



**PARLIAMENT**  
OF THE REPUBLIC OF SOUTH AFRICA

**SECRETARY TO THE NATIONAL ASSEMBLY**  
PO Box 15 Cape Town 8000  
Republic of South Africa  
Tel: 27(21) 403 2601 Fax: 27 (21) 403 3880  
mxaso@parliament.gov.za

**Comparative Study on international best practices and conventions relating to parliamentary powers and privileges and limitations thereof in Kenya, Australia, Canada, New Zealand, and the United Kingdom**

**Prepared by NA Table**  
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# 1. INTRODUCTION

On 19 May 2016, the National Assembly established an Ad Hoc Committee on the Review of the Powers and Privileges Act (the Ad Hoc Committee) to review the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act (No 4 of 2004) (the Act), taking into account the Constitutional Court judgment in *Democratic Alliance v Speaker of National Assembly and Others* [2016] ZACC 8, to bring the Act in line with developments relating to parliamentary powers and privileges, and introduce a bill in accordance with Chapter 13 of the Assembly Rules.

The Ad Hoc Committee, at its first meeting, had a discussion regarding its terms of reference and decided that a comparative study on parliamentary powers and privileges would facilitate its task of reviewing the Act. The comparative study, among other things, would enable the Ad Hoc Committee to take on board the experiences of other Parliaments in respect of powers and privileges, in its review of the Act. (See *Annexure B for terms of reference of the Ad Hoc Committee*).

In this regard, the National Assembly Table (NA Table) conducted a comparative study on international best practices and conventions relating to parliamentary powers and privileges. The study also looked at recent developments in relation to powers and privileges in other Parliaments. A questionnaire consisting of five questions (*see Annexure A*) was sent to various Parliaments, and responses were received from five Parliaments, namely: Kenya, the United Kingdom, Canada, Australia and New Zealand.

## 2. DEFINITIONS

### 2.1 What is parliamentary privilege?

The word “privilege” refers to a specific right or advantage; an exemption from a rule or a norm which puts its possessor in a different position from everyone else.<sup>1</sup> This right or advantage or benefit is reserved for a certain group, and in the case of Parliament, it is a right enjoyed by Members of Parliament. Thus, privilege is to a certain extent an exemption from the general law.<sup>2</sup>

A parliamentary privilege is a right and immunity enjoyed by Parliament collectively and by Members of each House individually.<sup>3</sup> Erskine May defines privilege as follows:

*“Parliamentary privilege is the sum of certain rights enjoyed by each House collectively as a constituent part of the High Court of Parliament; and by Members of the House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Some privileges rest solely on the law and custom of Parliament, while others have been defined in statute.”*<sup>4</sup>

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<sup>1</sup> Richard Gordon Q.C and Sir Malcolm Jack KCB, PhD, FSA “Parliamentary privilege: Evolution or codification?” (The Constitution Society Report, 2013) p14

<sup>2</sup> Erskine May *Parliamentary Practice* Twenty-second edition (London 1997) p 65

<sup>3</sup> Richard Gordon Q.C and Sir Malcolm Jack KCB, PhD, FSA “Parliamentary privilege: Evolution or codification?” (The Constitution Society Report, 2013) p13

<sup>4</sup> Erskine May *Parliamentary Practice* Twenty-second edition (London 1997) p 65

The purpose of parliamentary privilege is to preserve the exclusive rights of Members to freely attend to the public affairs of the House, without disturbance or interruption and to freely express themselves (free speech) without fear from arrest or civil prosecution.<sup>5</sup> The privilege exists so that Members might freely attend to the public affairs of the House, without disturbance or interruption.<sup>6</sup> The core privilege is free speech in Parliament which is derived from Article IX of the Bill of Rights, which provides that:

*“The freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament”.*<sup>7</sup>

According to Gordon and Jack<sup>8</sup>, parliamentary privilege is essential to the functioning of a modern, democratic Parliament. Free speech in Parliament is as crucial now as it was when the Bill of Rights was enacted in the 17<sup>th</sup> century in England. The core principle of this right enables a Member to say whatever he or she thinks fit in debate. The remarks made might be to a named individual or organisation, alternatively a Member may even express an opinion about another Member. However, the type of remarks made, whether offensive or not, will be determined in line with the Rules and decorum of the House.

