

Departmental Disclosure Statement

Parliamentary Privilege Bill

2013 No 179

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Justice.

The Ministry of Justice certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

15 November 2013

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Part One: General Policy Statement

Introduction

This Bill seeks to implement the recommendations of Privileges Committee, in its report *Question of privilege concerning the defamation action Attorney-General and Gow v Leigh (Leigh)*. The Privileges Committee concluded that the Court decision represented a significant shift in the interpretation of the scope of privilege and moved New Zealand away from the position in comparable Commonwealth jurisdictions. The Committee recommended legislation to restore the scope to Parliament's previous understanding. They also recommended addressing various other matters of privilege, including reaffirming certain other aspects of privilege and modernising existing legislation. On 3 September 2013, the Government made its response to the report, agreeing to adopt the Committee's recommendations.

The purpose of the Bill is to reaffirm and clarify aspects of the operation and scope of parliamentary privilege. This Bill does this by providing statutory guidance for the interpretation of certain legal terms relating to privilege and affirming in legislation certain other aspects of parliament privilege. The Bill does not seek to codify or replace the common law.

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. The privileges, immunities, and powers conferred on the House, its committees, and its members and officers and other participants are for the sole purpose of enabling them to carry out their functions, not otherwise for the personal benefit of the individuals concerned. These functions require parliamentarians to meet, legislate, and debate matters of public importance, and scrutinise the Government without fear or favour.

The Bill clarifies the scope of parliamentary privilege by:

- defining "proceedings in Parliament" based on the definition in the Australian Parliamentary Privileges Act 1987 to include, amongst other matters, where an official provides material for a Minister to respond to an oral question;
- providing statutory guidance on how to interpret "impeached or questioned";
- clarifying the protections afforded to certain broadcasts and reports of proceedings in Parliament; and
- ensuring that no person may incur criminal or civil liability for making an oral or written statement that affirms, adopts or endorses words written or spoken in proceedings in Parliament where that statement would not, but for the proceedings in Parliament, give rise to criminal or civil liability.

In doing so, the Bill will not alter or detract from Article 9 of Bill of Rights 1688.

The Bill also brings together and modernises existing legislation, and resolves a number of minor and technical issues. In addition it affirms the House's power to fine for contempt.

Statutory definitions and guidance

Parliament's freedom of speech is protected, primarily, by Article 9 of the Bill of Rights 1688 (UK), 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 Bill seeks to define the term "proceedings in Parliament" and provide statutory guidance on the scope and application of the terms "impeached or questioned" as they appear in Article 9. This statutory guidance is intended to be read alongside Article 9, which will be unchanged.

Reports and broadcasts of parliamentary proceedings

The Bill seeks to ensure appropriate protection from civil or criminal liability is extended to broadcasts and reports of parliamentary proceedings, recognising the development of new communication technologies and practices affecting the broadcast and reporting of parliamentary proceedings.

The Bill applies absolute privilege in respect of civil or criminal proceedings to the following matters:

- the live broadcast of proceedings in Parliament by any broadcaster, including select committee hearings; and
- delayed broadcasts or re-broadcasts of Parliament's proceedings by any broadcaster, including select committee hearings, that are made by order or under the authority of the House of Representatives.

The Bill applies qualified privilege in respect of any civil or criminal proceedings to the following matters:

- fair and accurate reports of proceedings in the House, or summaries using extracts of proceedings in the House; and
- the broadcast and other publication of extracts of Parliament's proceedings, including select committee hearings, that are not made by order or under the authority of the House of Representatives.

Effective repetition

The Bill seeks to clarify the effect of a person "adopting" or "endorsing" a statement made in the House (which is itself subject to absolute privilege) in later comments made outside the House. In particular, the Bill will clarify the extent to which something said by a person during parliamentary proceedings may be used to interpret the meaning of a statement made outside the House.

The Bill provides that statements made in the House may not be used to infer meaning to statements made outside the House. Statements made outside the House must be assessed on their content alone to determine whether they are actionable.

Consolidation and modernisation of existing statutes

Aspects of parliamentary privilege are reflected in the Defamation Act, the Legislature Act 1908 and the Legislature Amendment Act 1992. The Bill seeks to repeal and replace the Legislature Act 1908 and the Legislature Amendment Act 1992, and some provisions of the Defamation Act 1992. In doing so, the Bill makes minor amendments to modernise drafting and to update existing provisions so they are consistent with other statutes.

In addition, the Bill explicitly affirms the power of the House to fine for contempt and that the House does not have the power to expel its members.

