

2. Privy Council

The Privy Council appeal focused on two issues.[51] First, whether the allegations infringed Article 9 of the Bill of Rights 1688; and, second, whether the Court of Appeal should have ordered a stay of proceedings on the basis of prejudice to the defendant. The Board agreed with the Court of Appeal that Article 9 prohibited Television New Zealand from using parliamentary material but did not agree that a stay of proceedings was justified.

Speaking for their Lordships, Lord Browne-Wilkinson began by considering the legal basis of a Member's privilege. Like Cooke P, his Lordship held that the privilege did not derive solely from Article 9. Article 9 only forms part of a long line of authority supporting the wider principle that the courts will "not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges".[52]

If this is correct, what impact does parliamentary privilege have on the freedom of outsiders to comment upon and criticise legislators in a democratic society? There are, according to Lord Browne-Wilkinson, three public policy issues "in play" in these cases: "first, the need to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information; second, the need to protect freedom of speech generally; third, the interests of justice in ensuring that all relevant evidence is available to the courts." [53] Despite recognising this need for balance, his Lordship was unable to look past long-settled authority which dictated that the first of these three interests must prevail.

In an incisive case comment Geoffrey Marshall identified the flaw in this reasoning.[54] If, as Lord Browne-Wilkinson held, privilege will always prevail, there is in fact no "balancing" of public policy issues at all; there is only one public policy issue "in play". Interestingly, Lord Browne-Wilkinson favours a narrower interpretation of "questioning" in Article 9 in the context of using *Hansard* as an aid to statutory interpretation, because otherwise "any comment in the media or elsewhere on what is said in Parliament would constitute 'questioning'". [55] In that case his Lordship said, "the plain meaning of art 9, viewed against the historical background ... was to ensure that members of Parliament were not subjected to any penalty, civil or criminal, for what they said".[56] It is unfortunate that the same public policy considerations and historical understanding did not similarly influence their Lordships' decision in the *Prebble* case.

Like the Court of Appeal, the Board was concerned at the potential prejudice to TVNZ and noted the novelty of the Court of Appeal's order for a stay of proceedings. The Board accepted that in cases where the whole subject matter of the libel related to the plaintiff's conduct in the House, privilege would cause injustice to the defendant and constitute a serious inroad into freedom of speech.

51 [1994] 3 All ER 407.
52 Ibid at 413.
53 Ibid at 417.
54 Supra at note 41.
55 *Pepper v Hart* [1993] 1 All ER 42, 68.
56 Ibid.

While accepting that in such exceptional cases a stay of proceedings might be appropriate,[57] their Lordships did not agree with the Court of Appeal that this was such a case.[58]

Two aspects of the proceedings call for further comment. First, as Lord Browne-Wilkinson observed in *Pepper v Hart*,[59] Article 9, read literally, extinguishes the right to criticise, impugn or question parliamentary proceedings in *any* place outside Parliament. If this were so, citizens would have no right to engage in legitimate criticism of Parliament. The courts must, therefore, give Article 9 an interpretation which does not inhibit freedom of speech any more than is necessary. For as Marshall observes: [60]

> [I]f there is no threat to the free-working of Parliament in vigorous challenge or criticism of Parliament's proceedings or activities in the press or on the hustings, why should Parliament be in danger if criticism of the remarks or behaviour of members or ministers is made in the course of legal proceedings? .... The freedom of debate is sufficiently protected if members enjoy absolute privilege from criminal and civil actions directed at what they say in the course of debate or proceedings in the House.

This argument is compelling and, as shall be discussed, the courts have been more willing in recent years to accept arguments based on the fundamental right to free speech. Nevertheless, in *Prebble*, both the Court of Appeal and Privy Council acceded to the wider claims for privilege made by the House. These claims inflate the privilege beyond its original protective purpose.[61] Although the Courts appreciated the competing constitutional principles, they were not prepared to give practical effect to their concerns by applying a less expansive interpretation of Article 9.

A second area of concern is the perfunctory treatment given to the New Zealand Bill of Rights Act 1990. Section 14 of this Act affirms the importance of freedom of speech in New Zealand: "[e]veryone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form." The Privy Council makes no mention of the Act and in the Court of Appeal, only Cooke P gave it any real consideration.[62] He held that "Article 9 need not be interpreted in a way leaving a Member of Parliament free to sue a person in circumstances which would severely limit that person's

57 Lord Browne-Wilkinson gave the *Wright* case, supra at note 44, as an example. On those facts their Lordships would have granted a stay and expressly disapproved of the solution adopted by the Court in that case.

58 The majority of the Court of Appeal took the view that the allegations struck out were "close to the core" of the case; the Privy Council, 419, considered them "comparatively marginal".

59 Supra at note 29.

60 Supra at note 41, at 512-513.

61 The Attorney-General appeared with J C Pike as amici curiae by leave of the House in the High Court, Court of Appeal and Privy Council. The Attorney-General's submissions and perspective on the case are well summarised in his essay in Joseph (ed), supra at note 16, at 195-200.

62 It is clear that defence counsel drew their Lordships' attention to the relevant provisions: [1995] 1 AC 321, 326.

rights under s 14."[63] Nonetheless his Honour considered the fairest result was a stay of proceedings. It is disappointing that no Court seriously considered the relationship between s 14 and the restrictions placed on free speech by the law of parliamentary privilege.[64]

The Board's decision has been hailed as one of the most authoritative affirmations of freedom of speech in parliamentary debate this century. In the academic world it has largely escaped criticism.[65] Few commentators have considered the implications of this decision for the freedom of citizens to comment on parliamentarians' actions in the very forum to which they have been elected.[66] Attention has instead focused on keeping matters of privilege as far from the courts as possible and to effect any reform from within the walls of Parliament. This has been the intention of the Parliamentary Privilege Bill.