When any of these rights and immunities (i.e. privileges such as freedom from arrest or freedom of speech) are disregarded or attacked, the offence is called a breach of privilege and is punishable under the rules of Parliament.<sup>9</sup> Parliament has the power to punish a Member for contempt and regulate its own internal parliamentary proceedings.

Many modern states have constitutions and codified parliamentary privilege legislations, however, implementation of the parliamentary privilege legislation has proved to be challenging for many Parliaments. In this regard, the following questions are often raised when dealing with issues of privilege:

- To what extent can the right of free speech of Members be limited (in terms of abuse of such right), taking into consideration the public perception that parliamentary privilege puts Members above the law?
- Whether parliamentary privilege sufficiently accommodates third party (non-member) interests?
- To what extent can judicial intervention be limited in Parliamentary affairs in terms of the separation of powers doctrine?
- Whether Members of Parliament should be protected by parliamentary privilege even if they commit criminal offences or make defamatory remarks against third parties (non-members) in proceedings of Parliament?

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<sup>5</sup> Richard Gordon Q.C and Sir Malcolm Jack KCB, PhD, FSA “Parliamentary privilege: Evolution or codification?” (The Constitution Society Report, 2013) p12

<sup>6</sup> Richard Gordon Q.C and Sir Malcolm Jack KCB, PhD, FSA “Parliamentary privilege: Evolution or codification?” (The Constitution Society Report, 2013) p14

<sup>7</sup> Bill of Rights 1689, Preamble paragraph 2

<sup>8</sup> Richard Gordon Q.C and Sir Malcolm Jack KCB, PhD, FSA “Parliamentary privilege: Evolution or codification?” (The Constitution Society Report, 2013)

<sup>9</sup> Erskine May *Parliamentary Practice* Twenty-second edition (London 1997) p 65

## **2.2 What is parliamentary precinct?**

Parliamentary precinct is generally defined as the designated area of land or building(s) or part of the building(s) under Parliament's control, including the Chambers, every part of the building(s) in which the Chamber is situated, members' offices, and any forecourt, yard, garden, enclosure or open space used or provided for the purposes of that Parliament. In some countries, this general definition extends to parliamentary accommodation for members (i.e. parliamentary villages).<sup>10</sup>

## **3. PARLIAMENT OF KENYA**

### **3.1 Provisions for parliamentary powers and privileges**

The Kenyan Parliament is a bicameral legislature consisting of the National Assembly and Senate, established in terms of Article 93 of the Constitution. In terms of the constitutional provision relating to parliamentary powers and privileges:

*Article 117 of the Constitution of Kenya provides that 'there shall be freedom of speech and debate in Parliament' and that 'Parliament may, for the purpose of the orderly and effective discharge of the business of Parliament, provide for the powers, privileges and immunities of Parliament, its committees, the leader of the majority party, the leader of the minority party, the chairpersons of committees and members'.*

### **3.2 Developments relating to parliamentary powers and privileges over the last 10 years**

The National Assembly (Powers and Privileges) Act, now being repealed by the Parliamentary Powers and Privileges Bill 2014, was enacted on 22 April 1952. The law has been reviewed a number of times through Act No. 36 of 1961, L.N. 602/1963, L.N. 87/1964, Act No. 14 of 1966, Act No. 21 of 1966, Act No. 4 of 1973 and Act No. 10 of 1981.

The Act declares and defines certain powers, privileges and immunities of the National Assembly and in relation to members. It also secures freedom of speech in the National Assembly, regulates admittance to and conduct within the precincts of the National Assembly and gives protection to the persons employed in the publication of the reports and other papers of the National Assembly. The new Parliamentary Powers and Privileges Bill, now in the Senate as the second House after deliberations in the National Assembly, proposes a separate Committee of Privileges for each House, as the Kenyan Legislature became bicameral in 2010.

The current National Assembly (Powers and Privileges) Act 1952 applies only to the National Assembly. However, the Senate 'constructively' applies the National Assembly (Powers and Privileges) Act, and has recently used a subcommittee of the Rules and Business Committee to consider disciplinary issues.

