

Freedom of speech in Parliament: Constitutional safeguard or sword of oppression?

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This article explores the role and the abuse of the privilege of freedom of speech in Parliament. Some unfortunate consequences of the Court of Appeal decision in TVNZ v Prebble are examined, especially in the light of Article 9 of the Bill of Rights 1688 and the New Zealand Bill of Rights Act 1990. Avenues for reform of parliamentary privilege are addressed.

I INTRODUCTION

Abuse of the privilege of freedom of speech in Parliament must cease. Jim Bolger MP has in the past defied the will of the judiciary by breaching court-ordered name suppression, Winston Peters MP has sheltered behind the veil of privilege in making serious accusations against Sir Michael Fay, and Tasman MP Nick Smith has recently accused Wellington lawyer Bruce Carran of criminal conduct. In all instances the MPs have defended their actions with "public interest" grandiloquence. However, disrobe them of their cloak of rhetoric and one will realise that MPs are using the privilege as a sword of oppression, and that the inflicted harm is intolerable in a modern democratic society.

What is parliamentary privilege? Where does it come from? Why do we have it? Does it really need to be absolute?

Parliamentary privilege is the conglomeration of rights enjoyed by the House, and by its members individually, without which they could not discharge their functions, and which extend beyond those of other bodies and individuals.¹ In New Zealand, the House of Representatives, its committees, and its members, enjoy the privileges, immunities and powers held by the House of Commons in 1865.²

While there are numerous privileges,³ in practice the most problematic is freedom of speech in Parliament. As alluded to above, the privilege can emasculate one's rights.

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1 C J Boulton (ed) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (21 ed, Butterworths, London, 1989) 69.

2 *Legislature Act 1908*, s 242(1).

3 For example, privileges include freedom of speech, freedom from arrest or molestation, freedom of access to Her Majesty (or in New Zealand the Governor-General), the House's right of exclusive cognisance over its own proceedings, and the

Not only is the privilege itself problematic, but New Zealand law on parliamentary privilege is in disarray. The only legislation is the Legislature Act 1908 and article 9 of the Bill of Rights 1688 (UK),⁴ both of which are ambiguous in their ambit. Moreover, not only are the courts trapped in jurisdictional conflict with Parliament, but rarely are they required to elucidate the law.⁵

These problems are buttressed by escalating public concern over abuse of privilege. The time is ripe for reform. The law needs an injection of certainty, and as the Rt Hon Sir Geoffrey Palmer remarks, "[r]eal safeguards need to be put in place to reduce the capacity for abuse which exists."⁶ The scope of this article only permits discussion of the privilege of freedom of speech. Part II outlines the purposes of the privilege, while Part III addresses the problems it creates. Part IV recommends avenues for reform, Part V rounding the paper up in conclusion.

II THE UNDERLYING PURPOSES OF PARLIAMENTARY PRIVILEGE

Legal reform requires an understanding of the law's rationale, from which one is able to assess whether, in light of both evolving social values and any problems engendered by that law, reform is necessary.

McGee explains that "[t]he privileges enjoyed by the House of Commons . . . were the means to achieving an end – an effective and efficiently functioning legislature."⁷ Their overarching purpose was to remove any restraints on the operation of the House and to enable the House to curtail challenges to its authority and dignity. While freedom of speech in Parliament can be traced back to the fourteenth century,⁸ it is both most resolute in and commonly associated with article 9 of the Bill of Rights 1688 (UK), passed to curb the tyrannical excesses of the Stuart Kings.⁹ So historically the privilege secured independence of the House from the Crown.¹⁰ Today the Crown poses no threat. While article 9 used to be a check on the powerful, today it primarily

power to punish for contempt. See further D McGee *Parliamentary Practice in New Zealand* (Government Printer, Wellington, 1985) 422-471; above n 1, 69-134.

4 1 William and Mary, sess 2, c 2. Cf Defamation Act 1992, s 13.

5 *TVNZ v Prebble* [1993] 3 NZLR 513 is the only New Zealand case with any detailed discussion on the law relating to parliamentary privilege.