VII: PARLIAMENTARY PRIVILEGE BILL

The Hon David Caygill introduced the Parliamentary Privilege Bill to the House on October 19, 1994. The introduction to the Bill declares that "[t]he law relating to parliamentary privilege is ancient, obscure and potentially draconian."[67] This reform attempts to place the law "on a clear statutory basis, free from the oppressive features which it now contains." [68] It comprises twenty five sections but has an unusually long 68-page explanatory note. The Bill was written largely by Sir Geoffrey Palmer and contains reforms he has been advocating elsewhere.[69] Much of the Bill appears to have been shaped by recent events, particularly the clauses relating to free speech and to right of reply.

Some reforms appear entirely justified. For example, the Bill defines the offence of contempt of Parliament and abolishes Parliament's power to imprison or fine by requiring that such punishments be considered and determined by the High Court. Another potentially significant reform is the introduction of a statutory obligation on select committees to observe the rules of natural justice.[70]

The Bill made three significant proposals. First, it would abolish Article 9 of the Bill of Rights 1688 as part of New Zealand law in favour of a new, expanded

63 Supra at note 35 at 523.

64 In Canada the Supreme Court has recently entrenched privilege beyond the reach of the Charter: *Donahue v CBC* [1993] 1 SCR 319. See also Heard, "The Supreme Court Entrenches Parliamentary Privilege Out of the *Charter's* Reach ..." (1993) 4 Constitutional Forum 102.

65 See Brookfield, supra at note 49 and [1994] NZRL Rev 385-386; Leopold, "Free speech in Parliament and the courts" (1995) 15 Legal Studies 204. The Clerk of the House has also accepted the Privy Council's ruling: see McGee, supra at note 28.

66 But see Marshall, supra at note 41; and Huscroft, "Defamation, Racial Disharmony, and Freedom of Expression" in Huscroft & Rishworth (eds), *Rights and Freedoms* (1995) 171.

67 Para 3.

68 Para 4.

69 Palmer, *New Zealand's Constitution in Crisis* (1992) 117, 127; "Parliament and privilege: Whose justice?" [1994] NZLJ 325. Compare similar reforms advocated by R. Best in "Freedom of speech in Parliament: Constitutional safeguard or sword of oppression?" (1994) 24 VUWLR 91.

70 This would have the effect of subjecting select committees to full judicial review.

definition; second, it required any Member who intends to allege wrong-doing by any non-Member to first satisfy the Speaker that he or she has "grounds" for doing so; and third, persons outside the House adversely affected by assertions made against them in the House would be given a right of reply.

1. Freedom of Speech in Debate: Clause 7

It is proposed to repeal Article 9 of the Bill of Rights 1688 in favour of a new, expanded definition which comprises five subsections. They divide as follows:

(i) Subclause (1) restates the general principle contained in Article 9 of the Bill of Rights 1688. The Act however makes this principle subject to the other provisions of the Bill.

(ii) Subclause (2) elaborates on the substance of subclause (1) by prescribing which particular uses of *Hansard* in Court will amount to a forbidden "questioning".

(iii) Subclause (3) places the exception to privilege in relation to the use of *Hansard* as an interpretative aid on a statutory footing.

(iv) Subclause (4) creates exceptions for prosecutions of certain criminal offences.

(v) Subclause (5) repeals Article 9 of the Bill of Rights 1688 as part of New Zealand law.

Only subclauses (1), (2) and (5) will be discussed further and it is convenient to reproduce them below:

> 7. Freedom of speech and debate - (1) Subject to this Act, the freedom of speech and debates or proceedings in Parliament may not be questioned in any court or place out of Parliament.
>
> (2) Without limiting the generality of subsection (1) of this section, and subject to subsections (3) and (4) of this section, evidence may not be tendered or received, questions asked, or statements, submissions or comments made in any court or tribunal concerning proceedings in Parliament, by way of, or for the purpose of,-
>
> > (a) Questioning or relying on the truth, motive, intention, or good faith of anything forming part of those proceedings in Parliament; or
> >
> > (b) Otherwise questioning or establishing the credibility, motive, intention, or good faith of any person; or
> >
> > (c) Drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.
>
> ...
>
> (5) The Bill of Rights Act 1688 (UK), as applied by common law and section 3 of the Imperial Laws Application Act 1988, is hereby amended in respect of New Zealand by repealing Article 9.

Clause 7 is based on s 16 of the Parliamentary Privileges Act 1987 of the Australian Commonwealth Parliament. The Australian Act was hastily passed in response to the controversial narrowing of Article 9 by Hunt J in *R v Murphy*.[71] It has received the approval of the Privy Council which has described it as "the true principle to be applied."[72]

It is clear that the Privy Council's view of the corresponding Australian provision has influenced the authors of the Bill. I have argued that the Courts' application of Article 9 in the *Prebble* litigation goes beyond its original protective purpose. Section 14 of the New Zealand Bill of Rights Act, given scant treatment in *Prebble*, is not mentioned anywhere in the 68-page introduction to the Bill. Consideration of the restrictions privilege places on the free speech of non-Members is similarly omitted. In short, this clause would enshrine the shortcomings of the common law in statute.

Subclause (5) purports to repeal Article 9 of the Bill of Rights 1688. This would be unfortunate and unnecessary. There is a great deal of constitutional history tied up in the few short words of Article 9. The Bill of Rights 1688 sets out fundamental principles of our parliamentary democracy by declaring the freedom of Members to debate as they please, and conferring immunity from arrest, prosecution or legal suit. Such written declarations are part of our constitutional and political heritage and, in a country with a largely unwritten constitution, should not be lightly discarded. The Australian provision on which this clause is based shows it is not necessary to repeal of Article 9 to achieve the desired reforms.[73] In debate following the Bill's introduction, one MP urged the reformers to proceed with caution: [74]

> It is not for this Parliament to give away those rights that have been so hard won and that are, in essence, the ultimate protection of the freedom of the people in a parliamentary democracy.