The Bill establishes for each House of Parliament a Committee of Powers and Privileges. In respect of the National Assembly, the Committee shall consist of the Speaker as chairperson and fourteen other members of the House appointed in accordance with the Standing Orders of the Assembly. In

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<sup>10</sup>

National Assembly (Powers and Privileges) Act, 1952 (Kenya)

respect of the Senate, the Committee consists of the Speaker as chairperson and six other members of the House appointed in accordance with the Standing Orders. Both Houses have a Speaker.

The new proposed legislation (Parliamentary Powers and Privileges Bill 2014) differs from the old legislation (National Assembly (Powers and Privileges) Act) as it now includes the Senate Members and not only the National Assembly Members. The new Bill also creates new offences and penalties, a Code of Conduct and a disciplinary process.

### **3.3 Limitations on parliamentary powers and privileges**

The Parliamentary Powers and Privileges Bill 2014 intends to limit the right of assembly, demonstration, picketing and petition under Article 37 of the Constitution for the purposes of facilitating the orderly conduct of business and affairs of Parliament, the right of access to justice under Article 48 of the Constitution, the right of access to information under Article 35 of the Constitution, the protection of the right to property under Article 40 of the Constitution, the right of access to justice under Article 48 of the Constitution and the right to a fair hearing under Article 50 of the Constitution and freedom of the media under Article 38. However, these issues are still under consideration.

### **3.4 Forceful removal of members from the House**

The Kenyan Parliament has dealt with cases of forceful removal of members from the Chamber for breach of privilege. Standing Order 111 of the National Assembly provides thus:

*“If any Member shall refuse to withdraw when required to do so, by or under these Standing Orders, the Speaker or the Chairperson of Committee as the case may be, having called the attention of the House or Committee to the fact that recourse to force is necessary in order to compel such Member to withdraw, shall order such Member to be removed and such Member shall thereupon without question put be suspended from the service of the House during the remainder of the Session and shall during such suspension, forfeit the right of access to the precincts of Parliament and the Serjeant-at-Arms shall take necessary action to enforce the order”*.

A recent matter involving the suspension of a member follows thus:

On 31 March 2016, while His Excellency President Uhuru Kenyatta was delivering a State of the Nation Address to a joint sitting of the Houses of Parliament, the Hon. James Opiyo Wandayi and other legislators disrupted the President’s speech by blowing whistles. When ordered to withdraw from the Chamber pursuant to Standing Order 107, the Member refused to withdraw from the Chamber. He was thus forcefully removed and suspended for the remainder of the session in terms of Standing Order 111.

Concerns have however been raised regarding the self-executing nature of Standing Order 111 and the risk of disproportionality in its application, lack of uniformity of punishments for similar offences during the same session, inadequate opportunity to appeal the decision, among others (i.e. sanctions in Standing Orders 107-112).

The Leader of the Majority Party sought direction from the Speaker on matters arising out of media reports of a Court Order reversing a matter of proceedings of the House. The Court Order stayed the decision of the House to suspend the Hon. James Opiyo Wandayi for the remainder of the session of the House in terms of Standing Order 111 pending the hearing and determination of the Judicial

Review Application filed by the Honourable Member. In light of the Court Order, the Leader of the Majority Party sought clarification on the following fundamental issues -

1. what is the fate of the Standing Orders and in particular the disciplinary procedure set out in Standing Orders 107-112 of the National Assembly Standing Orders that are made pursuant to Articles 75(2)(a) and 124(1) of the Constitution?
2. what is the fate of the power of the House to make Standing Orders and how far can the House provide for the orderly conduct of its proceedings and what is envisaged by the use of the word "orderly conduct"?
3. what is the fate of the privileges conferred on this House by virtue of Article 117(2) of the Constitution and the National Assembly (Powers and Privileges) Act?

