

## **Parliamentary Privilege and free speech: MPs' privileges and citizens' freedom from oppression**

### **[abstract]**

In *Buchanan v Jennings* the Judicial Committee of the Privy Council (unanimously) held that a Member of Parliament may be held liable in defamation if the member makes a defamatory statement in the House and later affirms the statement (without repeating it) on an occasion which is not protected by parliamentary privilege. The statement in the House was covered by absolute privilege in the Defamation Act 1992 and the Bill of Rights 1688. The later statement was not.

The basis of the decision in the Privy Council was the notion of repetition by incorporation, or effective repetition. The response to this decision from the Privileges Committee was the report "Question of privilege referred 21<sup>st</sup> July 1998 concerning *Buchanan v Jennings*" (May 2005). This argued that the Privy Council – and by implication the lower courts also – had erred in the decision, and that the courts were in breach of Article 9 of the Bill of Rights 1688. This Article prevented proceedings of Parliament from being questioned, though the definition and precise scope of "proceedings" and "questioned" remains uncertain.

The Privileges Committee was concerned that the finding in the Privy Council would involve the courts assessing and adjudging parliamentary proceedings, thus breaking the principle of mutual restraint. They were also concerned that this would inhibit the free speech of Members of Parliament, and have a chilling effect on public debate.

They propose the enactment of a Bill that will effectively overturn the decision in *Buchanan v Jennings*, and establish that a statement by a Member outside the House, in which he or she refers to a statement they made in the chamber, cannot be effective repetition.

The judgements of the High Court, Court of Appeal and Judicial Committee of the Privy Council did not change the legal consequences of the current practice of Members of Parliament. The recommendation of the Privileges Committee will do that. It will give Members an expanded privilege, and one that attaches to individual Members rather than to the House as a whole. There are only two practical choices facing an MP challenged to repeat an apparently defamatory statement that they made in the chamber of Parliament. The first is to decline to comment altogether where the MP is not prepared to stand behind the truth of the alleged defamatory statement. This is the current position.

The second option is to be permitted to repeat in part or in full outside the House anything they said in the chamber. This latter option would amount to the creation of what could amount to a carte blanche warrant for MPs to say what they like. This might be justified, but it is not what Article 9 was designed to achieve.

The proposed amendment would not allow MPs to repeat defamatory statements outside the House with impunity, but would allow them to repeat the statements by incorporation or effective repetition – not by repeating the (potentially defamatory) statement, but by affirming that the Member stands by the statement that they had made in Parliament. In practice a media report is likely to publish the original statement in Parliament as well as the statement made outside the House, and thereby render the incorporation complete, albeit indirectly.

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## **Parliamentary Privilege and free speech: MPs's privileges and citizens' freedom from oppression**

### **1. Introduction**

In the House of Representatives on 21<sup>st</sup> July 1998 the Speaker made a ruling that a question of privilege was involved in a defamation action, *Buchanan v Jennings*, which was being heard in the High Court (CP No 1C 9/98). The action related to statements made by Owen Jennings MP to a newspaper, which, it was argued, effectively adopted and repeated earlier statements he made in the House. On trial in the High Court, and subsequently in the Court of Appeal (by a majority) and the Judicial Committee of the Privy Council (unanimously) it was held that a Member of Parliament may be held liable in defamation if the member makes a defamatory statement in the House and later affirms the statement (without repeating it) on an occasion which is not protected by parliamentary privilege.<sup>1</sup> The statement in the House was covered by absolute privilege in the Defamation Act 1992 and the Bill of Rights 1688. The later statement was not.

The basis of the decision in the Privy Council was the notion of repetition by incorporation, or effective repetition. The response to this decision from the Privileges Committee was the report "Question of privilege referred 21<sup>st</sup> July 1998 concerning *Buchanan v Jennings*" (May 2005). This argued that the Privy Council – and by implication the lower courts also – had erred in the decision, and that the courts were in breach of Article 9 of the Bill of Rights 1688. This Article prevented proceedings of Parliament from being questioned, though the definition and precise scope of "proceedings" and "questioned" remains uncertain.

Republication outside Parliament of a statement previously made in Parliament is not protected by absolute privilege. The words used by the Member were that he "did not rescile from his claim about the official's relationship". The Privy Council considered the established principle (of non-protection) applied also to later statements made outside the House that relate to, but do not repeat in full, what was said in the House (the effective repetition doctrine). The Privy Council concluded that using the parliamentary record in these circumstances to prove what was effectively said outside the House did not infringe Article 9 of the Bill of Rights 1688, which prevents proceedings in Parliament being impeached or questioned in any court. In part the Law Lords relied on Standing Order 396(1), which gave permission for reference to be made in court to proceedings in Parliament. Prior to 1996 the mere production of a record of what was said in parliament might have infringed Article 9. The Privileges Committee argued that the Standing Order was not intended to have this effect, since it could not override Article 9. However, this is not in fact what the Privy Council was saying; nor was Standing Order 396(1) a crucial element in the judgement.<sup>2</sup>

General concern about the judgement was expressed by Professor John Burrows, QC, in an opinion attached to the Report of the Privileges Committee, that the case conflicted with *Peters v Cushing* [1999] NZAR 241. He also criticised the nice distinction that was constructed around the use of the words "I do not rescile".

The Privileges Committee was concerned that the finding in the Privy Council would involve the courts assessing and adjudging parliamentary proceedings, thus breaking the principle of mutual restraint. They were also concerned that this would inhibit the free speech of Members of Parliament, and have a chilling effect on public debate.

They propose the enactment of a Bill that will effectively overturn the decision in *Buchanan v Jennings*, and establish that the statement by a Member outside the House, in which he or she refers to a statement they made in the chamber, cannot be effective repetition. The proposed amendment to the Legislature Act was that:

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<sup>1</sup> [2002] 3 NZLR 145 (CA); [2004] UKPC 36; [2005] 2 All ER 273 (New Zealand PC).

<sup>2</sup> Indeed, it is scarcely mentioned at all; para 16.

no person may incur criminal or civil liability for making any oral or written statement that affirms, adopts or endorses words written or spoken in proceedings in Parliament where the oral or written statement would not, but for the proceeding in Parliament, give rise to criminal or civil liability.