2. Prior Notice of Assertion: Clause 8

The Bill's proponents claimed that this clause was the answer to criticism that Members have been using parliamentary privilege as a 'sword of oppression'. MPs from across the political spectrum acknowledge that in recent years allegations against non-Members may have damaged the reputation and standing of the House.[75]

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71 See supra note 41 and accompanying text.

72 *Prebble v TVNZ*, supra at note 51, at 414.

73 Section 16(1) of the Parliamentary Privileges Act 1987 provides: "For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth, and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section."

74 544 NZPD 4874 (16 November 1994).

75 See, eg the Hon Paul East, 543 NZPD 4461 (19 October 1994); the Hon Jim Anderton, 544 NZPD 4873 (19 November 1994); Compare the Hon Winston Peters at NZLJ 329.

> It has become an increasingly common practice for members of Parliament to attack citizens, accuse them of criminal conduct and impugn their motives under the protection they secure from the privilege of freedom of speech and debate in Parliament. No effective safeguards or sanctions exist to discourage this practice. Members of Parliament defend their actions as being in the public interest. But where the allegations are baseless considerable injustice can flow from this practice.[76]

To address such "abuse" of privilege, the Bill would require any Member who wished to make an assertion of impropriety against a non-Member first to satisfy the Speaker of the House that grounds exist for making the assertion:

> 8. Prior notice of assertion in the House - (1) No Member shall make an assertion in the House of impropriety, breach of duty, dishonesty, or criminal conduct on the part of a person who is not a Member, unless that Member has given written notice to the Speaker of the proposed assertion.
>
> (2) The Member shall not make the assertion in the House unless the Speaker has notified the Member that he or she is satisfied that grounds exist for making it.
>
> (3) It shall be a breach of privilege to make an assertion in breach of this section.
>
> (4) Where a matter of privilege under this section is referred to the Privileges Committee, the person in respect of whom the assertion was made shall be entitled to make submissions to the Committee.

Due to the fact this clause imposes a limitation on Members' freedom of speech in Parliament it is useful to recall why MPs have for centuries enjoyed *unrestricted* speech.[77]

> All matters which impinge on the public interest must be capable of being debated in Parliament without fear or favour. Freedom to speak out must not be chilled or discouraged by the possibility of legal consequences later .... There are occasions upon which it will not be possible to ascertain all the relevant facts. But that should not prevent matters being aired in Parliament on that account. While it may be that from time to time inaccurate and wounding allegations are made without justification, that is a price which may have to be paid for the manifest public advantage flowing from the absolute nature of freedom of speech in debate in Parliament.

Notwithstanding these arguments, proponents of the Bill argue that with the recent and widespread abuse of privilege, unrestricted free speech can no longer be justified.

For Sir Geoffrey Palmer the basic issue "is one of fairness", the proposal in clause 8 is a safeguard against abuse.[78] In a speech delivered before the Bill was introduced, Sir Geoffrey identified a number of allegations made in the House which in his opinion justified the intended reform. They included allegations by Winston Peters that a businessman attempted to buy political support by offering donations; that well-known business figures have been guilty of tax evasion and conspiracy to defraud; and that the Director of the Serious Fraud Office lied to the

76 Introduction to the Parlimentary Privilege Bill, para 17.

77 Ibid, para 124.

78 [1994] NZLJ 325.

news media and failed in his duties of investigation and prosecution. The speech referred also to an allegation by Nick Smith that a named solicitor systematically defrauded a Friendly Society.[79] Each of these claims was widely publicised and those accused of improper or criminal conduct strongly denied the allegations. Whilst the seriousness of these allegations cannot be denied, it is questionable whether the Speaker could have invoked clause 8 to stop any of them being made.

One major problem is apparent on the face of the provision itself. Clause 8 provides that a Member may not make any assertion of impropriety on the part of a non-Member unless the Speaker is satisfied that "grounds" exist for making it. The Speaker must assume a quasi-judicial role to determine whether "grounds" are made out. There is no definition of what constitutes "grounds" in either the Bill itself or the introduction. Are "grounds" made out by presenting to the Speaker *any* corroborative information? Is the Speaker's role confined to determining whether the evidence *as presented* discloses "grounds" for the proposed assertion, or is it necessary for the Speaker to investigate the truth of the allegations? It is noteworthy that there is no requirement of reasonableness, which perhaps suggests that the threshold is not intended to be onerous. Given that Sir Geoffrey Palmer has largely written the Bill, it is appropriate to consider this provision against some of the allegations which have led him to support this reform.

Hansard records that each of the allegations to which Sir Geoffrey refers was supported by evidence which the relevant member has laid before the House. For example, after alleging that a Wellington lawyer had "systematically fleeced" the Druids Friendly Society, Nick Smith sought leave of the House to table a series of documents to substantiate the matters he raised.[80] Mr Peters fought long and hard to table the now notorious "winebox" documents to support his claims.[81] All these allegations were supported by "grounds" in a broad sense. If the Speaker had accepted that the tabling of documentation is sufficient to satisfy the requirement, then clause 8 would have failed to prevent the airing in Parliament of the very allegations which motivated the introduction of this reform. If a Member need demonstrate only that he or she is acting on *some* information, or that the assertion is not patently without foundation, clause 8 would be effective only in the most extreme circumstances. If, on the other hand, a stricter standard is contemplated, the requirement becomes more problematic.

Suppose that Mr Peters had presented the winebox documents to the Speaker as disclosing "grounds" for making his assertions of tax fraud and official corruption. The inquiry into the allegations which arose from these documents in now into its second year. Would the Speaker, in discharging the duty imposed by clause 8, have been required similarly to examine the probative value of the winebox documents? If so, there is little doubt that the office of Speaker, as presently

79 See [1994] NZLJ 325; in order, the references to *Hansard* are: 525 NZPD 8701 (10 June 1992); 539 NZPD 570 (22 March 1994); 528 NZPD 10763 (20 August 1992); 537 NZPD 17548 (18 August 1993).