6 G W R Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 117.

7 D McGee *Parliamentary Practice in New Zealand* (Government Printer, Wellington, 1985) 422.

8 See P A Joseph *Constitutional and Administrative Law in New Zealand* (Law Book Co, Sydney, 1993) 362.

9 The Stuart Kings were "quite likely to storm into Parliament with a few armed retainers and haul off Members of Parliament to the Tower of London": *Morning Report*, National, New Zealand, 23 August 1993, transcript, 1.

10 Above n 8.

protects MPs from disgruntled members of the public. Nevertheless, it still serves the overarching purpose of privilege. As Fisher J pointed out in *Peters v Collinge*:¹¹

The real concern of [the] privilege is that to secure freedom of expression and conscience, no Member of Parliament should ever feel constrained by the knowledge that he or she may one day be penalised by another person or body for his or her conduct there.

The Privy Council has even said that in a legislative assembly the privilege arises from inherent necessity.¹² Further, the privilege is also said to be in the public interest. Without it, new ideas may be suppressed, and public and private wrongs may remain unrighted.¹³

Having set the context, one can now explore the major problems created by the privilege of freedom of speech.

III PROBLEMATIC ASPECTS OF THE PRIVILEGE OF FREEDOM OF SPEECH

This privilege has given rise to at least three potentially serious problems: (1) a person defamed or otherwise maligned by statements in the House is unable to pursue a remedy in the courts; (2) as evident in *TVNZ v Prebble*, the courts have given article 9 of the Bill of Rights 1688 a very broad reading, arguably in excess of its purpose, with the result that MPs may not be able to protect their reputations in court; and (3) court name-suppression orders can be breached by Members. The gravity of these problems is now assessed.

A *The Inability to Sue for Statements in the House*

Article 9 of the Bill of Rights 1688 (UK) provides "[t]hat 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." This provision is part of New Zealand law,¹⁴ and that it precludes one bringing an action in defamation against a Member for statements

11 [1993] 2 NZLR 554, 573. See also *Wright and Advertiser Newspapers Ltd v Lewis* (1990) 53 SASR 416, 423-427, 447-448; *TVNZ v Prebble* [1993] 3 NZLR 513, 536 per Casey J; *Pepper v Hart* [1993] 1 All ER 42, 68.

12 *Chenard v Arissol* [1949] AC 127, 134.

13 Auckland District Law Society "Speaking Out: Members of Parliament and the Judicial Process" [1988] NZLJ 300. This was the justification given by Tasman MP Nick Smith recently when, in the House, he accused lawyer Bruce Carran of having "systematically fleeced" the Druids Friendly Society. He said free speech was granted to MPs so that they could "speak out for the little people without threat or intimidation from the powerful interests in the community": *The Dominion*, Wellington, New Zealand, 23 August 1993, 2.

14 Imperial Laws Application Act 1988, s 3(1).

in the House is undoubted.¹⁵ Such preclusion can be extremely damaging to the defamed party.

MPs' speech is subject only to the internal regulation and discipline of the House. As McKay J recently reaffirmed, "it is for the Courts to determine . . . whether a particular privilege exists, and for the House to control the manner and extent of its exercise."¹⁶ There are presently two general types of internal control operating on a Member's speech: (1) preventive measures, in the form of Standing Orders and Speakers' Rulings; and (2) reactive measures, in the form of in-House response to a complaint of breach of privilege raised by a Member. These measures are inadequate.

Standing Orders provide, *inter alia*, that the Speaker shall intervene when offensive or disorderly words are used,¹⁷ and that no Member shall use unparliamentary language.¹⁸ Speakers' Rulings are more specific. They provide that "[t]emperate and decorous language should be used with regard to persons outside Parliament,"¹⁹ and that "[M]embers are supposed to refrain from bringing the names of individuals into their speeches."²⁰ However, as Parliament is a forum for party political contest where "[m]uch of the debate is vapid nonsense,"²¹ it is not surprising that the Standing Orders are frequently infringed. As for Speakers' Rulings, they are often disregarded with impunity.²² The Speaker may reprimand a Member for disorderly conduct,²³ but this does little, if anything, to redress the harm a citizen may have already suffered. Furthermore, disorderly conduct may go unchecked due to the political affiliations of the Speaker.

