

# Regulatory Impact Statement

## Parliamentary Privilege Bill

### Agency Disclosure Statement

1. This Regulatory Impact Statement has been prepared by the Ministry of Justice. It analyses options for addressing some concerns about parliamentary privilege raised by Parliament's Privileges Committee (*Question of privilege concerning the defamation action Attorney-General and Gow v Leigh*, June 2013).
2. On 2 September 2013, Cabinet agreed to adopt the Privileges Committee's recommendations to introduce a Parliamentary Privilege Bill (the Bill). Cabinet invited the Leader of the House to report back to Cabinet by the end of 2013 with further proposals to clarify parliamentary privilege [CAB Min (13) 30/13 refers]. The Leader of the House subsequently advised of his intention to introduce and have the Bill referred to a Select Committee before the end of 2013.
3. The time available to develop this Regulatory Impact Statement has been relatively compressed and this has constrained the analysis. The constraints are most acute in relation to the effect of disagreement over the proper scope of parliamentary privilege. Ideally, we would use empirical evidence to assess the practical effect on Parliament's operations of key case law, including the *Leigh* decision and *Jennings v Buchanan*. We have assumed the Privileges Committee's report accurately represents the views of Parliament, which is directly affected by the decisions. However, we have not had an opportunity to gather evidence from others affected by the decisions, including government departments, parliamentary officials, academics and commentators. We have, instead, had to rely on the advice of bodies with relevant experience, including the Office of the Clerk of the House of Representatives, the State Services Commission, and Crown Law.
4. Mitigating this constraint, we note that the Privileges Committee's report was informed by submissions from the President of the Law Commission and other legal academics, government agencies and members of the public. The parliamentary process for the Bill gives a further opportunity for public consultation.
5. The Bill modernises and consolidates existing law. This Regulatory Impact Statement only assesses proposals that involve substantive change. Technical changes and changes that simply update language or consolidate provisions have not been assessed.

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## Executive summary

6. The Government Response to the Privileges Committee Report *Question of privilege concerning the defamation action Attorney-General and Gow v Leigh* was tabled in the House on 3 September 2013. The Privileges Committee concluded that the Court decision had effectively narrowed the scope of privilege as Parliament had understood it. They recommended legislation to restore the scope to Parliament's previous understanding, as well as addressing other matters of privilege and consolidating and modernising existing legislation.
7. The Government Response committed to the introduction of a Parliamentary Privilege Bill consistent with the Privileges Committee's recommendations. The Privileges Committee's recommendations cover four main areas:
  1. The introduction of the Parliamentary Privilege Bill
  2. Defining the scope of parliamentary privilege
  3. The application of immunities
  4. Consolidating and modernising aspects of the law of privilege: in particular, the power of the House to fine for contempt.
8. This Regulatory Impact Statement describes and assesses feasible options for each of the groups of recommendations.
9. The two key components of parliamentary privilege are Parliament's freedom of speech, and Parliament's right to control its own affairs for matters within its jurisdiction (exclusive cognisance). In practical terms, parliamentary privilege provides immunities from legal proceedings for actions done and things said in the context of parliamentary proceedings. It protects the participants in parliamentary proceedings, including parliamentarians, people appearing before Select Committees, and people reporting and commenting on parliamentary proceedings. The immunities flowing from privilege enable parliamentarians to meet, legislate, debate matters of public importance, and scrutinise the Government without fear or favour.
10. Ideally, parliamentary privilege would operate within a framework that minimises the potential for disputes, and enables people to undertake their roles confidently, and Parliament to function effectively, in a way that maintains public confidence in both Parliament and the Courts. Where the judiciary and legislature come to different views on fundamental issues, legislation may be the appropriate means of addressing the issue.
11. Given the complex and dynamic nature of a successfully functioning Parliament, there is a risk of unintended consequences from any significant rule change. The options considered therefore include maintaining the status quo, non legislative steps, narrowly targeted amendments, and the full suite of recommendations.
12. Given the comparative lack of evidence of the practical effects of the problems described in this paper, the Ministry of Justice has not developed a preference for any of the options, other than to recommend against codification.

# Status quo and problems

## Status Quo

13. Parliamentary privilege has an important role in New Zealand's constitutional arrangements. Privilege reinforces parliamentary sovereignty, and Parliament's role as lawmaker that represents, and is accountable to, the people of New Zealand.
14. The two key components of parliamentary privilege are Parliament's freedom of speech, and Parliament's right to control its own affairs for matters within its jurisdiction (exclusive cognisance).
15. Parliamentary privilege protects the participants in parliamentary proceedings, including parliamentarians, people appearing before Select Committees, and people reporting and commenting on parliamentary proceedings.
16. In practical terms, parliamentary privilege provides immunities from legal proceedings for actions done and things said in the context of parliamentary proceedings. The immunities flowing from privilege enable parliamentarians to meet, legislate, debate matters of public importance, and scrutinise the Government without fear or favour. In doing so, privilege:
  - preserves Parliament's role as New Zealand's principal law-making body, consistent with its democratically-elected membership and mandate
  - maintains Parliament's independence from the other branches of state
  - is intended to protect a collective activity, and individuals' ability to participate in parliamentary proceedings
  - reflects that it is for Parliament to sanction its own members, or members of the public, who breach privilege.
17. In June 2013, it became clear that Parliament and the Courts had reached different views on the proper scope of parliamentary privilege. The Privileges Committee concluded that a Supreme Court decision in September 2011 (*Attorney-General and Gow v Leigh*) had effectively narrowed the scope of privilege as Parliament had understood it. The Committee recommended legislation to restore the scope to Parliament's previous understanding. The Committee also considered that the resulting Bill would provide a suitable legislative vehicle to address various other matters of privilege that have previously been the subject of recommendations by the Committee, including some consolidation and modernisation of existing legislation.

### Main problem: uncertainty over proper scope of parliamentary privilege undermines confidence

18. Parliamentary privilege is a blend of statute, common law and practice. The common law has produced some inconsistent approaches to defining the scope of privilege. Some cases have led to Parliament and the Courts disagreeing on the scope and application of privilege. Two particularly important examples can be found in the Privileges Committee's responses to *Attorney-General and Gow v Leigh*<sup>1</sup> and *Jennings v Buchanan*<sup>2</sup>.
19. The effects of this issue are two-fold. The practical effects are discussed in paragraphs 39 – 42 (*Leigh*), and 77 - 80 (*Jennings*) below. The second, more abstract, effect is on the operation of the constitution, and public confidence in Parliament and the Courts, and the legitimacy of the laws they make and interpret. The difference in understanding of privilege between Parliament and the

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<sup>1</sup> *Attorney General and Gow v. Leigh* [2011] NZSC 106; Report from the Privileges Committee of the New Zealand House of Representatives on Question of privilege concerning the defamation action Attorney-General and Gow v. Leigh, I.17A, June 2013

<sup>2</sup> *Jennings v. Buchanan* [2004] UKPC 36

Courts risks bringing Parliament and the Courts into disagreement. Where the judiciary and legislature come to different views on fundamental issues, legislation may be the appropriate means of addressing the issue.