The Bill will repeal or amend 3 Acts:

- Repeal the Legislature Act 1908 and the Legislature Amendment Act 1992, with the remaining operative provisions of these Acts to be re-enacted in a Parliamentary Privilege Act, **to modernise and consolidate the existing legislation.**
- Amend the Defamation Act 1992, repealing section 13 and making consequential amendments, **in favour of more modern and comprehensive provisions in the new Act.**

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<ul style="list-style-type: none"> • Privileges Committee (June 2013) <i>Question of privilege concerning the defamation action Attorney-General and Gow v Leigh</i> http://www.parliament.nz/resource/0001871936 • The Government. (September 2013) <i>Government Response to the Report of the Privileges Committee on Question of privilege concerning the defamation action Attorney-General and Gow v Leigh</i> http://www.parliament.nz/resource/0001806851 • Privileges Committee (May 2009) <i>Report of the Privileges Committee on the question of privilege relating to the exercise of the privilege of freedom of speech by members in the context of court orders</i> http://www.parliament.nz/resource/0000078405 • Privileges Committee (May 2005) <i>Report of the Privileges Committee on the question of privilege referred on 21 July 1998 concerning the action Buchanan v Jennings</i> http://www.parliament.nz/resource/0001606944 • Standing Orders Committee (November 1989) <i>Report of the Standing Orders Committee on the Law Privilege and Related Matters</i> 	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>A Regulatory Impact Statement (RIS) was completed by the Ministry of Justice and will be accessible on the Ministry's website at http://www.justice.govt.nz/policy/regulatoryimpactstatements and can also be found and downloaded at http://www.treasury.govt.nz/publications/informationreleases/ris.</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
<p>The RIS did not meet threshold for RIA Team assessment; an internal Ministry of Justice review panel assessed it as meeting requirements.</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO
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Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	NO
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	YES
<p>(a) The costs and benefits arising from this Bill are not amenable to analysis. Potential impacts on legitimacy and confidence in government institutions are discussed in the RIS.</p> <p>(b) There is a hypothetical possibility that proceedings in Parliament and the application of privilege have the potential to cause persons to suffer a substantial loss of reputation or income which would not be compensated for. However this risk cannot be reasonably quantified. Further, it is not expected that the Bill will materially change the existing risk of such loss.</p>	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	NO
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

The Bill has no effect on New Zealand's international obligations.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The Ministry of Justice considered the principles of the Treaty of Waitangi during policy development and drafting of the Bill, and concluded it will have no effect on the existing application of Treaty principles.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

Advice provided to the Attorney-General by Crown Law, or a Bill of Rights Act 1990 section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website after a Bill's introduction. Any such advice, or reports, will be accessible on the Ministry's website at:
<http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/>.

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:

(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?

YES

(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?

YES

- (a) The Bill affirms the House's power to fine for contempt and sets a maximum fine of \$1000.
- (b) The fine for contempt will be enforced through the existing framework provided in Part 3 of the Summary Proceedings Act 1957.

3.4.1. Was the Ministry of Justice consulted about these provisions?

YES

The Ministry of Justice has led the policy development of the Bill, together with the Office of the Clerk.

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	NO
This Bill restates existing immunities from the disclosure of personal information in the course of Parliamentary proceedings.	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>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).</p> <p>The timeframe for the proposed Bill did not allow for further consultation with the public, the judiciary or media representatives. The Office of the Clerk of the House of Representatives, the State Services Commission, and Crown Law were consulted. The Department of the Prime Minister and Cabinet was informed.</p> <p>The Parliamentary process will give a further opportunity for public consultation.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
We have relied on the advice of bodies with relevant experience, including Crown Law, Parliamentary Counsel Office, the Office of the Clerk of the House of Representatives, and the State Services Commission.	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	YES
<p>The Bill amends existing immunities arising from parliamentary privilege by defining “proceedings in Parliament” to include, amongst other matters, the situation where an official provides material for a Minister to respond to an oral question. This was Parliament’s previous understanding of the scope of the immunity provided by parliamentary privilege, which was overridden by the Supreme Court’s approach in <i>Leigh</i>. The Bill gives statutory authority to the broader application of privilege. The widening of protections relating to broadcasting will also increase immunity for broadcasters and others.</p>	

Significant decision-making powers affecting individuals

4.6. Does this Bill create or amend a decision-making power to make a determination about a person’s rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>The Bill confirms the existing powers of the House to fine for contempt.</p>	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO

4.8. Does this Bill create or amend any other powers to make delegated legislation?	NO

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO