LEGISLATION ADVISORY COMMITTEE
PO Box 180
Wellington 6401

Phone 04 495 5911
Fax 04 494 9859
www.justice.govt.nz/lac
Email LAC@justice.govt.nz

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Hon Christopher Finlayson QC, MP
Chair
Privileges Committee
Parliament Buildings
P O Box 18 041
WELLINGTON 6160

Dear Mr Finlayson

PARLIAMENTARY PRIVILEGE BILL

1. The following submission is intended to aid the Privileges Committee in its consideration of a Bill that has important constitutional effects.

Submissions relating to implementation of the purpose of the legislation

Wording of clause 6: Purpose of parliamentary privilege

2. The current wording of clause 6 may, contrary to the intention of the Bill, raise a question about the status of the common law necessity test. Clause 6 states that "the privileges, immunities, and powers held, enjoyed and exercised in accordance with the rest of this Act … are held, enjoyed and exercised *for the purpose of* enabling [the House, its committees, and its members] to carry out their functions". It leaves open the possibility of a court challenge to the scope of a claimed privilege that is argued to be broader than necessary to achieve that purpose.

3. The LAC submits that clause 6 may create inadvertent ambiguity as to the status of the common law necessity test and seems to be in conflict with the Bill's stated purpose to amend the law as set down in the decision in *Attorney-General v Leigh* (clause 3(d)). This ambiguity could be addressed by inserting a more generalised or expansive statement of the purpose of privilege into clause 6(1). For instance, privilege exists to "safeguard the ability of

Parliament, its members and those who appear before it or its committees to carry out the business of Parliament".

4. That would have the advantage of recognising, at least in a general way, that the privilege protects members and witnesses, as well as Parliament itself.

5. The LAC suggests it would be preferable to omit clause 6(2).

Describing parliamentary privilege

6. The Bill refers throughout to absolute privilege, qualified privilege and parliamentary privilege. Clauses 9 through 13 describe those communications that are protected by absolute privilege: proceedings in Parliament, effective repetition statements, etc. The title of those clauses is "Absolute privilege".

7. The LAC notes that the main significance of the adjective "absolute" is to distinguish it from qualified privilege in defamation proceedings. "Parliamentary privilege" is a category of privilege that is absolute (unless circumscribed by Parliament or by statute). In order to avoid potential confusion, the LAC submits that the references in clauses 9 through 13 to "absolute privilege" could be replaced with "parliamentary privilege". A separate clause (such as a clause 8A) could state that parliamentary privilege is an absolute privilege if that were thought necessary. This would also be consistent with the title of the Bill.

Modernisation of clause 7

8. Clause 7 is drawn directly from the Legislature Act 1908, and the LAC submits that it could be modified and simplified to be made more consistent with LAC Guidelines. For instance, clause 7(4) uses a formula that references older, and perhaps out of date, United Kingdom parliamentary sources. It is the LAC's submission that the better practice would be simply to state that the privilege exists in New Zealand law as it always has. This will not preclude the use of English sources, but will acknowledge Parliament and its privileges as New Zealand institutions. There are authoritative New Zealand sources available, such as DG McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Limited, 2005), and it seems appropriate to acknowledge New Zealand practice as a foundation of privilege in this country. The Committee may wish to consider whether section 16 of the Judicature Act 1908, which is carried over in the Judicature Modernisation Bill 2013, provides a useful model for redrafting:

    (1) The House of Representatives, its committees, its members, and persons appearing before the House or its committees hold, enjoy and exercise all the privileges, immunities, and powers which they held, enjoyed and exercised on the commencement of this Act, as modified by this or any other Act.

    (2) Those privileges, immunities, and powers are part of the laws of New Zealand; and, as such, all Courts and all persons acting judicially must take judicial notice of them.

Submissions concerning the scope of privilege

Protection of "proceedings in Parliament"

9. Clause 8 defines "proceedings of Parliament", which are protected by an absolute privilege. The general definition of proceedings in Parliament given in clause 8(2) is "all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of the House or of a committee". A number of incidences are then given.

10. This is an expansive definition that is not limited by the incidences given. There is a range of communications that could be conceived as being for purposes of or incidental to the transacting of the business of the House. The following examples are typical but certainly not definitive of the kinds of examples that might arguably fall within the wide scope of clause 8:

    - Officials pre-emptively briefing a Minister on a matter that may or may not eventually be discussed in Parliament.

    - Unsolicited letters written by a member of the public to a Member of Parliament that discuss matters related to business in the House.

    - Formal or informal discussions between Ministers or Members and former Parliamentarians, former officials or interested members of the public who want, expect or anticipate their comments to be used on an attributed or unattributed basis in asking or answering parliamentary questions, raising matters in estimates consideration or in general debate.

11. The finding that an activity falls within clause 8 has important implications both for Parliament and members of the public who are subject to such communications. It is important that Parliament, and the public, know what is covered by parliamentary privilege.