### *Evidence of the problem*

20. Ideally, we would use empirical evidence to assess the practical effect of the *Leigh* and *Jennings* decisions on Parliament's operations. The Privileges Committee's reports, which refer to a "chilling effect" (an atmosphere which inhibits the flow of necessary information), set out the views of members of Parliament, who are directly affected by the decisions. However, the time available for analysis has not permitted evidence gathering from others affected by the decisions, including government departments, parliamentary officials, academics and commentators.
21. Accordingly, we have not been able to locate evidence to support or refute the existence of a chilling effect on Parliament proceedings from the *Leigh* and *Jennings* decisions. However, bodies with relevant experience - the Privileges Committee, the Office of the Clerk of the House of Representatives, and Crown Law - consider there is a real risk of a chilling effect.

### **Secondary problems: areas where the law could be clearer**

22. Some aspects of the law relating to parliamentary privilege are not transparent or widely understood. In part, the lack of understanding stems from the limited interface between parliamentary privilege and people in the course of their day-to-day lives. Part of the difficulty stems from privilege being subject to a blend of statute and common law, and the law and custom of Parliament.
23. Statutory expressions of parliamentary privilege are scattered across the statute book. Typically the references are very old, and have not evolved with changes in technology, the rise in independent new media reporting (e.g. blogging), and changing parliamentary procedure.
24. The Privileges Committee has therefore recommended the Bill incorporate a number of recommendations made in earlier reports by the Privileges Committee and Standing Orders Committee over a number of years. The recommendations generally aim to clarify aspects of the law of parliamentary privilege, rather than extend it, to reduce uncertainty and the possibility of conflict between Parliament and the Courts in interpretation.
25. For the purposes of regulatory impact assessment, the specific recommendations have been grouped into four specific issues:
  1. the introduction of the Parliamentary Privilege Bill
  2. defining the scope of parliamentary privilege
  3. the application of immunities
  4. consolidating and modernising aspects of the law of privilege: in particular, the power of the House to fine for contempt.
26. Other recommendations by the Privileges Committee to modernise and consolidate the statutory law of parliamentary privilege are not included in this Regulatory Impact Statement as they are exempt from regulatory impact analysis. The relevant exemption is that they are either technical "revisions" or consolidations that substantially re-enact the current law in order to improve legislative clarity or navigability.

# Objectives

27. As described above, the Privileges Committee has recommended the introduction of a Parliamentary Privilege Bill. This section explores the objectives sought by the proposed Bill, and identifies the criteria that will be used to assess the options, including the Bill recommended by the Privileges Committee.

## *Objectives*

28. Ideally, parliamentary privilege would operate within a framework that minimises the potential for disputes, and enables people to undertake their roles confidently, and Parliament to function effectively, in a way that maintains public confidence in both Parliament and the Courts. To achieve these objectives, the following characteristics are important:

- The scope of the law of parliamentary privilege is clear
- The law reflects current practice, and is able to evolve with changes in practice
- The law of privilege is easy to find and understand
- The law is straightforward to access and apply.

## *Overall criteria*

29. Given the complex and dynamic nature of a successfully functioning Parliament, there is a risk of unintended consequences from any significant rule change. The options considered therefore include maintaining the status quo, non legislative steps, narrowly targeted amendments, and the full suite of recommendations.

30. To assess how well the various options will achieve the desired objectives, they have been assessed against the following overall criteria to see:

- *How clearly they state the scope* - we assume that, if the scope is clearly stated, it will be easier to resolve the cases at the margins (conversely, where the scope is not clearly stated, the margins are less clear and more contested)
- *How well they describe the law of privilege without unduly prescribing it* – we assume that prescriptive legislation will become out of date more quickly, by not having the flexibility to accommodate evolving procedures
- *How well they consolidate existing legislation and practice relating to parliamentary privilege* – we assume that the more fragmented law is, the harder it is to find and understand
- *How modern the language is, and how consistent with current drafting practice* – we assume that modern statutes are easier to read and understand, given improvements in drafting practices
- *How closely they reflect current parliamentary practice* – we assume that the law will be more predictable and easier to apply if it accurately reflects current practice.

31. Some of the particular recommendations have also required more specific criteria, which are set out in the detailed description of the options below.

# Options and impact analysis

## 1. Introduction of a Parliamentary Privilege Bill

32. Where the judiciary and legislature come to different views on an issue, legislation is usually the appropriate means of addressing it. This is the course recommended by the Privileges Committee and accepted by the Government. The proposed Bill will therefore provide statutory guidance on some key elements of privilege.
33. The main risk arising from a legislative solution is that of unintended consequences. New provisions may prove to be less flexible than intended or may inadvertently undermine other aspects of privilege, for example by inviting greater scrutiny by the courts over privilege.
34. A Bill with disparate provisions for privilege risks being treated as a codification, which would replace common law. That would be undesirable, and not what the Bill is intended to do. In practice, this interpretation would significantly narrow the scope of privilege to what was within the Bill - essentially "freezing" the current position. Other aspects of privilege would be seen as defunct, limiting information or precedents which might otherwise be used in making a decision or judgement. No other comparable jurisdiction has codified privilege.
35. The first question is therefore whether to legislate or not, and if so, how comprehensive its scope should be. Given the complex and dynamic nature of a successfully functioning Parliament, there is a risk of unintended consequences from any significant rule change. One option that must be considered is to make carefully targeted changes to existing legislation to address the immediate problem posed by *Leigh*. At the other extreme, codification of privilege is technically feasible.

### *Feasible Options*

36. The following options for addressing the need for legislation have been considered:
  - A. Status quo – continue with the current narrowed understanding of privilege;
  - B. Proposed Bill – a new Act defining or describing various key aspects of privilege;
  - C. Alternative option - amend legislation to address *Leigh* only;
  - D. Alternative option - codify parliamentary privilege.