In other words, something said outside Parliament that is not of itself defamatory would be protected by parliamentary privilege, since reliance could not be placed on anything said in Parliament.

The judgements of the High Court, Court of Appeal and Judicial Committee of the Privy Council did not change the legal effect of the current practice of Members of Parliament. The recommendation of the Privileges Committee will do that. It will give Members an expanded privilege, and one that attaches to individual Members rather than to the House as a whole.<sup>3</sup> There are only two practical choices facing an MP challenged to repeat an apparently defamatory statement that they made in the chamber of Parliament. The first is to decline to comment altogether, where the MP is not prepared to stand behind the truth of the alleged defamatory statement. This is the current position.

The second option is to be permitted to repeat in part or in full outside the House anything they said in the chamber. This latter option would amount to the creation of what could amount to a carte blanche warrant for MPs to say what they like. This might be justified, but it is not what Article 9 was designed to achieve. As Keith J said in the Court of Appeal, the defamation proceeding did not question freedom of speech in Parliament itself. In other words, the MP is perfectly free to make the statement in Parliament as long as he stopped at that point (that is, a statement in Parliament). Sir Geoffrey Palmer, former Prime Minister and a leading constitutional scholar, stated, "I have always considered that the rule was very clear. That it was a bright line rule. And it was you could not repeat anything that you said in the House outside it. And you could not make statements that had that effect".<sup>4</sup> The proposed reform does not go as far as this option, but it allows the affirmation or endorsement of statements protected by parliamentary privilege.

The fundamental question is how far protection ought to extend. Does the incorporation of a statement made in Parliament amount to it being questioned when it is endorsed outside the House? The proposed amendment would not allow MPs to repeat defamatory statements outside the House with impunity, but would allow them to repeat the statements by incorporation or effective repetition. In practice a media report is likely to publish the original statement in Parliament as well as the statement made outside the House, and thereby render the incorporation complete, albeit indirectly.

This paper will proceed with an analysis of the origins of absolute privilege and its basis in Article 9 of the Bill of Rights 1688. It will then examine the effective repetition doctrine. The position in the USA and Canada will be evaluated for the purpose of comparison. Finally, the actual practice of MPs and the likely consequences of the proposed reform, will be assessed.

## 2. Bill of Rights 1688 Article 9 and absolute privilege

Parliamentary privilege is one of the ways in which the constitutional separation of powers is respected. McLachlan J, in the Supreme Court of Canada in *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*<sup>5</sup> observed that both Parliament and the courts respect "the legitimate sphere of activity of the other":

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<sup>3</sup> Bradford E. Biegan, "Presidential Immunity in Civil Actions: An Analysis Based Upon Text, History and Blackstone's Commentaries" (1996) 82 Virginia Law Review 677, 682; *United States v Johnson*, 383 US 169, 540 (1966).

<sup>4</sup> Interview between Sir Geoffrey Palmer and Linda Clark, "Nine to Noon", Radio New Zealand, 10<sup>th</sup> June 2005.

<sup>5</sup> [1993] 1 SCR 319 (SCC).

It is fundamental to the working of government as a whole that all these parts [of government] play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.<sup>6</sup>

This is a consequence of both the functional separation of powers between the executive and the judiciary, and the nature of the historical evolution of Parliament. Parliamentary privilege was partially codified in article 9 of the Bill of Rights 1688<sup>7</sup> – “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” – but the freedom of speech to which it refers was asserted at least as early as 1523.<sup>8</sup> Parliamentary privilege is a principle common to all countries based on the Westminster system, and has a loose counterpart in the Speech or Debate Clause of the United States Constitution.<sup>9</sup> It is an inherent privilege,<sup>10</sup> and one that is a direct consequence of the conflicts between Crown and Parliament during the fourteenth and fifteenth centuries.<sup>11</sup>

Several hundred years after the Speaker of the House of Commons first asserted the privilege of freedom of speech in 1541,<sup>12</sup> a separate Continental tradition of parliamentary immunity, based in part on the English system,<sup>13</sup> developed in France in the wake of the French Revolution.<sup>14</sup> Although based on a common rationale, the details of these privileges often differ from those of the Westminster tradition. However, the protection of members of legislative assemblies everywhere requires a degree of privilege – though it cannot be unlimited. The recent tendency has been for it to become more restricted.

Over the years the assertion of parliamentary privilege has varied in its scope and extent. In the leading English case of *Stockdale v Hansard*<sup>15</sup> the court was advised that “[t]he most trifling civil injuries to members [of Parliament], even trespasses committed upon their servants, though on occasions unconnected with the discharge of any Parliamentary duty, have been repeatedly the subject of enquiry [by either Chamber of Parliament] under the

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<sup>6</sup> [1993] 1 SCR 319 at 389 (SCC).

<sup>7</sup> 1 Will & Mar sess 2 c 2.

<sup>8</sup> *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (23<sup>rd</sup> ed, 2004) 80. See also *Bradlaugh v Gossett* (1884) 12 QBD 271 (QB); Jerre S. Williams, “The Parliamentary Privilege Limitation on Freedom to Criticize the British House of Commons” (1963) 42 Texas Law Review 1.

<sup>9</sup> Article 1 § 6, cl. 1. See *United States v Johnson*, 383 US 169 (1966); *Tenney v Brandhove*, 341 US 367, 372 (1951).

<sup>10</sup> *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 (SCC).

<sup>11</sup> James E. Castello, “The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure” (1986) 74 California Law Review 491, 530-532.

<sup>12</sup> Bradford E. Biegon, “Presidential Immunity in Civil Actions: An Analysis Based Upon Text, History and Blackstone’s Commentaries” (1996) 82 Virginia Law Review 677, 682-687.

<sup>13</sup> Note that by this time the parliament of Scotland had merged with that of England (1707) to form that of Great Britain. Whilst the constitutional laws of England were followed, Scottish practice had recognised similar parliamentary privileges. The Scottish Petition of Right 1689 contained equivalent provisions to the Bill of Rights 1688.