As for reactive measures, if a Member wishes to raise a possible abuse of privilege, the Member refers the matter to the Speaker, who determines whether a question of privilege is involved.²⁴ If there is a question of privilege, the matter is referred to the Privileges Committee,²⁵ which later reports back to the House, recommending the

15 Cooke P made this clear in *TVNZ v Prebble*, saying that "there can be no departure from or undermining of the principle that a member is absolutely protected from defamation proceedings for anything said by him [or her] in the House": [1993] 3 NZLR 513, 520. This protection would apply equally to any other tortious action a person might attempt to bring.

16 *TVNZ v Prebble* [1993] 3 NZLR 513, 541.

17 *Standing Orders of the House of Representatives* (Government Printer, Wellington, 1992) SO 169.

18 Above n 17, SO 170. See further above n 7, 139.

19 *Speakers' Rulings* (Government Printer, Wellington, 1982) 75/2.

20 Above n 19, 75/3.

21 Above n 6, 110.

22 Auckland District Law Society "Speaking Out: Members of Parliament and the Judicial Process" [1988] NZLJ 300, 302.

23 Above n 17, SOs 195-199.

24 Above n 17, SO 424.

25 Above n 17, SO 427.

punitive action, if any, to be taken.²⁶ However, while the Member in question may be censured by the House, there is no reparation for the victim.

It is thus apparent that the internal discipline of the House is inadequate. Preventive measures afford little if any protection, and reactive measures focus on the Member. The victim is excluded and has no remedy.

The privilege of freedom of speech violates the important principle identified by McKay J in *TVNZ v Prebble* that "every person is entitled to access to the Courts . . . to obtain redress for alleged wrongs."²⁷ While such a principle accords with the spirit of the New Zealand Bill of Rights Act 1990, the Act is of no assistance here. Neither section 27(2) (the right to apply for judicial review) nor section 27(3) (the right to bring civil proceedings against the Crown) applies. Section 27(2) is inapplicable because arguably an MP's defamatory statements would not constitute a determination of a tribunal or public authority. Section 27(3) is inapplicable for an MP is not representative of the Crown. Even if the aforesaid application of either subsection (2) and/or subsection (3) is inaccurate, the Act would still be of no avail. Article 9 of the Bill of Rights 1688 clearly prohibits bringing defamation proceedings against MPs. Accordingly, pursuant to section 4 of the New Zealand Bill of Rights Act 1990 article 9 predominates.

However, in addition to there being a violation of important principle, arguably New Zealand is in violation of its international obligations in denying a remedy to citizens defamed by MPs. New Zealand has ratified the ICCPR,²⁸ article 17 of which provides that "[n]o one shall be subjected to . . . unlawful attacks on his[her] honour and reputation," and that "everyone has the right to the protection of the law against such . . . attacks." Under article 2(3)(a) parties to the Covenant undertake "[t]o ensure that any person whose rights . . . are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." For international law to be breached here the attack must be "unlawful". Arguably article 9 of the Bill of Rights 1688 does not render defamation perpetrated by MPs lawful. Rather, and by analogy with diplomatic immunity, article 9 simply denies the courts jurisdiction. Indeed, the Privileges Committee views article 9 "as a rule of substantive law going to the jurisdiction of the courts."²⁹ So, the absolute freedom of speech enjoyed by MPs, with the concomitant absence of remedy for the defamed, is contrary to principle and arguably in violation of international law.

26 Above n 7, 463.

27 Above n 16.

28 International Covenant on Civil and Political Rights (1976) 999 UNTS 171. Entered into force for New Zealand 28 March 1979.

29 *Interim Report of the Privileges Committee* (1993) AJHR I.15B, 4.