The Speaker explained that the court order raised fundamental issues touching on the principle of separation of powers as contemplated in the Constitution. He said the Standing Orders are made pursuant to Article 124 of the Constitution to govern the manner in which the House conducts its business. He posed the question: *Can the Court therefore pronounce itself on the internal rules and procedures of the National Assembly without encroaching into the powers of Parliament to conduct its business? What is the Speaker required to do in light of the Court Order staying the decision of this House?*

The Speaker directed that the matters raised including the issues canvassed in the letters by Hon. Peter Kaluma and Hon. Jakoyo Midiwo be taken up by the Committee of Privileges as the body mandated under the National Assembly (Powers and Privileges) Act to consider and advise the House on matters of privilege. The Speaker added that the *"Committee is also at liberty to relook at the events of 31st March, 2016 for purposes of Article 75 of the Constitution and make such recommendations as may be appropriate. The Committee shall advise the House on the way forward as regards the Court Order and the issues raised by the Honourable Members"*. He further directed that pending the conclusion of the matter by the Committee of Privileges, the Honourable Member James Opiyo Wandayi be deemed a stranger and should not be allowed within the precincts of Parliament except for purposes of attending the summons of the Committee of Privileges as and when required by the Committee.

The Committee of Privileges looked at the experiences of the United Kingdom, Australia, India and South Africa, in terms of sanctions for disorderly conduct of members during parliamentary proceedings, including withdrawal from the House for the remainder of the sitting, naming of a member and suspension from the service of the House for a specified duration of time or sittings.

The Committee made the following findings and recommendations:

**a) Uniformity of Punishment**

The Committee resolved to propose changes to Standing Order 111 to provide for uniformity of punishment thereafter recommending its proposals to the Procedure and House Rules Committee to be incorporated in the on-going review of Standing Orders of the House.

**b) Self-Executing Standing Order 111**

It was observed that Standing Order 111 is self-executing without providing room for the presiding officer or chairperson of a Committee of the Whole House to manage unique situations. Issues arose

on whether the decision taken by the Speaker when enforcing this Standing Order violated the principles of proportionality. Proportionality has been defined as:

*“a principle requiring the administrative authority, when exercising discretionary power to maintain a proper balance between any adverse effects which its decision may have on the rights, liberties, or interests of persons and the purpose which it pursues.”*

The Committee appreciated that owing to the self-executing nature of Standing Order 111 the hands of the Speaker were tied. The Committee also recommended that the Procedure and House Rules Committee considers reviewing Standing Order 111 to provide room for presiding officers to manage unique circumstances as and when they arise.

**c) Fair hearing**

The Committee recommended that matters concerning Members accused of grossly disorderly conduct or other grave offences after initial action has been taken by the Speaker or Chairperson of the Committee of the whole House be automatically referred to the Committee of Privileges for hearing before the House makes a decision on the sanctions or penalties for the offence.

**d) Stiffer penalties**

The Committee recommended that the Procedure and House Rules Committee considers introducing stiffer sanctions/penalties for grossly disorderly conduct including fines, salary cuts, suspensions, among others, as a deterrent.

**e) Lifting of the Suspension of Hon. James Opiyo Wandayi**

While noting the representations made by the Hon. Midiwo and the Hon. Kaluma, appreciating the provisions of Articles 47, 50 and 259 of the Constitution on fair administrative action, and notwithstanding the provisions of Standing Order 111, the Committee was of the view that the suspension of the Hon. James Opiyo Wandayi be lifted as the duration of four months' suspension already served, constituted an adequate punishment in the circumstances. The Committee of Privileges did not recommend any further disciplinary action against the Member.



## **4. UNITED KINGDOM (UK) PARLIAMENT**

### **4.1 Provisions for parliamentary powers and privileges**

The powers and privileges of the House of Commons and House of Lords are not codified in a single document or in statute. Instead, they are provided for in various elements of historic practice, conventions, resolutions some legislation and court judgements given by the UK courts and in the courts of those Commonwealth countries which derive their parliamentary systems largely from Westminster (including to an extent the obiter dicta contained in relevant judgements). Both Houses enjoy the same parliamentary privileges which include:

- a) freedom of speech;
- b) control by the House of its affairs ("exclusive cognisance");
- c) power to discipline its own members for misconduct and punish anyone, whether a member or not, for contempt of Parliament;
- d) exemption from Acts of Parliament within the precincts of either House unless there is express provision that they should apply;
- e) freedom from interference in going to, attending at, and going away from Parliament;
- f) freedom from arrest in civil cases;
- g) exemption from subpoenas to attend court as a witness;
- h) freedom from service of court documents within the parliamentary precincts; and
- i) absolute protection of all papers published by order of either House.<sup>11</sup>