<sup>14</sup> Scott P. Boylan and Catherine L. Newcombe, “Parliamentary Immunity: A Comparison between established democracies and Russia: A crisis of democratic legitimacy for Russia” (1997) 3 Journal of International Legal Studies 205, 208-209.

<sup>15</sup> (1839) 9 Ad & El 1; 112 ER 1112 (QB).

head of privilege" (pp 1116-17) including "[k]illing Lord Galway's rabbits" and "[f]ishing in Mr Joliffe's pond" (p 1117). This would be justified only on a very wide interpretation of Article 9 – one much wider than its literal meaning.

However, the court in *Stockdale v Hansard* commented on the evidence that privilege "did not and could not extend to such a case" (p 1156). A leading Canadian authority, *Beauchesne's Rules & Forms of the House of Commons of Canada* (6<sup>th</sup> ed 1989) records at pp 11-12 a ruling of the Speaker of the Canadian House of Commons on 29<sup>th</sup> April 1971 asserting a much narrower concept of privilege, as follows:

On a number of occasions I have defined what I consider to be parliamentary privilege. Privilege is what sets Hon. Members apart from other citizens giving them rights which the public does not possess. I suggest that we should be careful in construing any particular circumstance which might add to the privileges which have been recognized over the years and perhaps over the centuries as belonging to members of the House of Commons. In my view, parliamentary privilege does not go much beyond the right of free speech in the House of Commons and the right of a Member to discharge his duties in the House as a member of the House of Commons.<sup>16</sup>

This is much closer to the literal meaning of Article 9. There has been variation in the extent of privilege asserted by Parliament over the years as well as a difference on occasion between the scope of a privilege asserted by parliamentarians and the scope of a privilege the courts have recognised as justified.<sup>17</sup>

Historically the courts have interpreted "proceedings in Parliament" quite liberally,<sup>18</sup> though not so broad as counsel in *Stockdale v Hansard* would have the court believe. Increasingly, however, they have sought to limit parliamentary privileges, especially where it hinders a private person's access to the courts.<sup>19</sup>

Such privileges do not confer personal protection to members of Parliament *per se*, but only to their activities insofar as they can be said to be part of the collegial parliamentary process:

The tradition of curial deference does not extend to everything a legislative assembly might do, but is firmly attached to certain specific activities of legislative assemblies, i.e., the so-called privileges of such bodies.<sup>20</sup>

Nor is all conduct within Parliament privileged. As stated in *Erskine May*:

not everything that is said or done within the Chamber during the transaction of business forms part of proceedings in Parliament. Particular words or acts may be entirely unrelated to any business which is in course of transaction, or is in a more

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<sup>16</sup> *House of Commons Debates* [Canada], vol V, 3<sup>rd</sup> Sess, 28<sup>th</sup> Parl, 29 April 1971, at p 5338.

<sup>17</sup> *House of Commons & Parent v Satnam Vaid & Canadian Human Rights Commission* [2005] SCC 30; 2005 CLLC 230-061, para 24. It has also been observed that there is a deliberate element of uncertainty; Sandra Williams, *Conflict of Interest: The Ethical Dilemma in Politics* (1985) 37.

<sup>18</sup> Patricia M. Leopold, "Proceedings in Parliament: The Grey Area" (1990) Public Law 475, 476.

<sup>19</sup> Patricia M. Leopold, "Proceedings in Parliament: The Grey Area" (1990) Public Law 475, 476.

<sup>20</sup> *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 at 370-71 per McLachlin J (SCC).

general sense before the House as having been ordered to come before it in due course.<sup>21</sup>

This however would appear to be limited to actions which have no real connection with parliamentary business, such as charging members with conspiracy to bring about a change in the government by bribing members of a provincial legislature.<sup>22</sup> Its scope has not, however, been fully explored.

Privilege "does not embrace and protect activities of individuals, whether members or non-members, simply because they take place with the precincts of Parliament".<sup>23</sup> Parliamentary privilege includes the "necessary immunity" that the law provides for Members of Parliament, in order for the legislature to do its legislative work.<sup>24</sup> The idea of necessity is thus linked to the autonomy required by legislative assemblies and their members to do their job.<sup>25</sup> This means that statements made outside or inside Parliament are not inherently privileged.

The historical foundation of every privilege of Parliament is therefore necessity.<sup>26</sup> If a sphere of the legislative body's activity could be left to be dealt with under the ordinary law of the land without interfering with the assembly's ability to fulfil its constitutional functions, then immunity would be unnecessary and the claimed privilege would not exist.<sup>27</sup> If the proceedings of Parliament were not affected by statements made outside Parliament then these statements ought not to be privileged.

When the existence of a category (or sphere of activity) for which the inherent privilege is claimed is questioned the court must not only look at the historical roots of the claim, but also determine whether the category of inherent privilege continues to be necessary to the functioning of the legislative body today.<sup>28</sup>

"Necessity" is to be read broadly. We must ask what the "dignity and efficiency" of the legislature requires:

If a matter falls within this necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, courts will not inquire into questions

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<sup>21</sup> *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (19<sup>th</sup> ed, 1976) 89 [passage referred to with approval in *Clark v Canada (Attorney-General)* (1977) 17 OR (2d) 593 (Ont HC)].

<sup>22</sup> *R v Bunting* (1885) 7 OR 524 (Ont CA).

<sup>23</sup> Joint Committee on Parliamentary Privilege, vol I, *Report and Proceedings of the Committee* (Session 1998-1999) HL Paper 43-I, HC 214-I, para 242.

<sup>24</sup> *Fielding v Thomas* [1896] AC 600 at 610-11 (Nova Scotia PC); *Kielle v Carson* (1843) 4 Moo PC 63; 13 ER 225 at 235-36 (Newfoundland PC).

<sup>25</sup> *House of Commons & Parent v Satnam Vaid & Canadian Human Rights Commission* [2005] SCC 30; 2005 CLLC 230-061, para 29.

<sup>26</sup> *House of Commons & Parent v Satnam Vaid & Canadian Human Rights Commission* [2005] SCC 30; 2005 CLLC 230-061, para 29.