<i>Introduction of Parliamentary Privilege Bill</i>	<b>A Status quo</b>	<b>B Proposed Bill</b>	<b>C Alternative option - address Leigh issue only</b>	<b>D Alternative option - codification</b>
<b>Description of options and impacts</b>	Parliamentary privilege largely not contained in legislation. Some statutory recognition across the statute book.	A range of aspects of parliamentary privilege would be defined or described in legislation.	Simple amendment to address the <i>Leigh</i> judgment – targeted amendment to Defamation Act to increase the scope of material covered by privilege.	Codify the legal framework – comprehensive and precise definitions in legislation.
· Is the scope clear, even at the margins?	No. Some aspects, for example that were identified in <i>Leigh</i> , have been made clear by court judgments, but Parliament disagrees with that clarification.	Clearer aids to interpretation will help determine scope at the margins, but there is still room for uncertainty.	Would clarify the scope in relation to defamation, but not more generally.	Yes, but could create difficulty by narrowing the scope for interpretation, essentially freezing the current position.
· Is the law of privilege described but not prescribed?	Yes.	Yes.	No – only with respect to defamation.	No. Codification would replace common law and practice. Common law precedents would be of little or no relevance.
· Is existing legislation and practice relating to privilege consolidated?	No.	Yes. Existing legislation would be consolidated. Common law undisturbed (except for <i>Leigh</i> and <i>Jennings</i> ).	No. Amendment would override common law position as set out in <i>Leigh</i> , but leave other legislation undisturbed.	Yes. A code would replace common law and practices, with a snapshot of the current position. This would limit the future ability to take guidance from earlier judgments or other information which might otherwise be used to assist in interpretation.

<i>Introduction of Parliamentary Privilege Bill</i>	<b>A Status quo</b>	<b>B Proposed Bill</b>	<b>C Alternative option - address Leigh issue only</b>	<b>D Alternative option - codification</b>
<ul style="list-style-type: none"> <li>Is the language modern, and consistent with current drafting practice?</li> </ul>	<p>No. The 1908 Act consolidating earlier legislation is quite archaic; there is continuing uncertainty arising from interpretation of Article 9 of the Bill of Rights 1688; Defamation Act needs updating to reflect modern technology.</p>	<p>Yes. Bill of Rights 1688 unchanged but modern definitions would clarify the operation of Article 9.</p>	<p>Yes, with respect to defamation if other amendments made to modernise Defamation Act</p>	<p>Yes.</p>
<ul style="list-style-type: none"> <li>Is current parliamentary practice closely reflected?</li> </ul>	<p>Yes, but the Privileges Committee and the Government do not agree with the approach taken by the Court in <i>Leigh</i>.</p>	<p>Yes.</p>	<p>Yes, broadly, but would specifically revise the approach in <i>Leigh</i>.</p>	<p>Yes, but likely to become obsolete and too restrictive as technologies and practices change.</p>
<p><b>Risks and mitigation</b></p>	<p>Status quo may risk impeding flow of information to the House, but there is no evidence that this has actually occurred.</p> <p>Further specific cases may arise where Parliament disagrees with case law on privilege.</p> <p>Mitigation: continue to deal with cases on their facts.</p>	<p>Some risk of unintended consequences.</p> <p>Mitigation – some unanticipated risks may emerge from wider consideration in the Select Committee process, and be able to be addressed. Otherwise, further legislative amendments may be required.</p>	<p>Minimal risk</p>	<p>High risk of unintended consequences. A code would replace common law and practice, with a snapshot which would essentially “freeze” of the current position.</p> <p>Could be mitigated by periodic reviews and amendments.</p> <p>No other jurisdictions have taken this approach – not recommended.</p>

## 2. Defining the scope of parliamentary privilege

37. The *Leigh* decision applied a narrow scope to the application of parliamentary privilege. The Privileges Committee disagrees with the decision.
38. Where the Courts and Parliament disagree on a particular matter, Parliament can legislate to resolve the situation, given its role as the principal law-making body. The Privileges Committee has therefore recommended introducing a Bill that legislates its preferred approach to the scope of parliamentary privilege, overcoming the *Leigh* decision.

### *Status quo*

39. Aspects of parliamentary privilege are recognised in various pieces of legislation including the Bill of Rights 1688 (which applies in New Zealand by virtue of the Imperial Laws Application Act 1988), the Legislature Act 1908, Legislature Amendment Act 1992, and the Defamation Act 1992. Other important aspects of privilege are drawn from common law and convention.
40. The Leigh decision, which forms part of the common law, has applied a narrow scope to one aspect of the application of parliamentary privilege.

### *Problem*

41. The Court in *Leigh* held that absolute privilege only applies where it is necessary for the proper and efficient functioning of the House. The Court concluded that because it was not necessary for absolute privilege to apply to departmental officials briefing Ministers, such briefings are not protected by absolute privilege.
42. The Privileges Committee considers these briefings to be necessary for the conduct of proceedings in Parliament and therefore requiring the same protection. The Privileges Committee considered that the narrower construction of "proceedings in Parliament" adopted by the Court could have a "chilling effect" on the flow of information to Parliament if officials and advisers supporting parliamentary functions were no longer covered by privilege.
43. The Committee recommended that this concern should be addressed with legislation providing clear definitions and guidance about the scope and purpose of privilege, and the key terminology.

### *Objectives and feasible options*

44. Certainty about the scope of parliamentary privilege could be created by either codifying the law of privilege or by clarifying the meaning of critical terms. The terms that seem to cause the greatest difficulty are in Article 9 of the Bill of Rights 1688, which provides that "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament". The critical terms are "parliamentary proceedings" and "impeached or questioned". While the scope of the phrase "question or impeach" was not specifically considered by the Court in the *Leigh*, earlier case law has shown that there is some uncertainty as to the meaning of this phrase.
45. The risk with seeking to resolve concerns about scope through defining terms is that of unintended consequences. Define the terms too precisely, and we risk the law freezing current practices. This would hinder privilege evolving as parliamentary practice, technology, and social expectations change. Define the terms too loosely, and we risk extending privilege to matters that ought properly to be within the Courts' jurisdiction.
46. The key objective is to find an appropriate balance between precision on the one hand, and flexibility on the other, while ensuring the reach of parliamentary privilege is not extended beyond what is appropriate. The Committee recommended that the Bill include a provision of a clear statement of purpose, which would give an important signal as to the balance sought. The Committee recommended a statement which makes clear that:

- privileges, immunities and powers are conferred on the House to enable it to carry out its functions, and
  - privilege is for the benefit of the House as an institution, not for the benefit of individuals.
47. In this section we consider options to provide further guidance in respect of the terms “parliamentary proceedings” and “impeach or question”. The status quo, the proposed Bill, and other feasible options have been compared to assess:
- *How clearly they state the scope*
  - *Whether the definitions might extend the scope of parliamentary privilege further than intended* - we assume that the proposals intend to make the law consistent with current parliamentary practice and minimise the risk of unintended consequences that might arise from significant change
  - *How well they describe the scope of privilege without prescribing it*
  - *How well they consolidate existing legislation and practice relating to parliamentary privilege*
  - *How modern the language is, and how consistent with current drafting*
  - *How closely they reflect current parliamentary practice.*

#### Parliamentary proceedings

48. The following options for better defining the scope of parliamentary privilege by defining ‘parliamentary proceedings’ have been considered:
- A. Status quo – continue with common law, including scope determined by the Supreme Court in *Leigh*;
- B. Proposed Bill - enact legislation containing a statutory definition of “parliamentary proceedings” substantially modelled on the Australian Parliamentary Privileges Act 1987, which defines “proceedings in Parliament” as “all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee”. It also includes a non-exhaustive list of examples, such as the preparation of a document for purposes of, or incidental, to the transacting of any such business.