80 537 NZPD 17548-50 (18 August 1993).

81 For some of the background, see Joseph, "Sampling the "Wine Box": The media, parliamentary papers and contempt of Court" [1994] NZLJ 292; and the *Report of the Privileges Committee: Concerning the printing of documents tabled by the Member for Tauranga on 16 March 1994* (1994) AJHR I.15A.

constituted, is not equipped to handle such a task. The burden this would place on the Speaker is inappropriate. However, the only way the Speaker could legitimately have stopped Mr Peters from making his claims would have been to examine the winebox documents and conclude that none of them disclosed any "grounds" for the assertions he wished to make.

Significant constitutional issues arise from the Speaker's involvement in determining whether a particular allegation has "grounds", however the term is construed. One consequence of the Speaker's approval would surely be to give the allegation more credibility in the minds of the public. At present, the public know that an MP who "hides" behind privilege could be wrong. If approval were granted on grounds that are subsequently proven to be mistaken or erroneous the authority and dignity of the Speaker's office would be undermined.[82]

These concerns raise questions about the quality of the Speaker's scrutiny process. It must necessarily take place behind closed doors and yet there is no apparent mechanism by which the Speaker can be held accountable for his or her determinations. The usual mechanism for checking the exercise of statutory power is the possibility of judicial review proceedings; but it is unlikely that the courts would entertain review proceedings over this power.

In modern judicial review, issues of reviewability will be determined by reference to "justiciability" in difficult cases.[83] Justiciability is a slippery concept and has evolved as a form of judicial restraint where the courts consider that the decision making power is inappropriate for review. The subject-matter of a power rather than its source is now a critical factor.[84] It has been said that the willingness of the Courts to interfere with an administrative or executive decision must also be affected by consideration of the constitutional role of the body entrusted by statute to exercise the power.[85] Given the relationship of the Speaker to the House and of the Courts to Parliament, a determination under clause 8 is not likely to be considered amenable to review. On the other hand, given that there is no other apparent mechanism of accountability, a Court may take the view that there must be someone, at least, to guard the guardian. The Bill does not explicitly purport to oust the inherent jurisdiction of the High Court to review the exercise of a statutory power.

Some MPs and academics have suggested that a Member who failed to submit an assertion of impropriety to the Speaker or who spoke out in defiance of a prohibition would be speaking without privilege and thus be free to be sued.[86] Despite the fact that the privilege of freedom of speech is made subject to the other provisions of the Bill, it is unlikely that non-compliance with clause 8 is intended

82 I am grateful to Richard Wells for his comments on this point.

83 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; Harrison, "Judicial review of administrative action: Some recent developments and trends" [1992] NZLJ 200.

84 See eg., *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815. In *Attorney-General (NSW) v Quin* (1990) 64 ALJR 327 it was held that a statutory power of appointment to judicial office was not an appropriate subject for review.

85 *CREEDNZ Inc. v Governor-General* [1981] 1 NZLR 172, 197-198 per Richardson J. His Honour affirmed this view more recently in *Hawkins v Minister of Justice* [1991] 2 NZLR 530, 536-8.

86 Huscroft, Rishworth, "Attempt to stifle free speech must be stopped", Sunday Star Times, 6 November, 1994, Section C, 11; Hon Paul East, Attorney-General, (1994) 544 NZPD 4872.

to remove privilege altogether. Subclause (3) makes it clear that failure to comply with the notice procedure is a breach of privilege. Elaborate procedures have evolved for adjudicating breaches of privilege through Standing Orders and established practice. They are usually raised at first instance with the Speaker who may refer complaints to the Privileges Committee. The ultimate power to consider and determine punishment in matters of privilege and contempt rests in the House which has always fiercely guarded this right. Although the matter is not free from doubt there is good reason to conclude that nothing in the Bill alters this position.

Despite the serious issues clause 8 raises, there is a lack of analysis in the Bill as to how the provision might work. The justification for placing this additional burden on the Speaker is the authority of the office, the independence of the Speaker from the ordinary political process, and the independent advice he or she receives from the Office of the Clerk of the House. It is interesting to note that the clause has no direct precedent in any overseas jurisdiction. Given the novelty of this proposal and the questions it raises, the analysis of how it might work is perfunctory.

Many MPs were reported to be opposed this reform.[87] Some were unhappy for any fetter to be placed upon Members' freedom of speech; others were uncomfortable with a "Government-appointed" officer [88] having powers of "censorship" over all Members; others feared that the independence of the Speaker's office will be compromised. The Attorney-General, who supported the introduction of the Bill, has remarked that clause 8 would curb "abuse" but create more problems than it solved. [89]

There is a danger in suggesting that parliamentary speech which could not have been successfully defended in a civil action is necessarily "abuse" of privilege. Certainly, the distinction between appropriate and inappropriate use of privilege can be fine. One example of abuse would be if a Member used Parliament as a general forum in which to make, say, racist remarks when the matter of race or immigration was not under consideration. [90] Winston Peters captured the point when invited by the editor of the New Zealand Law Journal to respond to Sir Geoffrey Palmer's criticisms of his activities: [91]

> When all else fails, and the inertia of established practice proves immovable, it rests with Members of Parliament to use the long-fought for powers that make it the centrepiece of our democracy, to address those concerns in an attempt to make good any such failure.