<sup>27</sup> *Beauchesne's Rules & Forms of the House of Commons of Canada* (6<sup>th</sup> ed 1989) 11; J P J Maingot, *Parliamentary Privilege in Canada* (2<sup>nd</sup> ed 1997) 12; *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (23<sup>rd</sup> ed, 2004) 75; *Stockdale v Hansard* (1839) 9 Ad & El 1; 112 ER 1112 at 1169 (QB); *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 at 343 and 382 per McLachlin J (SCC).

<sup>28</sup> *House of Commons & Parent v Satnam Vaid & Canadian Human Rights Commission* [2005] SCC 30; 2005 CLLC 230-061, para 29.

concerning such privilege. All such questions will instead fall to the exclusive jurisdiction of the legislative body.<sup>29</sup>

The purposive connection between necessity and the legislative function was emphasised in the British Joint Committee Report on privilege:

The dividing line between privileged and non-privileged activities of each House is not easy to define. Perhaps the nearest approach is that the areas in which the courts ought not to intervene extend beyond proceedings in Parliament, but the privileged areas must be so closely and directly connected with proceedings in Parliament that intervention by the courts would be inconsistent with Parliament's sovereignty as a legislative and deliberative assembly.<sup>30</sup>

Proof of necessity may rest in part in "shewing that it has been long exercised and acquiesced in".<sup>31</sup> The party who seeks to rely on the immunity provided by parliamentary privilege has the onus of establishing its existence as it is *prima facie* contrary to the common law.<sup>32</sup>

These categories include freedom of speech.<sup>33</sup> While in each case the specific instance of an exercise of the privilege is not reviewable by the courts, the role of the courts is to ensure that a claim of privilege does not isolate from the common and statute law the consequence of conduct by Parliament or by its officers or members that exceeds the necessary scope of the category of privilege.<sup>34</sup>

Article 9 of the Bill of Rights 1688 prevents a Court from entertaining any action against a member of the legislature which seeks to make the member liable, whether criminally or civilly, for acts done or things said in Parliament. There is an embargo on questioning the propriety of parliamentary events.<sup>35</sup> But this privilege is not unlimited.

In 1839 the courts rejected the authority of a formal resolution of the House of Commons that the court believed overstated the true limits of the privilege claimed.<sup>36</sup> The jurisdiction of the courts in adjudicating claims of privilege has since been accepted by authorities on parliamentary practice in the United Kingdom and Canada.<sup>37</sup>

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<sup>29</sup> *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 at 387 per McLachlin J (SCC).

<sup>30</sup> Joint Committee on Parliamentary Privilege, vol I, *Report and Proceedings of the Committee* (Session 1998-1999) HL Paper 43-I, HC 214-I, para 247.

<sup>31</sup> *Stockdale v Hansard* (1839) 9 Ad & El 1; 112 ER 1112 at 1189 (QB).

<sup>32</sup> *Stockdale v Hansard* (1839) 9 Ad & El 1; 112 ER 1112 at 1189 (QB).

<sup>33</sup> *Stopforth v Goyer* (1979) 23 OR (2d) 696 at 700 (Ont CA); *Clark v Canada (Attorney-General)* (1977) 17 OR (2d) 593 (Ont HC); *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (New Zealand PC); *Hamilton v Al-Fayed (No 1)* [2000] 2 All ER 224 (HL); Bill of Rights 1688, article 9.

<sup>34</sup> *R v Atlantic Sugar Refineries Co* (1976) 67 DLR (3d) 73 at 87 (Que SC).

<sup>35</sup> *Prebble v Television NZ Ltd* [1994] 3 NZLR 1 (New Zealand PC); McGee "Parliament and the Law – Some Recent Developments" (1997) 6 Canta LR 195. Cf also *Hamilton v Al Fayed* [1999] 1 WLR 1569. On *Rost v Edwards* [1990] 2 QB 460, which the Privy Council doubted, see McGee "The Application of Article 9 of the Bill of Rights 1688" [1990] NZLJ 346. The use of Hansard by the Courts as an aid to interpretation of legislation is not a breach of parliamentary privilege: see *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42.

<sup>36</sup> *Stockdale v Hansard* (1839) 9 Ad & El 1; 112 ER 1112 at 1156 per Denman CJ, 1177 per Littledale J, 1192 per Patteson J, 1194 per Coleridge J (QB).

<sup>37</sup> *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (23<sup>rd</sup> ed, 2004) 185-86; *Landers v Woodworth* (1878) 2 SCR 158 at 196

It is clear that Article 9 cannot be read literally,<sup>38</sup> for to do so would, in the words of Lord Nicholls of Birkenhead, “be absurd”.<sup>39</sup> As the British Joint Committee observed in its executive summary:

This legal immunity is comprehensive and absolute. Article 9 should therefore be confined to activities justifying such a high degree of protection, and its boundaries should be clear.<sup>40</sup>

It is also important to note that courts are apt to look more closely at cases in which claims to privilege have an impact on persons outside the legislative assembly than at those that involve matters entirely internal to the legislature.<sup>41</sup>

In *Church of Scientology v Johnson-Smith*<sup>42</sup> Browne J held that a record of parliamentary proceedings cannot be put in evidence for the purpose of supporting a cause of action, even though the cause of action itself arises out of something done outside the House.<sup>43</sup> But it is not a breach of parliamentary privilege to tender a passage in Hansard to prove that a statement was made.<sup>44</sup> The first example is relying on proceedings to found a cause of action, the latter is not.

It has been held proper to allow proof by way of answers to interrogatories, of what had been said in Parliament “not in any way to criticise them, nor to call them in question in these proceedings, but to prove them as facts upon which the defendants allege comments were made in the publication now sued upon by the plaintiff.”<sup>45</sup>

In *Wright and Advertiser Newspapers Ltd v Lewis*<sup>46</sup> it was held that the Court was entitled to examine statements made in Parliament to determine their truthfulness or otherwise in a case where the parliamentarian making the statement sued a member of the public who accused the parliamentarian of telling defamatory lies.