<i>Definition of “parliamentary proceedings”</i>	<b>A Status quo</b>	<b>B Proposed Bill – substantially the Australian definition</b>
<b>Description of options and impacts</b>	No statutory definition of parliamentary proceedings.	Substantially adopt Australian definition.
• Is the scope clearly stated, even at the margins?	No. Some aspects have been made clear by the Supreme Court in <i>Leigh</i> , but Parliament disagrees with that clarification.	Yes. Clearer aids to interpretation will help determine scope at the margins, but there may still be some uncertainty.
• Does the definition only extend the scope of parliamentary privilege as far as intended?	No, the scope would still be narrower than the Committee recommended.	Uncertain – see description of risks below.
• Is the law of privilege described but not prescribed?	Yes.	Yes.
• Is existing legislation and practice relating to privilege	No.	No. Definition would override common law position as adopted

<i>Definition of “parliamentary proceedings”</i>	<b>A Status quo</b>	<b>B Proposed Bill – substantially the Australian definition</b>
consolidated?		by the courts in <i>Leigh</i> . Article 9 of the Bill of Rights remains unaffected.
<ul style="list-style-type: none"> <li>Is the language modern, and consistent with current drafting practice?</li> </ul>	No. Continuing uncertainty arising from Article 9 of the Bill of Rights.	Yes. The Bill of Rights would remain unchanged but modern definitions would aid in interpretation.
<ul style="list-style-type: none"> <li>Is current parliamentary practice closely reflected?</li> </ul>	Unclear.	Yes, would reinforce Parliament’s understanding of privilege.
<b>Risks and mitigation</b>	<p>Uncertainty as whether particular activities are “proceedings of parliament” or not, could lead to a “chilling effect” on the willingness of officials and others to assist the conduct of business in the house for fear of liability arising from their conduct.</p> <p>This risk could be mitigated by increasing public and officials’ understanding of existing settings to ensure normal functioning continues satisfactorily.</p>	<p>Application of absolute privilege to briefing material would leave government agencies unable to use that material to establish misconduct by civil servants in employment proceedings.</p> <p>Mitigation:</p> <ul style="list-style-type: none"> <li>a public servant misleading a member of Parliament could be held in contempt of Parliament and subject to a sanction by the House.</li> <li>supporting public servants with guidance about obligations and implications regarding misconduct in briefing Ministers.</li> </ul>

### Question or Impeach

49. The following options for better defining the scope of parliamentary privilege by defining ‘question or impeach’ have been considered:

- A. Status quo – continue with the current reliance on common law;
- B. Proposed Bill - enact legislation substantially modelled on the Australian Parliamentary Privileges Act 1987, which makes it unlawful for a court or tribunal to consider evidence or ask questions about proceedings in Parliament for the purpose of:
  - questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament,
  - otherwise questioning or establishing the credibility, motive, intention or good faith of any person, or
  - drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.
- C. Alternative option - adopt Australian approach, with the addition of a provision making it clear that the specifications are not exhaustive.

<i>Definition of "question or impeach"</i>	<b>A Status quo</b>	<b>B Proposed Bill - adopt Australian approach</b>	<b>C Alternative option - Australian approach, with interpretation guide</b>
<b>Description of options and impacts</b>	Term is not defined. Common law provides guidance on how parliamentary proceedings can be used in Court.	Adopt Australian approach of describing what is an unlawful purpose for the use of parliamentary proceedings in Court.	Adopt Australian approach, with the addition of a provision making it clear that the specifications are not exhaustive.
· Is the scope clear?	No, current level of risk remains.	Yes.	Yes, but there is potential for uncertainty to develop at the margins over time.
· Does the definition only extend the scope of parliamentary privilege as far as intended?	No, the scope would still be uncertain.	Uncertain – see description of risks below.	Yes, could reduce risk of excessively narrow interpretation.
· Is existing legislation and practice relating to privilege consolidated?	No.	Yes, but may not capture all prescribed uses previously determined at common law.	Yes.
· Is the language modern, and consistent with current drafting practice?	No.	Yes.	Yes.
· Is current parliamentary practice closely reflected?	Yes. Common law position will remain. Scope is uncertain, but also flexible in order to address future uses.	Yes.	Yes.
<b>Risks and mitigation</b>	Uncertainty creates a risk that parliamentary proceedings are used inappropriately, or not used appropriately when they could be.	Risk of excessively narrow interpretation could be addressed in the drafting stage, including a clear statement of purpose.	Risk of developing uncertainty at the margins.

### 3. Immunities

50. The development of new technologies affecting the broadcast and reporting of parliamentary proceedings raises issues about the application of parliamentary privilege to these technologies.
51. Parliamentary privilege applies to parliamentary proceedings in order to protect those proceedings themselves, so that members may engage in free and fearless debate on issues of public concern. Such debate can take place irrespective of whether or not it is broadcast. However, broadcasting and reporting on parliamentary proceedings ensure the House's proceedings are accessible, so people can form their own views, participate in legislative processes, and hold Parliament to account.
52. Uncertainty about the application of the immunities provided by parliamentary privilege to broadcasting and reporting could inhibit the media and reduce the transparency and accessibility of parliamentary proceedings.
53. The immunities applying to reporting and broadcasting of parliamentary proceedings have always been tempered by the recognition that broadcasting or reporting of proceedings may cause harm to individuals or organisations in some circumstances. For that reason, a distinction is drawn between absolute and qualified privilege.
54. Absolute privilege provides a complete defence to any legal proceedings (whether civil or criminal) brought in respect of protected material (e.g. statements in the House). In contrast, qualified privilege provides a qualified defence to proceedings based on the protected material. For example, under the Defamation Act the qualified privilege defence may be overridden where the publication was predominantly motivated by ill-will or where the defendant took improper advantage of the protection.

#### *Problem*

55. The two main problems with the operation of parliamentary privilege in respect of broadcasting and reporting are:
  - It is not clear when absolute or qualified privilege applies to reports of proceedings that may be the subject of civil or criminal proceedings other than defamation proceedings
  - While the Defamation Act clarifies how parliamentary privilege operates in relation to defamatory statements, it has not kept pace with the ways in which parliamentary material is distributed.
56. Ideally, we would use empirical evidence to assess the practical effect of problems identified above on officials, the news media, and private individuals. However, the time available for analysis has not permitted evidence gathering from people affected by the problem.