B TVNZ v Prebble: Protection of MPs' Reputations

In *TVNZ v Prebble*, TVNZ wished to rely on statements made in the House in defending defamation proceedings brought against it by Richard Prebble MP.³⁰ On appeal from interlocutory rulings of Smellie J in the High Court,³¹ the Court of Appeal was unanimous in deciding that the privilege prevented TVNZ from relying on the parliamentary statements. Cooke P said that "any scrutiny of a member's motives for speaking or voting in a certain way has to be seen as contrary to the privilege, whether or not the motives are suggested to be improper."³² Note, however, that Article 9 of the Bill of Rights 1688 does not impose a blanket prohibition on admission of evidence of debates or proceedings in Parliament. Cooke P expressly adopted as correct the Attorney-General's submissions in this regard,³³ such that evidence of parliamentary debates or proceedings is admissible, if used in accordance with article 9, when used: (1) to prove material facts, for example the fact that a statement was made in Parliament at a particular time or that it refers to a particular person; (2) to prove that a Government decision was announced in Parliament on a particular day; (3) to establish that an MP was present in the House and voted on a particular day; (4) to establish that a report of parliamentary debates corresponds with the debate itself and is fair and accurate and therefore attracts qualified privilege in the law of defamation; and (5) to assist statutory interpretation. Further, evidence of parliamentary debates or proceedings is admissible in a trial of perjury.

In deciding that the privilege prevented TVNZ from relying on the parliamentary statements, the Court of Appeal seems to have followed the English courts' approach, and indeed Cooke P felt constrained by precedent.³⁴ However, it is noteworthy that the decision is contrary to the relatively recent Australian case of *Wright and Advertiser Newspapers Ltd v Lewis*,³⁵ a case with similar facts where the defendant could rely on statements made in the House.³⁶

30 Richard Prebble had brought an action against TVNZ for its broadcast of a "Frontline" story called "For the Public Good". He alleged that the broadcast conveyed that his involvement in State assets sales was part of a conspiracy which he implemented in a manipulative and dishonest manner to enable business leaders to obtain the assets on unduly favourable terms in return for donations to the New Zealand Labour Party. TVNZ wished to rely on statements in the House for its defences of fair comment and justification.

31 *Prebble v TVNZ* (1992) 8 CRNZ 439.

32 Above n 16, 519.

33 Above n 16, 518.

34 Cooke P said: "The views that I have been expressing are directed to the present law and are much influenced by the wide interpretation that has traditionally been given to art 9 of the English Bill of Rights;" and "Perhaps the ... privilege ... has come to be established on an unnecessarily wide basis ... [b]ut established on a wide basis I think it is": above n 16, 518-519.

35 (1990) 53 SASR 416 (South Australian Supreme Court).

36 In that case White J said: "I do not think that a defendant, so defending himself, can be regarded in any real sense as impeaching or questioning the freedom of speech, debates or proceedings in Parliament as forbidden by Art 9; nor can the courts be

In any event, the Court of Appeal in *TVNZ v Prebble* (McKay J dissenting on this point) granted a stay of proceedings. Richardson J thought "that the High Court could not fairly hear the case if it could not adequately consider a substantial plea of justification,"³⁷ while Cooke P seems to have opined that to allow the case to proceed would be in violation of TVNZ's right to freedom of expression under section 14 of the New Zealand Bill of Rights Act 1990.³⁸ While not phrased as such in his Honour's judgment, it appears that Cooke P thought a stay should be granted to avoid violating TVNZ's right to freedom of expression in terms of being able to present information to defend the action. The President granted the stay on the basis of the judiciary's being subject to the New Zealand Bill of Rights Act 1990, for if not granted the judiciary itself would be in breach of section 14. Cooke P pointed out that a stay would not be granted in like cases if reliance on statements made in the House for a defence was not reasonable. His Honour said the Court had to be alert to the possibility of a defendant pleading parliamentary matters unnecessarily to attract a stay of the action. Pleadings not made in good faith or advanced on purely tactical and flimsy grounds would not warrant a stay.³⁹

With respect, there are at least three problems with *TVNZ v Prebble*. Firstly, and in addition to at least some of the judgments' incomplete analyses of the law and surrounding policy issues, the decision itself is questionable. It seems to extend the application of article 9 beyond its original purpose.⁴⁰