12. In addition, as currently worded clause 8 could lead to parliamentary privilege being used to protect wrongdoing. The English case *R v Chaytor*[1] recently considered whether the submission of allegedly false expense claims by MPs could be shielded by parliamentary privilege in that jurisdiction under article 9 of the Bill of Rights Act 1688. The Court concluded that it could not, because not protecting those matters would not impact adversely on the core business of Parliament. However an argument could be made that such administrative matters could be covered by clause 8 of this Bill, as matters "incidental to the transacting of the business of the House". The potential for protecting third party wrongdoing is also apparent, such as if a letter to a member of Parliament contained defamatory statements or if leaked documents were used in the House and the leaker was potentially protected.

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

13. In light of the points made above, the Committee ought to consider whether the provision can be redrafted such that it might better indicate the limits of "parliamentary proceedings".

Protection of effective repetition statements by non-members of Parliament

14. Clauses 8(4) and 10 seek to alter the law relating to "effective repetition" statements in the decision in *Buchanan v Jennings*[2] by ensuring such statements are protected by absolute privilege. Clause 8(4) extends the protection of absolute privilege to "any person" who makes such a statement outside proceedings in Parliament.

15. The doctrine of effective repetition as discussed in *Buchanan v Jennings* focused on members of Parliament, outside Parliament, repeating or affirming statements made in Parliament. It did not consider the situation of effective repetition statements made by non-members of Parliament endorsing, adopting or affirming statements made by parliamentarians. The LAC submits that the Committee may wish to consider whether clause 8(4) achieves its stated intention (abolishing the effective repetition doctrine in the decision in *Buchanan v Jennings*) or whether it goes beyond this by also covering effective repetition statements made by any person. It would be enough to deal with *Buchanan v Jennings* simply by enabling MPs themselves to stand by their own statements. It is not clear that enabling others to rely on this new privilege is necessary for the purposes of Parliament.

16. In addition, doing so risks upsetting the current balance of the fair reporting requirements in the Defamation Act 1992. The Committee could usefully examine the intended interaction of such a provision with the current defamation rules that effectively restrict third party reporting of statements in the House to that which is "fair and accurate". The LAC notes that at present third parties who publish a "fair and accurate reproduction of proceedings" are protected by qualified privilege under the Defamation Act. Clauses 8(4) and 10 go further than this because endorsing or affirming a statement goes beyond merely reproducing what was said and because the privilege that would be conferred is absolute, not qualified.

17. The LAC submits that more thought should be given to that interaction, and whether it is good policy for those who are reporting a statement in the House to be held to a higher standard than those who endorse those statements. Consideration ought to be given to whether a third party repeater should only get a qualified privilege that might be defeated by knowledge of the untruth of the statement or an improper purpose. That would parallel the existing reporting privilege in the Defamation Act.

Protection of "broadcasts"

18. The Bill confers absolute or qualified privilege on specified broadcasts of parliamentary proceedings (clauses 11, 12, 17). Broadcast is defined as a

2 *Buchanan v Jennings* [2005] 2 NZLR 577 (PC).

transmission using a means of telecommunication which is for reception or access by the public and using any device or equipment (clause 4). However, the Bill excludes any such transmissions that are made "solely for performance or display in a public place". The definition is drawn from the Broadcasting Act 1989.

19. In the LAC's view, there are foreseeable circumstances in which proceedings in the House might be displayed on a large screen in a public place – for instance, if there were debates in the House on a matter of great public interest and there had been a hikoi, there could be live screening in Parliament grounds or on Queens Wharf. The LAC can see no reason why such broadcasts should not also be entitled to protection by privilege. The LAC suggests paragraph (c) of the definition of "broadcast" in clause 4 should be omitted given the context of this Bill.

Statutory interpretation

20. The LAC assumes that it is not intended to disturb the principles of interpretation around use of and reference to parliamentary statements and related documents (including changes to Bills between introduction and assent, and reports of select committees) by the Courts. To ensure the status quo is not disturbed the LAC suggests adding after clause 8(6):

> 6A Nothing in subsection (6) requires any court or tribunal to admit in evidence any item referred to in that subsection.

Power of Parliament to punish for contempt

21. Clause 21 confirms the power of the House of Representatives to impose a fine for contempt and sets a maximum of $1000. This raises the question of what other punishment powers the House has and whether these should also be set out in statute, along with the limits on those powers.

22. The LAC submits that clause 21 could be reformulated to set out all the powers that Parliament has to punish for contempt. It might also list the procedural protections that apply both to the fine and to any other possible penalties. Standing Orders currently provide very few procedural protections for those brought before the Privileges Committee on allegations of contempt.

23. The LAC notes that this may be a difficult exercise and perhaps should be confined to contempt by persons who are not members. DG McGee (at 668–675)[3] discusses the available penalties for non-members and in addition to imprisonment and fines they seem to be "censure", "apology", and "exclusion from the precincts".

24. It seems anomalous to define a maximum fine but remain silent on a maximum term of imprisonment. As Parliament has managed to conduct its affairs for nearly 150 years without imprisoning anyone (the matter was apparently considered once, in 1896) perhaps Parliament should, by statute,

[3] DG McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Limited, 2005).

deny itself that penalty. In any event such a power should be subject to appropriate procedural protections such as rules as to representation, the right to speak and so forth.