#### *Objectives*

57. The objective here is to find an appropriate balance of two competing interests. On the one hand, there is a strong public interest in enabling parliamentary proceedings to be broadcast and reported on. This enables public participation in democratic processes, and helps the public to hold their elected representatives to account.
58. On the other hand, people and businesses can be harmed by the broadcast and rebroadcast of material that is defamatory, inaccurate, or subject to suppression orders. Providing complete immunity from laws that protect legitimate interests could call Parliament and the media into disrepute, and undermine the legitimacy of those institutions.
59. A related objective is to ensure the scope of parliamentary privilege clearly covers the range of ways in which parliamentary material is distributed.

60. Below, the status quo, the proposed Parliamentary Privilege Bill, and other feasible options are compared to assess:
- *How clearly they state the scope of parliamentary privilege*
  - *How well they describe the scope of privilege without prescribing it*
  - *Whether they resolve competing legal obligations* – an obligation to publish parliamentary material should not result in exposure to legal liability
  - *Their workability* – laws should be capable of practical implementation. Immunities based on false assumptions will not work properly, and may expose people to unintended liability
  - *The balance they draw between absolute and qualified privilege* – we assume that absolute privilege should be more limited than qualified privilege, because it effectively limits the remedies to those whose interests have been adversely affected.

## Application of absolute privilege to broadcasting and rebroadcasting with the authority of House

### *Status quo*

61. The Defamation Act provides that, for the purposes of defamation proceedings, live broadcasts of Parliament's proceedings are absolutely privileged (s 31(2)), while delayed broadcasts (whether under the authority of the House or not) are protected by qualified privilege (s 16 and Schedule 1).
62. The privilege attaching to broadcasts of parliamentary proceedings (whether delayed or live) at common law is unclear. Common law privilege extends beyond defamation and protects parliamentary proceedings from all civil or criminal liability.
63. It is likely that common law privilege would not apply to broadcasts, because they are not a necessary part of parliamentary proceedings. The purpose of affording absolute privilege to parliamentary proceedings is to protect those proceedings themselves, so that members may engage in free and fearless debate on issues of public concern. Such debate can take place irrespective of whether or not it is broadcast. Accordingly, any protection afforded to broadcasts (rather than content) of such debates may extend the scope of parliamentary privilege recognised at common law.

### *Problem*

64. The Privileges Committee's 2009 report *Question of privilege relating to the exercise of the privilege of freedom of speech by members in the context of court orders* noted that limited protection afforded to broadcasts of parliamentary proceedings created an unacceptable risk of proceedings being brought against the Clerk of the House, or others authorised by the House, for disseminating of parliamentary proceedings. This risk was seen as arising particularly in the context of new technologies, such as televising and web-streaming, and the ability to archive and retrieve such material. The electronic life of a podcast of a parliamentary debate that may breach a court order (for example) has a potentially longer-lasting impact than an instantaneous expression in the House that is not broadcast.
65. The Legislature Amendment Act provides protection for a "parliamentary paper" that is published by or under the authority of Parliament. The term "parliamentary paper" is defined as "any report, paper, votes or proceedings". Whilst the courts have predominately taken a liberal approach to the interpretation of terms such as "report" so as to catch technological developments, the Committee considered the inclusion of broadcasts in the term "parliamentary paper" would stretch the interpretation beyond what has occurred in the courts to date.
66. The Committee therefore recommended amending the Legislature Act to ensure that live and delayed broadcasts or rebroadcasts of the proceedings in Parliament, made by order of or under the authority of the House of Representatives, are protected in a manner consistent with the existing

protection for the publication of parliamentary papers provided by the Legislature Amendment Act 1992.

67. As noted above, time limitations have meant that it has not been possible to obtain empirical evidence to assess the practical effect of problems identified by the Committee.

#### *Feasible Options*

68. The following options for providing appropriate protections for live and delayed broadcasts or rebroadcasts of the proceedings in Parliament have been considered:

- A. Status quo – maintain explicit recognition of absolute privilege for live broadcasts and qualified privilege for delayed broadcasts in the Defamation Act 1992 and rely on the scope of the protection afforded to parliamentary papers by the Legislature Amendment Act 1992 in respect of other proceedings;
- B. Proposed Bill – enact legislation explicitly recognising the application of absolute privilege to live broadcasts of Parliament’s proceedings and delayed broadcasts or rebroadcasts of Parliament’s proceedings, including select committee hearings, that are made by order or under the authority of the House of Representatives.

69. A further option was considered, whereby only qualified privilege would apply to significantly delayed broadcasts or rebroadcasts, on the basis that a significant delay would allow for any problematic material to be withheld. However this approach was not feasible, given the ongoing life of electronic media, and inability to “withdraw” material once it has been circulated on electronic technologies.

<i>Application of absolute privilege to broadcasting and rebroadcasting with the authority of House</i>	<b>A Status quo</b>	<b>B Proposed Bill – explicit application of absolute privilege</b>
<b>Description of options and impacts</b>	Explicit recognition of absolute privilege for live broadcasts, but delayed broadcasts are only protected by qualified privilege (see Schedule One of the Defamation Act 1992). Qualified privilege applies even when authorised by the House itself in order to make its proceedings accessible and transparent to the public.	Explicit recognition of absolute privilege to live and delayed broadcasts or rebroadcasts of Parliament’s proceedings, including select committee hearings, that are made by order or under the authority of the House.
• Is the scope clear?	Yes for defamation, but not for other purposes.	Yes, for all purposes.
• Is the law of privilege described but not prescribed?	Yes.	Yes.
• Are competing legal obligations resolved?	Uncertain – there is no evidence of parliamentary proceedings not being broadcast due to concerns regarding legal risk.	Yes – this proposal would increase the protection afforded to dissemination of parliamentary material.

<i>Application of absolute privilege to broadcasting and rebroadcasting with the authority of House</i>	<b>A Status quo</b>	<b>B Proposed Bill – explicit application of absolute privilege</b>
<ul style="list-style-type: none"> <li>Is the option workable?</li> </ul>	Yes.	Yes.
<ul style="list-style-type: none"> <li>Is the balance between absolute and qualified privilege drawn correctly?</li> </ul>	Possibly – the uncertainty surrounding the application of privilege in these circumstances means it is unclear exactly where the balance would be determined to be in any particular case.	Possibly – the extension of absolute privilege in the manner proposed could be seen to prioritise the protection of the dissemination of parliament material over the rights of persons who may be affected by the content of parliamentary proceedings that may otherwise attract criminal or civil liability.
<b>Risks and mitigation</b>	Uncertainty of the scope of the protections afforded to broadcasts of parliamentary proceedings (outside of defamation) is undesirable. This uncertainty could be mitigated by a smaller change to legislation by amending the definition of “parliamentary paper” in the Legislature Amendment Act 1992.	This proposal risks extending the protections afforded to broadcasts of parliamentary material beyond what is desirable. For example, the proposal could be implemented in a way that would protect the actions of an individual who rebroadcasts cached footage of Parliament TV containing statements that breach a suppression order. This risk could be mitigated by tight drafting that limits the protection to particular broadcasts or rebroadcasts being authorised by the House.