The second problem is the lack of analysis of potential application of the New Zealand Bill of Rights Act 1990. From *Wright v Lewis* it is clear that there are two opposing views on the application of article 9 in *TVNZ v Prebble*-type situations, both of which have validity. Given section 6 of the New Zealand Bill of Rights Act 1990 (interpretation consistent with the Bill of Rights to be preferred), one may ask whether the Court of Appeal should have preferred the meaning and application of article 9 favoured in *Wright v Lewis*. The body of English precedent tending to suggest that the broader, more preclusive view be adopted, in no way prevented the Court of Appeal from preferring the narrower interpretation. Indeed, the Court of Appeal has expressed its willingness to reinterpret provisions of statutes where possible, notwithstanding

fairly regarded as doing so if they permit a defendant to so defend himself. It would not be sought to visit any legal consequences on the member, nor to examine his actions or motives except so far as that examination might be rendered necessary by the member's own actions. The object would be merely to repel the accusation made by the member that a false imputation had been made against him. If Parliamentary privilege operated to prevent a person, exposed to an action by a member for defamation, from defending himself by proving the truth of his criticism of the statements or conduct of the member, it would indeed be 'turned into an abominable instrument of oppression': Above n 35, 426-427. See also *Garda Representative Association v Ireland* [1989] IR 193.

37 Above n 16, 534.

38 Above n 16, 521, 523.

39 Above n 16, 522.

40 The avoidance of penalty for statements in the House to enable the House to function effectively and efficiently.

precedent to the contrary.⁴¹ Why then did the Court of Appeal not choose the narrow meaning? There are a number of possible reasons: (1) counsel for TVNZ does not appear to have made such a Bill of Rights argument and hence the Court may not have been aware of it; (2) the Court of Appeal's awareness of constitutional conventions restraining judicial intrusion into the parliamentary sphere; (3) the judiciary could avoid contravention of TVNZ's right to freedom of expression by granting the stay; (4) limitation of TVNZ's right to freedom of expression could have been considered reasonable and demonstrably justified in a free and democratic society, pursuant to section 5 of the New Zealand Bill of Rights Act.

The Court's decision (in terms of giving article 9 a very broad reading) is justifiable on the third and fourth of the possible grounds. Unfortunately only the President referred to the Bill of Rights Act in any detail. While stating that if article 9 "can be given a meaning consistent with the rights and freedoms in the Act, that meaning shall be preferred to any other meaning,"⁴² his Honour failed to pursue the range of meanings open to the Court, relying instead on the third reason above. With respect, the Court of Appeal really should have explored Bill of Rights issues in more detail.

The third and related problem with the decision is its effect on the ability of MPs to protect their reputations in court. If an MP is defamed, and in defending an action brought by that MP the alleged defamer relies on statements in the House which are precluded by the Court's broad reading of article 9, and the court considers a stay appropriate, then the MP personally is without remedy.

While expressing no opinion on the matter, the Court of Appeal in *Hyams v Peterson* noted that some argue that "when issues of genuine public interest are under debate, the principle of freedom of speech should leave the media more free to defame the plaintiff."⁴³ Such is the American approach, evident in *New York Times v Sullivan*.⁴⁴ Whether New Zealand should follow suit is a moot point. What is clear, however, is that MPs should know whether or not they can protect their reputations in court. With the decision in *TVNZ v Prebble* an MP will not know until civil proceedings are well under way.

41 *Flickinger v Hong Kong* [1991] 1 NZLR 440.

42 Above n 16, 523.

43 [1991] 3 NZLR 648, 657.

44 376 US 254 (1964). In this case the Supreme Court, at 270, said: "debate on public issues should be uninhibited, robust, and wide-open, and ... it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." For the English equivalent, see *Derbyshire County Council v Times Newspapers Ltd* [1993] 2 WLR 449.