Additional matters

Withdrawal of authority for certain rebroadcasts

25. Clause 12 confers absolute privilege on a delayed broadcast or rebroadcast of proceedings in the House made by order or under the authority of the House. Question time is currently rebroadcast, presumably under the authority of the House, and there is the prospect of broadcast and perhaps rebroadcast of at least some select committee proceedings.

26. In a context where a member or submitter has knowingly breached a court suppression order, and possibly other situations, the live broadcast is protected by absolute privilege, but it would seem appropriate to enable the House to prevent or withdraw its authority for the rebroadcast of a statement in breach of a court order. It is for the House to decide how its authority to broadcast is granted or withdrawn. However, the Committee could consider adding to clause 12 a new subsection:

    (2) This clause does not apply if the broadcaster knows or reasonably should have known that the order or authority for the delayed broadcast or rebroadcast has been withdrawn.

27. Otherwise, the broadcaster can apparently rebroadcast the breach (and indeed may be contractually bound to Parliament, Parliamentary Services, or even the Speaker to do so) and claim absolute privilege if the authority to broadcast has not been expressly withdrawn in advance.

Waiver of privilege of non-members

28. Clause 6 refers to the privilege being that of the House, its committees, and members. Arguably it should also apply directly to the authors of documents and providers of information. Paragraphs (a) and (b) of clause 8(2) will be the actions of non-members, and in most cases the actions in paragraph (c) will be those of officials or other non-members.

29. This raises the question of whether the House should be able to waive privilege. For instance with reference to the case of *Attorney-General v Leigh*, perhaps on rather different facts, could the House have decided that the privilege attaching to Mr Gow's action should be waived? It may not be likely in the context of briefing a Minister, but the House or a committee might be inclined to waive the privilege in evidence given to a committee if it was knowingly false, severely damaging and generally thought to be an abuse of process. Alternatively, the answer may be that the privilege cannot be waived but the conduct of the offending party might amount to an abuse of process or contempt under SO 407(b) or SO 407(p). The second alternative is probably preferable so as to avoid the anticipation of a "chilling effect" by a

witness who does not know whether the House or committee might later waive his or her privilege.

Interaction with the offence of perjury

30. The LAC suggests that the Committee also examine the intended interaction of clause 8 with section 108 of the Crimes Act 1961 (the offence of perjury). Clause 8(2) defines any evidence given before the House or its committees as "proceedings in Parliament". Clause 8(3) prevents any submissions or comments (etc) related to proceedings in Parliament from being examined in court for the purpose of (among other things) "questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament". On its face then clause 8 appears to restrict the courts from looking into the basis for or motivation behind anything said in evidence to Parliament or one of its committees.

31. This provision, if enacted, conflicts with section 108(1) of the Crimes Act 1960, which sets out the offence of perjury. Perjury includes assertions made to a tribunal on oath that the witness knows to be false and that are intended to mislead the tribunal. The House of Representatives and (for practical purposes more importantly) its committees are expressly stated to be a "tribunal" for the purpose of that offence provision (section 104(4)).

32. If there were an allegation of perjury having been committed before the House or one of its committees, it would be impossible for a court to determine whether it had been committed without "questioning…the truth [and] motive" of the witness's evidence. But this would be prohibited by clause 8(3).

33. This raises the question of whether clause 8(3) impliedly repeals section 108 of the Crimes Act insofar as it applies to evidence given before the House under oath.

Employment issues and contracting out

34. The State Services Commissioner appears to believe that chief executives and other public servants will be able to be disciplined for actions such as maliciously motivated advice to Ministers in the context of Parliamentary proceedings.[4] Those views were expressed long before the Parliamentary Privilege Bill became available. If correct, the "chilling effect" referred to by several writers would resurface.

35. The State Services Commissioner (for chief executives) or chief executives (for their staff) could not use the ill-motivated documents or advice in employment proceedings because clause 8(3)(b) would prevent that.

36. One matter of concern is if the State Services Commissioner, or chief executives, could attempt to get public servants to contract out of the protection given by clause 8(3), perhaps by requiring that employment contracts define misconduct to include matters that would be grounds for

4 In letters to the Privileges Committee dated 29 October and 23 November 2012; copies **attached** for ease of reference.

dismissal were they not privileged. It is not clear whether or not this is possible, but it ought to be prohibited. If it is not prohibited, the "chilling effect" resurfaces.

37. Section 86 of the State Sector Act 1988 (as recently enacted) confers immunity on public servants from civil liability for good faith actions or omissions in pursuance or intended pursuance of their functions.

38. It seems the State Services Commissioner infers that public servants have no immunity if the actions are not in good faith. That is surely correct, except where the bad faith action has the protection of the Bill. That probably has to be clarified, and a prohibition on contracting out of or imposing any condition of employment that negates the effect of clause 8(3) should achieve that.

Conclusion

39. Thank you for taking the time to consider the LAC's submission. The LAC wishes to be heard on this submission, and would be happy to work with officials on the technical issues if the Committee so directs.

Yours sincerely

Geoff McLay
LAC member

pp David Cochrane
LAC member