## Application of qualified privilege to reports and summaries of proceedings

### *Status quo*

70. The Defamation Act 1992 currently applies qualified privilege in respect of defamation proceedings to fair and accurate reports of proceedings in the House, and summaries using extracts of proceedings in the House, including the broadcast and dissemination of extracts of Parliament’s proceedings (including select committee hearings). Qualified privilege applies even where they are not made by order or under the authority of the House.

71. These activities would be unlikely to fall within the scope of the more general common law of parliamentary privilege.

### *Problem*

72. Unlike broadcasts of full proceedings, reports or summaries of parliamentary proceedings may be edited or packaged in a way that is misleading or inaccurate. It is therefore appropriate that the protections afforded by parliamentary privilege are not extended automatically. It is also necessary to ensure that the scope of any protection afforded to such activities is clear.

73. The Media Freedom Committee of the Commonwealth Press Union (New Zealand Section) made a submission to the Privileges Committee's 2009 inquiry into the privilege of freedom of speech by members in the context of court orders. The Media Freedom Committee suggested that the media were unclear about the scope of their protection against actions such as contempt of court or breach of statutory no-publication provisions when reporting things said in the House. In particular, it was suggested that the media considered that qualified privilege would apply to such reports. The Privileges Committee reiterated its view that this was not the current legal position.<sup>3</sup>
74. The Committee was concerned that the media's role in providing the public with information about the business of the House could, therefore, be compromised. The Committee considered that, recognising the important role played by the media, qualified privilege should be extended to cover fair and accurate reports of all proceedings, by analogy with qualified privilege under the law of defamation.
75. As noted above, time limitations have meant that it has not been possible to obtain empirical evidence to assess the practical effect of problems identified by the Committee.

#### *Feasible Options*

76. The following options have been considered for providing appropriate protections for: fair and accurate reports of proceedings in the House; and summaries using extracts of proceedings in the House.
- A. Status quo – maintain recognition of qualified privilege for fair and accurate reports of proceedings in the House, and summaries using extracts of proceedings in the House in the Defamation Act 1992 and provide no protection in respect of other proceedings;
- B. Proposed Bill - enact legislation explicitly extending qualified privilege to fair and accurate reports of proceedings in the House, and summaries using extracts of proceedings in the House in respect of any civil and criminal proceedings.
77. No further options are immediately apparent.

<i>Application of qualified privilege to reports and summaries</i>	<b>A Status Quo</b>	<b>B Proposed Bill – explicit application of qualified privilege</b>
<b>Description of options and impacts</b>	Qualified privilege applies in defamation proceedings for fair and accurate reports of proceedings in the House, and summaries using extracts of proceedings in the House. No protection in respect of other civil or criminal proceedings	The Bill would extend the Defamation Act approach and apply qualified privilege to these activities in respect of other civil and criminal proceedings.
• Is the scope clear?	Yes - in respect of defamation proceedings. No - in respect of all other civil and criminal proceedings.	Yes.
• Is the law of privilege	Yes.	Yes.

<sup>3</sup> Privileges Committee, *Question of privilege relating to the exercise of the privilege of freedom of speech by members in the context of court orders*, May 2009.

<i>Application of qualified privilege to reports and summaries</i>	<b>A Status Quo</b>	<b>B Proposed Bill – explicit application of qualified privilege</b>
described but not prescribed?		
<ul style="list-style-type: none"> <li>Are competing legal obligations resolved?</li> </ul>	Uncertain – there is no evidence of reports and summaries of parliamentary proceedings not being published due to concerns regarding legal risk, but media representatives have expressed concern.	Yes - this proposal would increase the protection afforded to dissemination of parliamentary material.
<ul style="list-style-type: none"> <li>Is the option workable?</li> </ul>	Yes.	Yes.
<ul style="list-style-type: none"> <li>Is the balance between absolute and qualified privilege drawn correctly?</li> </ul>	Yes in respect of defamation proceedings, but uncertain with respect to other civil or criminal proceedings.	Yes – the proposal would extend protections afforded to those reporting on the business of Parliament but reduce the ability to seek redress for breaches of court ordered suppression, for example.
<b>Risks and mitigation</b>	Evidence before the Privileges Committee indicated that media organisations were uncertain as to the scope of the protections afforded to reports on the business of Parliament. This risk could be mitigated by such organisations taking legal appropriate legal advice.	Qualified privilege may only be overridden where a defendant is predominantly motivated by ill will or otherwise takes improper advantage of the occasion of publication. It would not be sufficient for a defendant merely to take insufficient care to check that the material being published is not protected by a court order (for example). The extension of qualified privilege as proposed risks encroaching on the Court’s ability to ensure that its orders are respected.

## “Effective repetition” of comments made in the House

### *Status quo*

78. The issue in respect of “effective repetition” is the extent to which something said inside Parliament can be used in proceedings on the basis of an effective (as opposed to actual) repetition of the parliamentary statement outside of Parliament. The most recent New Zealand example of a claim based on effective repetition is *Jennings v. Buchanan*. The Privy Council held that a member effectively repeated a defamatory statement by saying that he “did not resile” from what he had said in Parliament.

79. Repetition outside Parliament of a statement previously made in Parliament is not protected by absolute privilege. However, the Privy Council in *Jennings* considered that such a statement may be protected by qualified privilege.

#### *Problem*

80. The Privileges Committee has indicated concern that the finding in *Jennings* creates a risk of the courts assessing and adjudging parliamentary proceedings, contrary to Article 9 of the Bill of Rights. In addition, the Committee has recorded concern about the potential for a “chilling effect” on free speech in the House and in public debate.

81. At present, the “effective repetition” position has only been considered in the context of defamation proceedings. The Committee was concerned about the possibility of the doctrine spreading into other areas of law.

82. As noted above, it has not been possible in the time available to obtain empirical evidence to assess the practical effects of the problems identified by the Committee.