C Breach of Court Name-Suppression Orders

Finally, the freedom of speech privilege enables MPs to breach court name-suppression orders,⁴⁵ in circumstances which without the privilege would constitute contempt of court. The ramifications of such breach go well beyond there being an abuse of privilege: (1) the named individual's rights to a fair trial and the presumption of innocence may be eroded; (2) the protection provided by the order for the individual and/or those associated with either that person (eg family members) or the alleged offence (eg the victim) is lost; and (3) the MP usurps the judiciary, in breach of the separation of powers doctrine.⁴⁶ How can one possibly assert that the public interest is served by such conduct? Again, the current internal regulation and discipline of the House cannot adequately deal with the problem.

It should be evident that the privilege of freedom of speech creates problems which are indeed grave. There is thus good reason to advocate reform.

IV AVENUES FOR REFORM: THE NEED FOR BALANCE

The purposes of parliamentary privilege are sound enough, but the law over-zealously pursues them, both to the detriment of the individual and in breach of constitutional doctrine and international law. In a modern democratic society with increasing recognition of human rights and fundamental freedoms, evident in the enactment of and the growing jurisprudence arising from the New Zealand Bill of Rights Act 1990, some reasonable balance should be the goal of reform.

Some would advocate overhauling and codifying the whole area of parliamentary privilege.⁴⁷ The Standing Orders Committee does not support such substantial reform.⁴⁸ Indeed, given Parliament's sovereignty and the historical battles between Parliament and the courts over privilege, a tempered approach to reform is more likely to effect change. The requisite balance can be achieved through partial codification and statutory amendment, and certain other, non-statutory measures. The following reforms are recommended.

45 In 1988, then Opposition Leader Jim Bolger MP named in Parliament a person connected with allegations of corporate fraud whose name was subject to a court suppression order: New Zealand Law Society "Parliamentary Privilege: Public Interest v Individual Rights" (1988) 291 LawTalk 1.

46 See further above n 22, 303.

47 For example, Opposition Justice spokesman David Caygill MP thinks that "[t]he whole area of privilege is out of date and in need of a comprehensive review," and "would be reluctant to embark on piecemeal reform": *The Evening Post*, Wellington, New Zealand, 6 October 1992, 3.

48 *Report of the Standing Orders Committee on the Law of Privilege and Related Matters* (1989) AJHR I.18B, 7-8. The Committee said there is a dearth of codification of privilege in other countries and that overseas experience reveals that cross-fertilisation of rules between Commonwealth countries can be beneficial.

A *Amend the Standing Orders*

The Standing Orders should be amended to expressly prohibit the utterance of potentially defamatory statements unless an MP can show reasonable cause (to the Speaker) to convey the information. The potential public interest of that conveyance must be proportional to the potential harm. Furthermore, to promote compliance with and enforcement of the Standing Orders, "[t]he Speaker should be given more independence."⁴⁹

While a useful starting point, this reform is inadequate by itself, for Standing Orders are liable to be breached or hurdled by quibbling MPs.

B *The 'Right of Reply'*

The Australian Senate has a procedure "whereby persons who have been named or readily identified in debates in the Senate may take steps to vindicate any adverse [e]ffect this may have had on their reputations or privacy."⁵⁰ The person concerned writes to the President of the Senate requesting that an appropriate response be incorporated in *Hansard*. If the President deems the claim worthy of consideration it is referred to the Privileges Committee, and if the Committee does not regard the claim as insignificant or vexatious, it may, after consideration, recommend that a response be published.

New Zealand should adopt this procedure, perhaps with a presumption that, in the absence of good reason to the contrary, a suitable response be included in *Hansard*. While the Standing Orders Committee was against the right of reply, its reasons are all open to attack.⁵¹

C *Statutory Amendment of Article 9 to Permit Waiver of Privilege*

In *TVNZ v Prebble* there was difference of opinion as to whether the House can waive its article 9 privilege. Only Cooke P said unequivocally that it could.⁵² In response to the case, the Privileges Committee has recommended that the House resolve "[t]hat it is not competent for [the] House to waive, or otherwise absolve anyone from compliance with, Article 9."⁵³ This recommendation appears legally correct. As

49 "The Speaker should be chosen on a free vote and on[c]e chosen should resign his or her seat and become the MP for a notional seat": above n 6, 127.