The comprehensive *Review of Standing Orders* was tabled in the House [92] late in December 1995. This *Review*, undertaken by the Standing Orders Committee, affects much of the Parliamentary Privilege Bill. The Committee unanimously

87 See, eg, "Wrestling with privilege reform", The New Zealand Herald, 10 September 1994, p 3.

88 Strictly speaking, the Speaker is appointed by the House: Constitution Act 1986, s 12. Although it is expected that the Speaker does not play a politically partisan role, the Speaker in New Zealand does not sever all links with his or her political party, as does the Speaker of the House of Commons. This can give rise to a perception that the Speaker lacks complete neutrality. See, eg., above at note 22.

89 544 NZPD 4872 (16 November 1994).

90 Leopold, "Freedom of speech in Parliament - Its misuse and proposals for reform" [1981] PL 30, 31.

91 [1994] NZLJ 329.

92 Report of the Standing Orders Committee, *Review of Standing Orders* (AJHR I. 18A, 1995). Adopted by the House on 19 December 1995, with effect from 20 February 1996: 552 NZPD 10860 (19 December 1995).

rejected in principle the proposal in clause 8 of the Bill to restrict Members' freedom of speech. The Committee also had "grave doubts" as to the procedure's workability. Mr Caygill has indicated that there is now virtually no support in Parliament for the proposal in clause 8.[93]

3. Right of Reply: Standing Orders 163 - 166

The idea of a right of reply was first introduced into Parliament in Clause 9 of the Bill but the Standing Orders Review Committee has since decided to incorporate a right of response in the new Standing Orders (reproduced below), in substantially the same form as clause 9 of the Parliamentary Privilege Bill. The Committee was persuaded that persons outside the House who are the subject of allegations in the House "should be able to invoke a procedure to allow them to put their side of the story on the Parliamentary record." [94]

The purpose of a right of reply is to accord to a person claiming to have been defamed in parliamentary proceedings the same avenues of publicity that were open to the Member when the defamatory words were used. It acknowledges that the legitimate use of privilege can damage a person's reputation and provides the affected person with a measure of redress. [95]

163 Application for response

(1) A person (not a member) who has been referred to in theHouse by name, or in such a way as to be readilyidentifiable, may make asubmission to the Speaker in writing-

(a) claiming to have been adversely affected by the reference or to have suffered damage to that person's reputation as a result of the reference,

(b) submitting a response to the reference, and

(c) requesting that the response be incorporated in the parliamentary record.

(2) A submission must be made within three months of the reference having been made.

(3) Any response must be succinct and strictly relevant to the reference was made. It must not contain anything offensive in character.

164 Consideration by Speaker

(1) The Speaker shall consider whether in all the circumstances of the case the response should be incorporated in the parliamentary record.

(2)In that consideration, the Speaker-

(a) may confer with the person who made the submission and with the member who referred to that person in the House, and

93 In conversation with the writer, February 22, 1996.

94 Supra at note 92, at 81

95 Clause 9 is modelled on a similar provision in the Parliamentary Privileges Act 1987 of the Australian Commonwealth Parliament.

(b) shall take account of the extent to which reference is capable adversely affecting, or damaging the reputation of, the making the submission.

(3) The Speaker is not to consider or judge the truth of the reference made in the House or of the response to it.

165 Speaker decides against incorporation

If the Speaker decides that the response should not be incorporated in the parliamentary record, the Speaker must inform the person concerned that no further action will be taken.

166 Speaker decides that response should be incorporated

(1) A response which the Speaker determines should be incorporated in parliamentary record is presented to the House for publication by order of the House.

(2) The Speaker may decide that a response should be incorporated in the parliamentary record after the person has amended it in a manner approved by the Speaker.

As in clause 8 the Speaker is given considerable discretion. The response must be succinct and may not contain irrelevant or offensive statements (S.O. 163(3)). The Speaker may confer with the person who made the submission and also the member who made the allegation (S.O. 164(2)(a)) and is required to consider the potential damage to the complainant's reputation (S.O. 164(2)(b)). On this basis the Speaker may decide whether the response should be tabled, and, if necessary, invite the person to amend the response. The Speaker may not judge the truth of either the assertion or the response. The essence of the right being granted is clear: the response must be brief and to the point, and is subject to the overriding statutory discretion of the Speaker.

At issue is access to publicity. Recent events, however, have shown that the media which accord wide publicity to "scandalous" assertions in the House generally give similar publicity to "the other side." For example, Nick Smith's allegations against the Druids' lawyer made front page news, but so too did the lawyer's strong denial of the allegations.[96] Arguably, the redress which the new provisions provide is unnecessary because the affected persons will attract the opportunity to reply by virtue of the publicity which the original assertion attracts.

The proponents of a right of reply argued that any "reply" through the media is subject to the considerations which motivate the media to publish; whereas the right of reply in the standing orders is based on different, more certain criteria. The provisions accord the reply the dignity of a place in the records of the House Such arguments convinced many MPs that such a procedure would assist in maintaining public confidence in the protection of Members' free speech. If it is accepted that it is in the public interest that MPs should be able to speak freely on matters of public interest, there will be a cost to reputations outside Parliament. A right of reply provides a modest measure of redress.

96 "Druids' Lawyer Denies MP's Allegations", The Evening Post, 19 August 1993, Section 1, 12.

The idea of a right of reply has had the support of both the Law Society [97] and prominent business people.[98] Yet in all the controversy over parliamentary privilege, attention has focused on whether parliamentarians have too much free speech. Few have considered the possibility that it is the rest of society which may not have enough.

VIII: FREEDOM OF SPEECH FOR ALL: A NEW CATEGORY OF QUALIFIED PRIVILEGE

So far, this article has focused on how the law protects speech in Parliament. In the New Zealand legal tradition this protection is not part of a general right to free speech but an exemption from the law of defamation for words spoken in a particular setting. In contrast, the United States places the right of its legislators to speak freely within a framework of constitutional limits on liability for defamatory statements where the plaintiff is a public official. In the United States, a politician who commences a defamation action must show actual malice or reckless disregard for the truth on the part of the defendant.