#### *Feasible Options*

83. The following options for providing appropriate protections in respect of “effective repetition” have been considered:

- A. Status quo – statements made in the House may be used to infer meaning to statements made outside the House; in such circumstances, the statement made outside the House will not attract absolute privilege but may attract qualified privilege;
- B. Proposed Bill - legislate to provide that statements made in the House cannot be used to infer meaning to statements made outside the House. Statements made outside the House would need to be assessed on their own content;
- C. Alternative option - clarify in legislation that members and others who make statements that effectively repeat statements made in the House enjoy qualified privilege in respect of such statements.

<i>Application of absolute privilege to "effective repetition"</i>	<b>A Status quo</b>	<b>B Proposed Bill - apply absolute privilege to effective repetition</b>	<b>C Alternative option - apply qualified privilege to effective repetition</b>
<b>Description of options and impacts</b>	Statements made in the House may be used to infer meaning to a statement made outside the House. <i>Jennings</i> suggested that where a statement made outside the House referring to a statement made in the House "effectively" (rather than actually) repeats the statement made in the House, it will not attract absolute privilege but may attract qualified privilege.	Statements made in the House would not be able to be used to infer meaning to statements made outside the House. Statements made outside the House would need to be assessed on their own content to determine whether they are actionable.	Clarify in legislation that members and others who make statements that effectively repeat statements made in the House enjoy qualified privilege in respect of such statements.
· Is the scope clear?	No – currently uncertain as to when a statement may be determined to "effectively repeat" a statement in the House.	Yes – it is clear that statements made outside the House would be assessed on their content alone.	Yes – it would be clear that only qualified privilege would apply to such statements.
· Is the law of privilege described but not prescribed?	Yes.	Yes.	Yes.
· Are competing legal obligations resolved?	No.	No.	No.
· Is the option workable?	No. The Privileges Committee suggests uncertainty in this area is causing problems.	Yes.	Yes.
· Is the balance between absolute	No – current approach allows parliamentary proceedings to be used in	Yes – would absolutely protect statements made in parliamentary	No – would still permit the use of parliamentary proceedings to infer

<i>Application of absolute privilege to "effective repetition"</i>	<b>A Status quo</b>	<b>B Proposed Bill - apply absolute privilege to effective repetition</b>	<b>C Alternative option - apply qualified privilege to effective repetition</b>
and qualified privilege drawn correctly?	court proceedings.	proceedings.	meaning to statements made outside of Parliament.
<b>Risks and mitigation</b>	<p>The use of parliamentary proceedings to assign meaning to a statement made outside the House places too little value on the operation of parliamentary privilege, contrary to Article 9 of the Bill of Rights.</p> <p>In mitigation, <i>Jennings</i> is not of universal application and it may be that future cases would be determined differently.</p>	<p>Prohibiting the use of statements made in the House to infer meaning to statements made outside it risks effectively extending absolute privilege to statements made outside the House. This could lead to members and others making reckless or defamatory statements in the House with a view to referencing them outside the House for greatest distribution. This could bring Parliament into disrepute. In mitigation, the House can still regulate the conduct of members.</p>	<p>Would still allow parliamentary proceedings to be questioned in a Court, which may place too little value on the operation of parliamentary privilege, contrary to Article 9 of the Bill of Rights. The operation of Article 9 itself and the proposal for legislative guidance on use of parliamentary material in litigation could mitigate this risk.</p>

## 4. Clarifying power of House of Representatives to fine for contempt

### *Status quo*

84. Sanctions for contempt support the legitimacy of Parliament by signalling that contempt of Parliament is taken seriously, and that participants in parliamentary proceedings must respect the institution. The House of Representatives has used the power to fine for contempt rarely. In the last 110 years, it has been used twice: in 1903; and again in 2006. The Standing Orders of the House recognises the House's power to hold people in contempt and provides some details of the types of behaviour that may constitute contempt.<sup>4</sup> However, the House's power to punish for contempt is not specified in the Standing Orders.
85. The Legislature Act 1908 provides that the House has all the powers and privileges "held, enjoyed and exercised" by the House of Commons as at 1865 (s 242). It is not clear whether these powers included the power to fine for contempt. This uncertainty is due to uncertainty regarding the scope of the House of Commons' powers on this matter. As at 1865, the House of Commons had not exercised the power to fine for contempt for 199 years. Some argue that, because the House of Commons' power had fallen into disuse, it could not have transmitted the power to the New Zealand House of Representatives. Against that argument, it is commonly accepted that desuetude (the concept that legislation or legal principles lapse after a long period of disuse) is not a legal doctrine in England and Wales. The UK Joint Committee on Parliamentary Privilege considered that the House of Commons retains its power to fine for contempt.

### *Problem*

86. The power to fine is implied rather than being explicitly set out in legislation. Parliament has used the power to fine very infrequently. These factors may cast doubt on the legal basis of the power to fine. It is not clear whether a parliamentary fine for contempt could be the subject of determination by the Courts but, if this did occur, Parliament would lose credibility. That could affect its ability to manage its proceedings and to gain the information it needs to make informed decisions.
87. The Privileges Committee, in its report *Question of privilege concerning the defamation action Attorney-General and Gow v Leigh*, recommends that the power to fine for contempt be included in the Bill in order to provide a clear declaration regarding the scope of Parliament's powers.
88. However, implementing a statutory power to fine raises other questions, including whether the statute should specify the conduct which is liable to be penalised, the maximum penalty which may be imposed, how that penalty may be enforced, and whether there are appropriate review or appeal mechanisms.

### *Objectives and feasible options*

89. The problem assumes that the status quo leaves uncertainty over the House's ability to impose a fine for contempt, and that this uncertainty is undesirable.
90. We assume that the problem should be resolved consistently with New Zealand's constitutional values, which are based on ideas of fairness and legitimacy. For example, laws should be prospective, clearly accessible and understandable. Processes established by law should be procedurally fair, which means decision-makers are impartial, and the person affected by the decision has a right to be heard. There should generally be an appeal or review mechanism available where decisions, particularly those imposing a punishment, are made about a person.

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<sup>4</sup> See Standing Orders of the House of Representatives, November 2011, SO 406 and 407.

91. Below, the status quo, the proposed Bill and other feasible options are compared to assess:
- *How clearly they state the existence and scope of the power to fine*
  - *Their consistency with underlying constitutional values* – we assume that people are more likely to view a penalty as legitimately imposed (even if they disagree with it) if the prohibited conduct is clearly signalled in advance, the process is fair, and the penalty is proportionate
  - *How effective and enforceable they will be* – we assume a penalty that can be imposed but not enforced in practice is likely to undermine, rather than reinforce, the credibility of Parliament
  - *How modern the language is, and how consistent with current drafting practice*
  - *How closely they reflect current parliamentary practice.*
92. The following options have been considered to provide appropriate recognition of the House's power to fine for contempt:
- A. Status quo – no specific statutory recognition of the power, rely on recognition of the power Transmitted from the House of Commons and implied by the Legislature Act 1908;
  - B. Proposed Bill - enact legislation explicitly recognising the House's power to fine for contempt;
  - C. Alternative option - enact legislation explicitly recognising the House's power to fine for contempt, specify how such a fine would be enforced and include a statutory upper limit for the fine that may be imposed;
  - D. Alternative option - enact legislation explicitly recognising the House's power to fine for contempt, specify how such a fine would be enforced, include a statutory upper limit for the fine that may be imposed and, in addition, include a statutory definition of contempt and provide an appeal and review mechanism.