50 *Report of the Standing Orders Committee on the Law of Privilege and Related Matters* (1989) AJHR I.18B, 17.

51 The Committee said that: (1) a rebuttal could take several weeks to effect; (2) a decision to allow a response to be printed inevitably involves an element of judgment in respect of the member's comment; (3) failure to take advantage of the procedure could be seen to be an admission of guilt by the person about whom the comment was made; and (4) the Standing Orders already guard against the irresponsible use of the privilege of freedom of speech: above n 49, 17-18.

52 Above n 16, 521.

53 Above n 29, 5.

McGee points out, "[i]t is trite law that a House of the legislature cannot by resolution change the law of the land."⁵⁴

Article 9 should be amended to permit the House to waive privilege. A request to the Speaker for a waiver could be referred to the Privileges Committee. If the Committee is satisfied that the alleged defamatory comments have no reasonable basis or were made recklessly, vexatiously or maliciously, then it could recommend that the Speaker (who would need to be independent) waive privilege, temporarily lifting the shield of immunity from the "offending" MP.⁵⁵

To avoid any possible party political contest or bias in the Privileges Committee, an alternative mechanism would be for the Speaker to refer the matter to the Ombudsman, whose decision on waiving privilege would be final. This mechanism would require reform of the Ombudsman Act 1975.

D *Statutory Articulation of the Scope of Article 9*

The courts have given article 9 a very broad reading, arguably beyond the purpose for its enactment. It should be stated in statute that the purpose of article 9 was "to ensure that [M]embers of Parliament were not subjected to any penalty, civil or criminal, for what they said,"⁵⁶ and that accordingly it does not preclude reliance on statements in the House to defend a defamation action brought by an MP.

It may be objected that such preclusion is necessary, for conceivably a defendant's reliance on parliamentary statements could require the court, in determining whether the defence is established, to question the motives of MPs for speaking in a certain way, contrary to both article 9 and the dignity of the House. However, arguably this is not the evil that article 9 was enacted to prevent. And if the dignity of the House is tarnished, it is through the actions of its Member(s), not the other party. If there has been no impropriety then Parliament's so called dignity will not be spoiled, and if there has, why in today's society should it not be revealed? The rhetoric in *TVNZ v Prebble* that "privileges do not extend beyond what is required for the energetic discharge of the duties inherent in the role of the House"⁵⁷ should meet reality. The uncertainty to which *TVNZ v Prebble* has given rise would then be quelled: defendants could rely on statements in the House in establishing defences, and MPs would be able to protect their reputations in the courts.

54 D McGee "The Application of Article 9 of the Bill of Rights 1688" [1990] NZLJ 346, 348.

55 This reform builds upon an idea of Peter Hilt MP. See *The New Zealand Herald*, Auckland, New Zealand, 8 October 1992, 3.

56 *Pepper v Hart* [1993] 1 All ER 42, 68 (HL).

57 Above n 16, 541 per McKay J.

E Prohibit and Criminalise Breaches of Court-Ordered Name Suppression

MPs simply should not be permitted to breach name-suppression orders. While an express prohibition could be added to the Standing Orders,⁵⁸ arguably their possible infringement and the gravity of the problem requires criminalising disclosure of a suppressed name, rendering it an offence beyond the reach of privilege.⁵⁹

V CONCLUSION

Parliamentary privilege is necessary, but resultant problems require its temperance. While contentious, the proposed reforms would balance MPs' freedom of speech in Parliament with the rights of the individual. While they would not always provide recourse to possible monetary compensation through the courts, one would usually be able to have a reply published in *Hansard*. New Zealand's international obligations would be given effect to, article 9 would be given its proper meaning, the uncertainty stemming from *TVNZ v Prebble* would be resolved, and court ordered name suppression would not be circumnavigable by MPs. Further, taken together the reforms could enhance the quality of debate in the House. If there was ever a time for reform, it is now.

58 Standing Order 172 already prohibits reference to matters awaiting judicial decision, but it is not explicit on the issue of name-suppression orders.

59 Like s 108 of the Crimes Act 1961, this would be a statutory exception to art 9.