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per Richards CJ (SCC); J P J Maingot, *Parliamentary Privilege in Canada* (2<sup>nd</sup> ed 1997) 66.

<sup>38</sup> *Jennings v Buchanan* [2004] UKPC 36 at para 9; [2005] 2 All ER 273 (New Zealand PC).

<sup>39</sup> Joint Committee on Parliamentary Privilege, vol I, *Report and Proceedings of the Committee* (Session 1998-1999) HL Paper 43-I, HC 214-I, para 91.

<sup>40</sup> Joint Committee on Parliamentary Privilege, vol I, *Report and Proceedings of the Committee* (Session 1998-1999) HL Paper 43-I, HC 214-I, p 1.

<sup>41</sup> *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 at 350 per McLachlin J (SCC); *Bear v State of South Australia* (1981) 48 SAIR 604 (Australia Indus Rel Ct); *Thompson v McLean* (1998) 37 CCEL (2d) 170 (Ont Gen Div) para 21; *Stockdale v Hansard* (1839) 9 Ad & El 1; 112 ER 1112 at 1192 (QB).

<sup>42</sup> *Church of Scientology v Johnson-Smith* [1972] 1 QB 522.

<sup>43</sup> See also *Finanne v Australian Consolidated Press* [1978] 2 NSWLR 435 and the cases collected in *Uren v John Fairfax and Sons Ltd* [1979] 2 NSWLR 287.

<sup>44</sup> *Mundey v Askin* [1975] 2 NSWLR 369; *R v Secretary of State for Trade* [1982] 2 All ER 233; *Prebble v Television NZ Ltd* [1994] 3 NZLR 1, 11.

<sup>45</sup> *Uren v John Fairfax and Sons Ltd* [1979] 2 NSWLR 287, 289.

<sup>46</sup> *Wright and Advertiser Newspapers Ltd v Lewis* (1990) 53 SASR 416.

In *Cushing v Peters*<sup>47</sup> the first cause of action in the plaintiff's case depended upon the plaintiff putting in evidence that the defendant had, in a statement in the House, named the plaintiff as the person about whom he had earlier made defamatory statements. The defendant sought to have evidence of his statement in the House excluded on the grounds that to admit it would be to call in question proceedings in Parliament contrary to Article 9 of the Bill of Rights 1688. The District Court Judge, following *Hyams v Peterson*,<sup>48</sup> declined to exclude the evidence.<sup>49</sup> The appeal to the High Court<sup>50</sup> was allowed.

Following *Prebble v Television NZ Ltd*<sup>51</sup> the full Court held that the plaintiff's first cause of action was based on words said by the defendant in the House. However, the plaintiff's second cause of action was based on the defendant's affirmation of what he had said in Parliament and what was said was admissible as evidence of what the defendant was affirming.<sup>52</sup> The distinction may be illustrated by supposing that the television appearances were by one person (not an MP) and the words were spoken in Parliament by another. The first broadcast cannot be made defamatory by the subsequent statement in Parliament but the second broadcast affirming what had been said in Parliament is clearly defamatory.

Particular areas of parliamentary activity will have a very significant legal consequence for non-members who claim to be injured by parliamentary conduct, including those whose reputations may suffer because of references to them in parliamentary debate. In *New Brunswick*<sup>53</sup> it was held that press freedom guaranteed by the Canadian Charter of Rights did not prevail over parliamentary privilege. It lay within the exclusive competence of the legislative assembly itself to consider compliance with human rights and civil liberties.

In *Attorney-General of Ceylon v de Livera Viscount Radcliffe* observed that:

[G]iven the proper anxiety of the House to confine its own members' privileges to the minimum infringement of the liberties of others, it is important to see that those privileges do not cover activities that are not squarely within a member's true function.<sup>54</sup>

Much of the law of privilege remains unwritten, which has been considered to be a virtue.<sup>55</sup> There has been little formal adjudication of the boundaries of the parliamentary privilege claimed by the House of Commons. The courts exercise due diligence when examining a claim of parliamentary privilege which would affect the rights of non-parliamentarians.<sup>56</sup>

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<sup>47</sup> *Cushing v Peters* [1994] DCR 803. See also *Cushing v Peters* (No 3) [1996] DCR 322 and *Lawrence v Katter* (1996) 141 ALR 447 (special leave to appeal to the High Court was granted on 26 June 1997).

<sup>48</sup> *Hyams v Peterson* [1991] 3 NZLR 648.

<sup>49</sup> Philip A Joseph "Parliamentary Privilege: *Cushing v Peters*" [1996] NZLJ 287 and Allan "Parliamentary Privilege in New Zealand" (1997) 6 Canta LR 324.

<sup>50</sup> *Peters v Cushing* (HC, Wellington AP 183; 341/96, 14 November 1997, Ellis and Greig JJ) and see Joseph "The Appeal to the High Court in *Peters v Cushing*" [1998] NZ Law Review 214.

<sup>51</sup> [1995] 1 AC 321 (New Zealand PC).

<sup>52</sup> See *Beitzel v Crabb* [1992] 2 VLR 121.

<sup>53</sup> *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 at 373 and 390 per McLachlin J (SCC).

<sup>54</sup> [1963] AC 103, 120 (Ceylon PC).

<sup>55</sup> G F Lock, "Labour Law, Parliamentary Staff and Parliamentary Privilege" (1983) 12 Indus L J 28, at 34.

<sup>56</sup> *Stockdale v Hansard* (1839) 9 Ad & El 1; 112 ER 1112 at 1192 (QB); WR Anson, *The Law and Custom of the Constitution* (5<sup>th</sup> ed 1922) vol I at p. 196.