The aim in this section is to draw on the principles underlying parliamentary privilege and consider their applicability in the wider context of defamation. At issue is the extent to which defamation law should interfere with free speech. The Parliamentary Privilege Bill attempts to correct the imbalance in rights between parliamentarians and other citizens by giving parliamentarians less free speech. Those who argue MPs are allowed to say too much fail to appreciate why we value their freedom of expression. A more principled response is to reduce the availability of defamation actions in the context of political discussion.

The threat defamation law can pose to free expression is recognised internationally.[99] In American jurisprudence this threat is said to "chill" freedom of expression.[100] The reasons for this lie in the characteristics of the action itself and Court processes. In a defamation action the plaintiff need prove only that the defendant published a defamatory statement. The onus then falls on the defendant to prove that the defamatory material was true or based on truth. The only other way a defendant may escape liability is to convince the court that the publication was privileged.[101] This defence, known as qualified privilege, is available when the person making the defamatory statement had a legal, social or moral duty to make the statement to the person receiving it.[102] The value of this defence is that the person sheltering behind it need not prove the truth of the facts alleged. But the defence may be lost by malice on the part of the publisher or if the words are

97 *Lawtalk* 423 Oct 1994, 11-14.

98 "Fay campaigns for right of reply", The New Zealand Herald, 8 August 1995, Section 1, 5.

99 *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534; *Theophanous v Herald & Weekly Times Ltd* (1994) 124 ALR 1.

100 *New York Times Co v Sullivan* 376 US 254; 11 L Ed 2d 686 (1964).

101 This is very much an over-simplification of the law of defamation which in New Zealand is a highly technical combination of statute and common law.

102 *Adam v Ward* [1917] AC 309, 334; *Truth(NZ) Ltd v Holloway* [1960] NZLR 69.

published to an inappropriately large audience. In the context of political discussion, it will be extremely difficult for a defendant to successfully argue for a duty to inform the general public.[103]

Court processes also have a chilling effect on freedom of expression. Ideally, defamation actions discourage those who would make false statements, but in reality they also deter statements which may be true but cannot be proven so in Court. Even when a claim could be substantiated, the mere prospect of having to defend a law suit can be sufficient to deter a person who might otherwise make a statement. It has been recently suggested that the escalating quantum of damages awarded for defamation in New Zealand will likewise produce increased self-censorship.[104] From a plaintiff's point of view, victory in defamation proceedings can fail to redress the harm caused by the original assertion. For example, Mr Prebble's defamation proceedings over TVNZ's Frontline programme issued in 1990, yet he was not "vindicated" by TVNZ's apology and settlement until mid-1995. By this time the original controversy had long since passed.

In New Zealand, the fundamental importance of freedom of expression is affirmed in the New Zealand Bill of Rights Act 1990. Section 14 provides, "Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form." This provision requires the Courts to re-examine defamation law to ensure, pursuant to s 5 of the Act, that the s 14 right is subject only to such reasonable limits as can be demonstrably justified in a free and democratic society. The task of reshaping defamation law to take account of s 14 falls to the judiciary because the basis of the action continues to be governed by the common law.[105]

Why should political discourse receive greater protection from defamation proceedings than other forms of expression? For one commentator "[t]he rationale for this protection is straightforward and compelling: discussion of government and government officials is essential in a democracy, and should not be deterred by fear of defamation liability. Moreover, such officials have ample ability to protect their reputations given their access to the media, and so do not require legal remedies in any event."[106] Whilst it may be too sweeping to say that public officials have *no* need of legal remedies, the central argument is sound. Until recently, it has not been given serious consideration by Commonwealth judges. Two recent decisions, however, one in England, the other in Australia, have given limited recognition to the public interest considerations that have ensured defamation proceedings have had a low profile in American politics for decades.

The bold decision of the United States Supreme Court in *New York Times Co v Sullivan*[107] marked a victory for freedom of speech over defamation law. An

103 See eg., *Bradney v Virtue* (1909) 28 NZLR 828.

104 Huscroft, supra at note 66, 176-177. This view is supported by a recent decision of the European Court of Human Rights which held that the availability of excessive damages awards violates freedom of expression: *Tolstoy Molislavsky v United Kingdom* (1995) 20 EHRR 442.

105 Because the Defamation Act 1992 left the substance of the action to develop at common law there is no question of s 4 of the New Zealand Bill of Rights Act 1990 preventing judicial reform of the law.

106 Huscroft, supra at note 66, at 187.

107 376 US 254; 11 L Ed 2d 686 (1964).

advertisement appeared in the New York Times calling for support for groups fighting segregation in the southern United States. The advertisement criticised the conduct of the Montgomery police but contained a number of factual inaccuracies. Sullivan was the city commissioner of public affairs and alleged that the article defamed him by implication. A sympathetic jury awarded $500,000 damages. The case was appealed to the Supreme Court which did not fail to appreciate that the proceedings were less about defamation than segregationist officials attempting to quell political opposition. The Court considered how the guarantees to freedom of speech in the First Amendment relate to the ability of American citizens to criticise government and government representatives.[108]

> [W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

The Court held that the First Amendment precluded a public official from suing for defamation unless he or she could show that the defendant made the statement with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not. "Such a privilege for criticism of official conduct is appropriately analogous to the protection awarded a public official when *he* is sued for libel by a private citizen."[109] The Court noted the fact that such strong protection for freedom of expression did appear uniquely American:[110]

> [I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion" .... The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.

In Commonwealth jurisdictions Judge Learned Hand would have found many judges who *did* consider the American position folly, and still more who considered it at least eccentric. Given the vast differences in our constitutional and political histories, the adoption of US constitiutional principles should be approached with caution. Nevertheless, the highest courts of England and Australia have recently held that the public interest considerations which underpinned *New York Times* are no less valid elsewhere, notwithstanding that American jurisprudence is founded in its autochthonous constitution.