<i>House's power to fine for contempt</i>	<b>A Status Quo</b>	<b>B Proposed Bill – legislative confirmation of power to fine</b>	<b>C Alternative option – Option B, plus limit and enforcement process specified</b>	<b>D Alternative option – Option C, plus definition of contempt and appeal mechanism specified</b>
<b>Description of options and impacts</b>	No legislative recognition of the power to fine for contempt; rely on Legislature Act.	Confirm the power of the House to fine for contempt in the Bill.	Confirm the power of the House to fine for contempt in the Bill, specify enforcement process and set an upper limit.	Confirm the power of the House to fine for contempt in the Bill, specify enforcement process, set a statutory limit for fine, define the conduct constituting contempt, and provide an appeal and review mechanism.
· Is the statement of the existence and scope of the power to fine clear?	No specific legislative recognition but reflected in Standing Orders.	Yes. The power to fine would be clear, and other elements set out in Standing Orders.	Yes.	Yes.
· Is the option consistent with constitutional values, providing clarity about the conduct being penalised, fair process, and the quantum of fine?	No. Standing Orders provide some guidance on what conduct may constitute contempt, but no information on quantum of fine.	No. Existence of power would be clear and Standing Orders would provide some guidance on what conduct may constitute contempt, but no information on process or quantum.	Yes. Power, process and maximum penalty clear. Standing Orders provide guidance on conduct that may constitute contempt.	Yes.
· Will the option be effective and enforceable?	Yes – no evidence to date that this is not the case.	Yes.	Yes.	Yes.
· Is the language modern, and consistent with current drafting practice?	Yes, relevant Standing Orders are clear and published on Parliament's website.	Yes.	Yes.	Yes.

<i>House's power to fine for contempt</i>	<b>A Status Quo</b>	<b>B Proposed Bill – legislative confirmation of power to fine</b>	<b>C Alternative option – Option B, plus limit and enforcement process specified</b>	<b>D Alternative option – Option C, plus definition of contempt and appeal mechanism specified</b>
<ul style="list-style-type: none"> <li>Is current parliamentary practice closely reflected?</li> </ul>	Yes.	Yes.	Yes.	No. Adds new elements of process not currently covered in Standing Orders.
<b>Risks and mitigation</b>	<p>Risk remains that power to fine for contempt may be challenged.</p> <p>Also risk that it provides insufficient protection for integrity of parliamentary proceedings.</p> <p>Possible mitigation – Parliamentary procedures provide a range of formal and informal sanctions (e.g. Privilege Committee) to protect integrity of parliamentary proceedings.</p>	<p>Legislating to clarify the situation raises the risk of suggesting the House did not previously have this power.</p> <p>In mitigation the legislation should make clear that the House has always had this power and the provision is for the avoidance of doubt only.</p> <p>Providing for a statutory power without specifying an upper fine limit may lead to disproportionate fines. In mitigation, this has not proved to be the case to date.</p> <p>Not specifying the conduct that may constitute contempt in legislation may not be appropriately accessible. In mitigation, this information is accessible by publication of the Standing Orders on a public website.</p>	<p>Legislating to clarify the situation raises the risk of suggesting the House did not previously have this power.</p> <p>In mitigation the legislation should make clear that the House has always had this power and the provision is for the avoidance of doubt only.</p> <p>Specifying an enforcement process risks rolling this specialised power into the regular judicial process, that could diminish the House's powers to maintain the integrity of its own processes.</p>	<p>Appeal or review by the Courts would encroach on the exclusive cognisance of the House. This could be mitigated by a review mechanism internal to House.</p>

## Consultation

93. The Privileges Committee undertook substantial investigation and consideration of the issues to complete the report on which the Bill is based. They considered submissions from the President of the Law Commission and other legal academics, government agencies and members of the public. The report also builds on nearly two decades of previous work on this issue, including the former Standing Orders Committee Report on privilege (1989).
94. The timeframe for the proposed Bill did not allow for further consultation with the public, or with the judiciary or media representatives, who are directly interested parties. The Office of the Clerk of the House of Representatives, the State Services Commission, and Crown Law were consulted [and their comments will be reflected here]
95. The Parliamentary process will give a further opportunity for public consultation.

## Conclusions

96. Given the comparative lack of evidence of the practical effects of the problems described in this paper, the Ministry of Justice has not developed a preference for any of the options listed below. However we do not recommend codification of parliamentary privilege.

Topic	Options
Introduction of a Parliamentary Privilege Bill	A. Status quo
	B. Proposed Bill
	C. Alternative option – address <i>Leigh</i> only
	D. Alternative option – codification <b>Not recommended</b>
Definition of “parliamentary proceedings”	A. Status quo
	B. Proposed Bill - substantially the Australian definition
Statutory guidance on “question or impeach”	A. Status quo
	B. Proposed Bill - adopt Australian approach
	C. Alternative option – Australian approach, with addition of interpretation guide
Application of absolute privilege for broadcasting and rebroadcasting purposes with authority of House	A. Status quo
	B. Proposed Bill – explicit application of absolute privilege
Application of qualified privilege to broadcasting and rebroadcasting purposes without authority of House	A. Status quo
	B. Proposed Bill – explicit application of qualified privilege

Topic	Options
"Effective repetition" of statements made in the House	A. Status quo
	B. Proposed Bill - apply absolute privilege to effective repetition
	C. Alternative option - apply qualified privilege to effective repetition
House's power to fine for contempt	A. Status quo
	B. Proposed Bill – legislative confirmation of power to fine
	C. Alternative option – Option B, plus limit and enforcement process specified
	D. Alternative option – Option C, plus definition of contempt and appeal mechanism specified

## Implementation plan

97. Given that intention of legislation is to restore Parliament's previous understanding, implementation is not expected to be significant – clarity of understanding between the key stakeholders is major requirement for successful achievement of objectives of Bill.

## Monitoring, evaluation and review

98. Any review of the law and practice of parliamentary privilege is appropriately a matter for the House of Representatives. The House has a triennial review of Standing Orders where issues concerning parliamentary privilege can be raised and considered. If there are any future judicial decisions in this area they can be referred to the Privileges Committee.