As far as the courts are concerned, they will not allow any challenge to be made to what is said or done within the walls of Parliament in the performance of its legislative functions and protection of its established privileges.<sup>57</sup>

Sir Erskine May defines privilege as:

... 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.<sup>58</sup>

Maingot defines it as:

The necessary immunity that the law provides for Members of Parliament, ... in order for these legislators to do their legislative work.<sup>59</sup>

Lord Browne-Wilkinson, in *Prebble v Television New Zealand Ltd*, observed that the basic concept underlying Article 9 was:

the need to ensure so far as possible that a member of the legislature and witnesses before committees of the House can speak freely without fear that what they say will later be held against them in the courts. The important public interest protected by such privilege is to ensure that the member or witness *at the time he speaks* [original emphasis] is not inhibited from stating fully and freely what he has to say.<sup>60</sup>

The European Court of Human Rights observed that:

The immunity attaches only to statements made in the course of parliamentary debates on the floor of the House of Commons or House of Lords. No immunity attaches to statements made outside Parliament, even if they amount to a repetition of statements made during the course of Parliamentary debate on matters of public interest.<sup>61</sup>

Members of Parliament do need to have freedom of speech in the Chamber, but this is not, and never has been, unqualified. As Lord Bingham of Cornhill observed in *Jennings v Buchanan*:

The right of members of Parliament to speak their minds in Parliament without any risk of incurring liability as a result is absolute, and must be fully respected. But that right is not infringed if a member, having spoken his mind and in so doing defamed another person, thereafter chooses to repeat his statement outside Parliament. It may very well be that in such circumstances the member may have the protection of qualified privilege, but the paramount need to protect freedom of speech in Parliament does not require the extension of absolute privilege to protect such statements.<sup>62</sup>

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<sup>57</sup> *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 332; [1994] 3 NZLR 1 at 6-7 per Lord Browne-Wilkinson (New Zealand PC); relying on *Burdett v Abbot* (1811) 14 East 1; *Stockdale v Hansard* (1839) 9 Ad & El 1; 112 ER 1112 (QB); *Bradlaugh v Gossett* (1884) 12 QBD 271; *British Railways Board v Pickin* [1974] AC 765; *Pepper v Hart* [1993] AC 593; and Sir William Blackstone, *Commentaries on the Laws of England* (17<sup>th</sup> ed, 1830), vol 1, p 163.

<sup>58</sup> *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (23<sup>rd</sup> ed, 2004) 75.

<sup>59</sup> J P J Maingot, *Parliamentary Privilege in Canada* (2<sup>nd</sup> ed 1997) 12.

<sup>60</sup> *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 333-334; [1994] 3 NZLR 1 at 8 per Lord Browne-Wilkinson (New Zealand PC).

<sup>61</sup> *A v United Kingdom* (2002) 36 EHRR 917, at para 84.

<sup>62</sup> [2004] UKPC 36 at para 17; [2005] 2 All ER 273 (New Zealand PC).

This is true whether or not the effective repetition doctrine is accepted.

The privilege protected by art 9 is that of Parliament itself. An individual member of Parliament cannot override the privilege, as by electing to sue as a plaintiff. This is illustrated by the intervention to protect the House's privileges in *Prebble v Television NZ Limited* and its declining to do so in *Cushing v Peters*.<sup>63</sup> The sequence of events (as in *Cushing*) is vital.

Lord Bingham of Cornhill concluded, in our respectful opinion correctly, that:

[a] statement made in Parliament is absolutely privileged ... A statement made out of Parliament may enjoy qualified privilege but will not enjoy absolute privilege, even if reference is made to the earlier privileged statement. A degree of circumspection is accordingly called for when a Member of Parliament is moved or pressed to repeat out of Parliament a potentially defamatory statement previously made in Parliament. The Board conceives that this rule is well understood, as evidenced by the infrequency of cases on the point.<sup>64</sup>

The proposed reform of parliamentary privilege would end the effective repetition doctrine. But this step pre-supposes that the doctrine is inappropriate and is based on a very wide interpretation of Article 9 and of absolute privilege, a breadth that is not supported by the case law.

The tendency has been to restrict the scope and application of parliamentary privilege. This is consistent with changing perceptions of the citizen-State relationship, and with notions of public law and developing human rights jurisprudence.

### 3. Effective Repetition Doctrine

The effective repetition doctrine was largely articulated in the Judgments of the High Court, Court of Appeal and finally in a unanimous decision of the Privy Council in the *Buchanan v Jennings* litigation. This section looks at the definition and potential scope of the doctrine. It derives from the scope of parliamentary privilege that attaches to statements spoken in the House that may otherwise give rise to actions in defamation. The origins of parliamentary privilege have been well canvassed in this paper. Briefly put though, absolute privilege has its' roots in Article 9 of the Bill of Rights 1688 which states:

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

Absolute privilege affords Members of Parliament protection from Defamation action for statements spoken in the course of Parliamentary proceedings that are potentially defamatory. It is widely accepted by the Courts and Parliament alike that the privilege clearly attaches to statements that are said in the course of Parliamentary proceedings and that the privilege affords protection to the House itself rather than individual members. In *Buchanan v Jennings* the Privy Council re-affirmed that absolute privilege attaches to statements made during the course of Parliamentary proceedings holding that: "...the value of free and open communication is held to require an even stronger measure of protection... Parliamentary proceedings are the other main situation in which absolute privilege attaches to statements made".<sup>65</sup>

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<sup>63</sup> See report of the Privileges Committee on the question of privilege referred on 11 June 1996, concerning the action *Cushing v Peters*, in the District Court at Wellington, AJHR, 1.15A, 1996.

<sup>64</sup> *Jennings v Buchanan* [2004] UKPC 36 at para 20; [2005] 2 All ER 273 (New Zealand PC).

<sup>65</sup> *Jennings v Buchanan*, at para 8.

*Buchanan v Jennings* further went on to affirm the well accepted position that the repetition of statements, either wholly or by repeating the sting of a defamatory statement, outside of the House will leave the member open to defamation action. The absolute privilege rule does not extend in this context to afford the member protection from the libel action:<sup>66</sup>

"It is common ground in this appeal that statements made outside Parliament are not protected by absolute privilege even if they simply repeat what was said therein..."