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108 Ibid at 269 - 270.

109 Ibid at 282.

110 Ibid at 269 - 270.

In *Derbyshire County Council v Times Newspapers Ltd* [111] the House of Lords held that it would be contrary to the public interest for institutions of central or local government to have any right at common law to maintain an action in defamation. The Law Lords expressly considered the public interest considerations which had moved the Supreme Court in *New York Times* and subsequent cases which had applied the principle: "While these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country." [112] Lord Keith of Kinkel noted "the chilling effect" induced by the threat of a civil action for libel:[113]

> Quite often the facts which would justify a defamatory publication are known to be true but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public.

While ruling that the public interest precluded central and local "organs of government" from suing for defamation, their Lordships did not accept that the same public interest prevented individual officials from bringing defamation proceedings.[114] This next step in the reform process was left to be taken elsewhere in the Commonwealth.

In *Theophanous v Herald & Weekly Times Ltd* [115] the High Court of Australia gave practical effect to its previous finding[116] that the Australian constitution and system of representative government necessarily implies a freedom of communication in relation to "political discussion". In *Theophanous* the Court had to decide what impact this implied freedom of communication had on defamation actions brought by individuals. Theophanous was a member of the parliamentary immigration committee. He commenced proceedings after the defendant newspaper published a letter which called for his dismissal from the committee, alleging that he was biased towards Greek migrants and that his actions were "the antics of an idiotic man." [117]

The Court decided that freedom of communication on political matters could not be enjoyed unless "political discussion" was protected from defamation liability. This protection arises when a defendant shows it was unaware that the statement was false, that it did not publish recklessly as to whether the matter was true or false, and that in all the circumstances publication was reasonable. Their Honours were concerned to balance freedom of communication with protection of individual reputation and, whilst acknowledging the *Sullivan* test, did not require the plaintiff politician to prove malice. In their Honours' view, the American jurisprudence, particularly in its expansion from public officials to public

111 [1993] AC 534.

112 Ibid at 548 per Lord Keith of Kinkel.

113 Ibid.

114 Ibid at 551.

115 (1994) 124 ALR 1.

116 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television v The Commonwealth of Australia* (1992) 177 CLR 106.

117 Supra at note 116, 9.

figures,[118] unjustifiably subordinates protection of individual reputations.

This decision significantly changes defamation law in Australia, and will no doubt influence future developments in New Zealand. *Theophanous*, however, leaves two key concepts underdeveloped. First, the scope of "political discussion" is not clear. It is said to include "discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office."[119] Those who discuss the political views and public conduct of persons engaged in activities which are the subject of political debate, such as trade union leaders, Aboriginal political leaders, political and economic commentators, may also rely on the new defence. The Court preferred to allow the distinction between protected and unprotected discussion to develop on a case by case basis. The second area of concern is the extent to which a defendant is obliged to establish that publication was reasonable. To satisfy this burden a defendant must show that it took reasonable steps to check the accuracy of the impugned material or that it was otherwise justified in publishing without taking such steps.[120] The major shortcoming of this requirement is the uncertainty of its scope.[121] Nonetheless, the significance of this case lies in the Court's acceptance that public interest considerations must affect the availability of defamation actions, at least in relation to "political discussion".

Against the trend elsewhere in the Commonwealth, the Supreme Court of Canada has recently rejected argument, based on the *Charter of Rights and Freedoms,* that common law defamation be altered to adopt the "actual malice" rule in *New York Times*. In *Hill v Church of Scientology of Toronto*[122] the appellants held a press conference at which they read from allegations contained in a notice of motion with which they intended to commence contempt proceedings against the respondent, who was a Crown attorney. The appellants later became aware that there was no factual foundation for their allegations but continued with the proceedings regardless. Cleared of the charges, the respondent sued for defamation and was awarded $1.6 million damages. Before the Supreme Court, the appellants sought adoption of the *New York Times* "actual malice" test. Whilst the Court declined this invitation it is arguable that it was not necessary for them to do so. The appellants had proceeded with actual knowledge that their intended course of action had no foundation in fact. Such knowledge would remove any protection offered by the *New York Times* defence. The facts in this case may have influenced the result and it is possible a more meritorious appellant could have argued successfully for adoption of the actual malice rule.

1. Reform of Defamation Law in New Zealand

In 1972, Sir Geoffrey Palmer published an article which strongly argued that defamation law unreasonably inhibited free expression in New Zealand.[123]

118 See eg., *Curtis Publishing Co v Butts* (1967) 388 US 130.

119 Supra at note 116, 13.

120 Ibid at 23.

121 Some of these problems are examined in greater detail in Huscroft, supra at note 104, and in Trindade, "Political Discussion and the Law of Defamation" (1995) 111 LQR 199.

122 (1995) 126 DLR (4th) 129. For further comment see Huscroft, "Defamation, Damages, and Freedom of Expression in Canada" (1996) 112 LQR 46.

123 "Politics and Defamation - A Case of Kiwi Humbug?" [1972] NZLJ 265, 269.

> The law of defamation as it is developed in New Zealand serves to dampen down public debate. It tends to keep things quiet, which may be what the politicians want but is not necessarily in the public interest. There is nothing free, uninhibited and robust about freedom of expression in New Zealand.

It is interesting to observe the metamorphosis of Sir Geoffrey's views as an academic during his political career. Two years after retiring from politics in 1990, Sir Geoffrey devoted a chapter in a book he published about the state of New Zealand's constitution to a sustained attack upon the media's reporting of politics.[124] In his view, J S Mill's vision of media conveying useful information to citizens in a participatory democracy has been corrupted in New Zealand by media which too often propagate "misrepresentations and falsehoods."