The Court go on to state that article 9 is not infringed by any inquiry of the court into the statement made in Parliament because the statement being brought into question is the extra-Parliamentary statement as that is the statement upon which the Plaintiff's claim rests.<sup>67</sup>

The central issue for the Court in the *Jennings* case was whether absolute privilege attached to statements that affirmed statements made in the House rather than actually repeated the statements made. In other words, the Court examined whether a statement that *effectively repeats* the words spoken in Parliament should give rise to an action. The Privy Council agreed with the Court of Appeal's finding that the words spoken outside the House in the *Jennings* case, namely "I do not resile from my earlier statement", amounted to an effective repetition of the earlier statement made in Parliament and that this should be treated as if the statement had actually been repeated outside of the House. This was so even though the effective repetition could only be given context by any Court inquiring into an action by looking at the words actually spoken in Parliament.

The Court ultimately found that article 9 did not preclude the Courts from inquiring into statements made in Parliament where it was necessary to assess as a matter of fact, whether a statement effectively repeating an earlier statement spoken in the House, was defamatory.<sup>68</sup>

The Privileges Committee have reported on the *Buchanan v Jennings* case and expressed concerns with the potential negative effects of the finding of the Court. The ultimate recommendation of the report was for a broad legislative amendment to be made that would overturn the *Jennings* decision. The primary concern with the decision is that it would mean members would have to exercise restraint in affirming statements they had made in the House if they were to be protected from civil action. This would be achieved, as pointed out in the final *Jennings* decision, by either remaining silent or confirming the statement was made and leaving comment at that. The Privileges Committee report pre-supposes that the *Jennings* decision was a departure from the status quo in that Members generally took the view that they were able to reaffirm and adopt the statements made in Parliament that amounted to an effective repetition of the earlier statement and enjoy the protection of privilege. In this committee's research there is little evidence to suggest that is how Members have approached their conduct outside the House. This is perhaps why this issue was only raised and considered in depth in the *Jennings* decision.

One of the underlying considerations for the Privy Council in *Buchanan v Jennings* was the balancing exercise required when considering the importance of promoting open and robust discussion and debate in Parliament compared with "the need to afford a measure of protection to the reputation and credit of individuals".<sup>69</sup> The enunciation of the effective repetition rule gives a title to what could become a significant avenue of erosion on the rights and freedoms of individuals to protect and maintain their reputation. It must be seriously considered whether the perceived need for the media to hold MPs accountable for statements made in the House and the MPs need to respond to such questioning outweighs the individual's right to defend their reputation.

#### 4. The position in the USA and Canada

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<sup>66</sup> *Ibid*, at para 13

<sup>67</sup> *Ibid*

<sup>68</sup> *Buchanan v Jennings*, refer para 16

<sup>69</sup> *Ibid*, at para 6

In considering the scope and application of Parliamentary Privilege in New Zealand, it is necessary for the consideration to extend to encompass other, comparable jurisdictions internationally. Canada and the United States of America are the jurisdictions that will be considered in this section of the paper.

While both of these countries' legal systems are common law-based, and both their legislatures are based (albeit somewhat more loosely in the case of the United States of America) on the Westminster system of parliamentary democracy; it has traditionally been more Canada to which this country has looked for guidance on issues of constitutional law. For example, the New Zealand Bill of Rights Act 1990 was strongly influenced in its drafting by the Canadian Charter of Rights and Freedoms – an influence that continues today to be felt through the interpretation and application of the New Zealand Bill of Rights by our domestic courts. That is not to say however that no guidance is gained from the United States. On the contrary, it is now very uncommon to come across citations of decisions of the United States Supreme Court or Circuit Courts of Appeal in New Zealand judgments – especially when issues of civil rights are concerned.<sup>70</sup> New Zealand has long been conscious of the limitations that our diminutive size places on our legal system and, consequently, we do not hesitate to use comparative common law approaches in the shaping of our judicial decisions and, in turn, our legal system.

In terms of their approaches to the issue of parliamentary privilege both the United States and Canada share a similar philosophic basis – albeit drawn from two different sources. Canada, perhaps unsurprisingly, uses Article 9 of the Bill of Rights 1688 as the starting point for all questions relating to parliamentary privilege, notwithstanding the written constitution of that country.<sup>71</sup> Essentially, under Canadian law, the power exists to define these privileges by statute, but in order to do so it is first necessary to determine what these privileges were in 1867 when the constitution of that country was adopted.<sup>72</sup> In contrast to this, the United States looks to their own constitution as the basis for consideration of questions relating to legislative privilege. The relevant provision in the United States Constitution prevents the questioning of the "... speeches and debates" of elected representatives of that country "... in any other place."<sup>73</sup> Thus, when the above provision is compared with Article 9, it can be seen that the ethos of the two approaches is essentially the same notwithstanding the variances in the wording of the two provisions.

Difficulties arise however, when one looks beyond the simple fact of the existence of the privilege and begins to consider the scope and extent of its application. In part, this difficulty is further complicated by the fact that both countries operate a federal structure, allowing for variations in the application and interpretation of the law in each individual province, territory or state.<sup>74</sup> The second problem is a more straight forward one, that is, the question currently under consideration in this paper is not one which appears to have been directly considered in either country. While it may well be that consideration has been given to the question at an inferior court level, it does not seem to have been considered by the superior courts of either country. What this means is that the approach that would likely be adopted should the issues ever arise is uncertain. Traditionally, the United States Supreme Court has almost unwaveringly taken an inward-looking approach to questions of constitutional law and so it

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<sup>70</sup> See e.g. *Hopkins v Police* [2004] 3 NZLR 704.

<sup>71</sup> However, the Bill of Rights remains is not directly incorporated into Canadian law, although it is nonetheless incorporated by reference through s 18 of the (Canadian) *Constitution Act 1867* (UK) 30 & 31 Vict, c. 3 as well as through s 4 of the *Parliament of Canada Act 1868*.

<sup>72</sup> See further *Gagliano v. Canada (Attorney General)* 2005 FC 576 (27 April 2005) Tremblay-Lamar J.

<sup>73</sup> Article 1, §6, cl 1.

<sup>74</sup> Although some form of legislative privilege does exist in each state, territory or province. For some examples of this in the United States see: Dan B. Dobbs *The Law of Torts* St Paul, 2001, p 1155 note 16.

seems highly unlikely that its superior courts would consider cases from any “foreign”, common-law courts<sup>75</sup> – despite the aforementioned similarities with Article 9. Given this, it is extremely difficult to determine with any degree of certainty the approach that country’s courts would adopt to the questions at hand. That said, the impact and influence of the common law (predating the adoption of the Constitution of the United States) – including the 1688 Bill of Rights – should not be underestimated.<sup>76</sup>

In Canada however, the task is considerably easier – given the absence of any reluctance on the part of their courts to use other jurisdictions’ judgments as an aid in interpretation, even for questions of constitutional significance. Indeed, as noted above, New Zealand has commonly looked to Canada when presented with issues of constitutional law – especially in the field of civil rights. However, the Canadian courts do not appear to have been presented with the same issues that our courts were called upon to consider in the *Buchanan v Jennings* cases. That said the issue of parliamentary privilege and the extent of its application has previously been presented in the Canadian Courts. In *Stopforth v Goyer*,<sup>77</sup> the court in the province of Ontario was required to consider the effect of complete repetition outside the parliamentary chamber of comments made within it. The Court held, in accordance with overseas authority, that such comments were not protected by privilege and thus, were actionable in defamation. Similarly, in *Re Ouellet (no 1)*,<sup>78</sup> statements outside of the House were held to fall outside of the scope of the privilege. This latter decision, which was subsequently upheld on appeal,<sup>79</sup> has since become the guideline judgment for Canadian jurisprudence in this area. Consequently, while a factual scenario akin to that in *Buchanan v Jennings* has yet to be considered by the Canadian Courts, the above Ontario decision suggests that the approach adopted in such a case would mirror that taken in *Buchanan v Jennings*. Certainly, the Canadian legislatures – both federal and provincial – do not seem to have sought to limit the liability of their members where a statement is made outside of the scope of the privilege. In *Roman Corp v Hudson Bay Oil and Gas Co*,<sup>80</sup> a suggestion of some degree of extension of the privilege had arisen in the intermediate appellate court. This view, while not directly overruled by the Supreme Court of Canada was, however, indirectly disavowed by the court. Joseph Maginot, in *Parliamentary Privilege in Canada*<sup>81</sup> expresses his approval of the traditional English approach excluding statements made outside of the House from the protective scope of the privilege.

This could also be said to be a true reflection of the situation in New Zealand – it is only when a statement is effectively repeated – through affirmation or a refusal to reside from it – that the difficulties this paper seeks to address arise. Nevertheless, it has been suggested that a similar result would be reached in Canada should a case like *Buchanan v Jennings* ever arise there.<sup>82</sup> This view is likely based on the view taken by the New Zealand Court of Appeal (and, since the publication of that text, the Privy Council). Such a view can also be traced back to the views expressed in the Australian case of *Beitzel v Crabb*,<sup>83</sup> that is also cited in support of this view.<sup>84</sup>

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<sup>75</sup> In April of this year, a number of conservative commentators called for the impeachment of Supreme Court Justice Anthony Kennedy for citing overseas law and international norms in his opinions.

<sup>76</sup> See for example the discussion of the influence of the common law in relation to qualified privilege in David A. Elder *The Fair Report Privilege*, Butterworths 1979 at § 1.05.

<sup>77</sup> (1979) 23 OR (2d) 696 (CA).

<sup>78</sup> (1976) 67 DLR 3d 73.

<sup>79</sup> 72 DLR 3d 95 (Que CA).

<sup>80</sup> [1973] SCR 820.

<sup>81</sup> 2<sup>nd</sup> ed., Ottawa 1997.

<sup>82</sup> Cf. Brown, *The Law of Defamation in Canada* (2<sup>nd</sup> ed) Carswell, ch 12.3.

<sup>83</sup> [1992] 2 VR 121.

<sup>84</sup> See also the Report of the Committee on Defamation (1975) Cmnd 5909 (“The Faulks Report”).

Ultimately, the law pertaining to parliamentary privilege is characterised by the internationality of the common law and the Westminster system of government. This commonality has always been an essential aspect of jurisprudential development in common law countries and is recognised even in the United States, notwithstanding the separate track their jurisprudence has followed essentially since 1789. . Consequently, it can be expected that the Canadian courts, while not having had to do so to date, will likely adopt the common approach to the issue of effective repetition of statements made behind the shield of parliamentary privilege.

## **5. Consequences of status quo and of proposed reform**

According to the Privileges Committee, the law as established by this judgement shows that effective repetition could extend beyond defamation to obscenity laws, contempt of court, and incitement to racial disharmony and so on. Parliamentary statements are accorded absolute privilege with respect to defamation actions, in the Defamation Act 1992, s 13(1).

If the proposed amendment were made only MPs would be protected by it. Currently MPs are forced to restrain their enthusiasm outside the confines of Parliament, but not within. If they defame a member of the public within the chamber of Parliament a victim's only recourse is the 1996 procedure, which allows them to enter a statement in the parliamentary record (Standing Orders 160, 163). While Speakers' rulings on un-parliamentary language provide a considerable degree of protection for Members of Parliament, non-Members are not protected at all within Parliament. If the proposed amendment were passed the former would have more protection, at the expense of the latter.

The main effect would be to confer the absolute privilege that presently attaches to proceedings in Parliament on individual Members of Parliament. The amendment would apply to defamatory statements affirmed, adopted or endorsed outside the House, and also to contempt of court and other forms of liability.

The Privileges Committee does not have an active role in punishing Members of Parliament for using parliamentary privilege improperly. Indeed, it does not inhibit their freedom of action within the Chamber. Rather than an expansion of the privileges of Members of Parliament it would be desirable to clarify that this privilege is limited to conduct within Parliament, and that even there it is qualified by a need to account to the Privileges Committee, which ought to be required to hear complaints from non-Members alleging that a Member has harmed their reputation.

It might not be desirable to allow class actions, or require the Privileges Committee to hear claims that parliamentary privilege had been misused for personal gain, or in breach of, inter alia, the Human Rights Act. This could expose Members of Parliament to malicious complaints that could inhibit free speech. But where an individual is named in Parliament the Privileges Committee should be required to hold the Member to account if the allegation made is shown, to the satisfaction of the Privileges Committee, to be inappropriate.

9 March 2006