Sir Geoffrey's views on the media would probably be supported by many of those who are the focus of sustained media attention. But it is important to remember that politicians and others of standing in the community have the most to gain from strict defamation law.[125] Their perceptions of the extent to which society should value freedom of expression over individual reputation are necessarily coloured by their views on the media. It is important that debates over freedom of expression do not descend to arguments about freedom of the press. Notwithstanding the dominant role of the media in facilitating public discourse, all New Zealanders have the right to freedom of expression. In terms of the New Zealand Bill of Rights Act 1990, the question is whether the restrictions which defamation law places on that freedom are demonstrably justified.

Those who object to a relaxing of defamation law argue that lowering the threshold of liability encourages the dissemination of false views and opinions. For one critic, "the essence of the "public figures" defence is to make it possible for people to lie about politicians almost with impunity."[126] However, in *New York Times* the Court allowed media and other citizens to escape liability for good faith mistakes, not deliberate lies. This threshold is the logical upper limit of protection for free speech; for where there is knowledge of the falsity of one's statements or awareness of likely falsity, there is no sincere expression and thus no need to protect what is expressed. The *Hill v Church of Scientology of Toronto* case illustrates this situation.

As has been argued elsewhere,[127] I believe the New Zealand Bill of Rights Act 1990 demands reform of the law of defamation to give greater effect to freedom of expression. Public interest considerations have influenced the law to greater and lesser extents in the United States, Australia and England; and in England and Australia the Courts have not had recourse to an explicit statutory affirmation of freedom of expression. What is the appropriate balance for New Zealand? Given our historical preference for protecting individual reputations, adoption of the rule in *New York Times* may be too fundamental a departure from precedent for the

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124 Palmer, supra at note 69, 200.

125 Mulgan, *Politics in New Zealand*, (1994) 283.

126 Davies, "The Public Figures Defence: A Subversion of Democracy" in Turner & Williams (eds), supra at note 4, at 204.

127 Huscroft, supra at note 66; Tobin, "Defamation of Politicians" [1995] NZ Law Review 90.

New Zealand courts. An incremental approach is more likely to find favour. The compromise adopted by the High Court of Australia in *Theophanous* would be a promising beginning to much-needed reform. We have long recognised that our politicians need to be able to speak without fear of being sued. It is now time to recognise that a measure of truly free speech should not be the exclusive preserve of parliamentarians.

IX: CONCLUSION

In 1868, Cockburn CJ reminded the Court of Queen's Bench of the benefit to the whole nation from publicity afforded to parliamentary affairs. No one could doubt this benefit, even though it comes at a price: [128]

> [T]hough injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties...

One of the hallmarks of a free society is its tolerance, indeed defence, of free expression. As Cockburn CJ recognised, this freedom is nowhere more important than in the context of political debate. Parliament is the apex of law-making power and those who participate in its proceedings are allowed to speak with absolute freedom. Only outside Parliament does the law recognise the value of individual reputation, which it protects through the law of defamation. Yet the House of Representatives is not the only place where it is important that there be rigorous, free debate on political matters.

The Privy Council's decision in the *Prebble* case has serious implications for those who criticise the speech and conduct of parliamentarians on occasions protected by the law of parliamentary privilege. The criticism that the Courts have inflated parliamentary privilege beyond its original protective purpose is well founded. Both the Court of Appeal and the Privy Council acknowledged the danger privilege poses to free speech, but were unwilling to give effect to their concerns by accepting a less expansive interpretation of Article 9. It is unfortunate that Courts, anxious to uphold judicial deference to parliamentary proceedings, should make it easier for Members of Parliament to stifle criticism of their performance in the forum to which they have been elected.

It must be acknowledged that Winston Peters' revelations in the House of big-business tax fraud and public officials engaging in cover-ups have exposed how potent the law of parliamentary privilege can be. For some, the appropriate response to the apparent imbalance between the right of parliamentarians to speak freely and the right of ordinary citizens to vindicate their reputations is to restrict parliamentarians' freedom of speech.

The Parliamentary Privilege Bill attempted to answer criticism that parliamentary privilege is being abused. Endeavouring to keep questions of the scope of a Member's freedom of speech squarely within the walls of Parliament,

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128 *Wason v Walter* (1868) 4 LR QB 73, 94.

the Bill attempts to place a procedural restriction on Members' freedom of speech by requiring prior notice to the Speaker of an assertion of impropriety against non-Members. At best prior notice is an easily overcome, time wasting procedural rule; at worst it is an insidious provision which could amount to a serious impediment to free debate. A great deal of power is given to the Speaker without any mechanisms of accountability. The right of reply given by S.O. 163 is less objectionable, though it too is less than satisfactory. The restrictions on what may be said by way of reply, and the wide discretion given to the Speaker weaken the effectiveness of this reform, but of all the recent proposals it has the most merit.

In the final section I have attempted to demonstrate that the current focus on parliamentary privilege is misplaced. The possibility of expanding the defence of qualified privilege in defamation proceedings raises many issues and could well form the subject of an article in its own right. The Americans have long realised that actions for defamation are a clumsy and ineffective means of regulating political debate. In England and Australia there is increasing recognition of the fundamental importance to a democratic society that there be uninhibited criticism of its government officials and structures. This may see a measure of the protection for free expression which has been afforded to politicians extended to all citizens. In New Zealand there are few signs of this sentiment. Indeed it appears that our tendency to want to silence unpalatable expression is as strong as ever. Perhaps a greater understanding of what it means to have truly free speech will be required to force a retreat of defamation writs from the battleground of political discourse.

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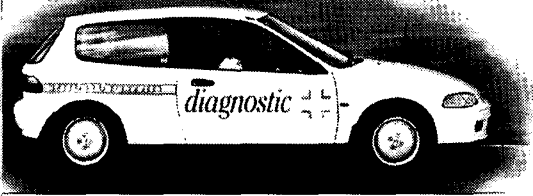

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