Principal amongst the statutory provisions is Article 9 of the 1689 Bill of Rights which provides that the freedom of speech and debates or proceedings in Parliament should not to be impeached or questioned in any court or place out of Parliament. The second most significant piece of legislation relating to the privileges of Parliament is the Parliamentary Papers Act 1840, which extends the shield of Article 9 to anything published by order of Parliament (for example reports of its debates and reports of its select committees). Also relevant are the Witnesses (Public Inquiries) Protection Act 1892 (which makes it a statutory offence to interfere with a witness before a committee of Parliament) and the Parliamentary Witnesses Oaths Act 1871 read together with the Perjury Act 1911, which makes it a statutory offence to give false evidence to a committee of Parliament under oath.

These various statutory provisions do not extinguish the claim of Parliament to its inherent privileges and its right to punish contempt. At the start of every Parliament the Speaker lays claim to the "ancient and undoubted rights and privileges" of the Commons by means of a humble petition to the Sovereign. These rights include freedom of speech in debate, freedom from arrest, freedom of access to the Queen and that the most favourable construction should be placed upon all proceedings. Effectively, the making of the petition by the Speaker is purely symbolic but it is perhaps a useful ritualised re-statement of the Commons' claim to historic and inherent privileges against interference by the other branches of government.

In practice only the first privilege claimed is relevant in modern circumstances and that is anyway enshrined in Article 9 of the Bill of Rights certified above. The principle upon which the privilege of freedom from arrest is based is the absolute priority of attendance by Members of both Houses (House of Commons and House of Lords). However, it has never been allowed to interfere with the administration of criminal justice or emergency

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<sup>11</sup> [https://www.publications.parliament.uk/pa/ld/lldcomp/composo2013/Part3\\_05.htm](https://www.publications.parliament.uk/pa/ld/lldcomp/composo2013/Part3_05.htm)

legislation.<sup>12</sup> The privilege of freedom from arrest has never properly been taken to extend to criminal matters except in the Chamber when the House is sitting.<sup>13</sup> According to the Procedure Committee report, the House requires police forces in the UK to notify the Speaker of each instance of the arrest of a Member on a criminal charge, and requires the Speaker to report that notification to the House.<sup>14</sup>

## 4.2 Limitations on parliamentary powers and privileges

Parliament has long recognised the balance that must be struck between claiming privileges in excess of or in contradiction to the general law applying to others in the jurisdiction for itself and ensuring that these are only used when strictly necessary. This affects the creation of new rights where the two Houses resolved in 1704 that they did not have the power to “create to themselves any new privilege that is not warranted by the known laws and customs of Parliament”. It also means that Parliament has placed limits on its existing rights. For example, the House of Commons agreed in 1978 that it would exercise its penal jurisdiction sparingly and only when satisfied that to do so was essential in order to provide reasonable protection from improper obstruction, whether actual or threatened, which was likely to cause substantial interference with the work of the House, its Members or its officers.

Privilege belongs to the House itself. Individual Members enjoy parliamentary privilege only as far as is necessary to perform their parliamentary duties but they are subject to the general law in the same way as other citizens.

By virtue of Article 9 of the Bill of Rights, a Member of the House of Commons speaking in a debate is protected by parliamentary privilege from any action for defamation or any other question or molestation. The only limitations on this are the rules of order in debate which govern the content of speeches, enforced by the presiding officer, and the repeated advice by the Speaker that “privilege should always be exercised wisely and consideration given to those being criticised” (e.g. HC Deb [2006-07] 5, c34). The House has also resolved that, subject to the discretion of the Chair, reference may not be made in any proceeding to matters currently before the courts.

Where the limits of parliamentary privilege are in question, in practice nowadays it is a matter for the courts to decide whether privilege applies in particular cases. As the court decided in *R v Chaytor*<sup>15</sup> - a case concerned the trials of three former MPs for false accounting in relation to the parliamentary expenses scandal of 2009. Each defendant was separately committed for trial at the Crown Court and separately raised the argument that proceedings could not be brought against them due to the protection of parliamentary privilege. The court ruled that the politicians were not afforded protection by parliamentary privilege. Upon appeal, the former MPs’ case was dismissed. They were sentenced between 16 and 18 months’ imprisonment for the expenses claims.

Where Parliament disagrees with a decision of the courts touching on its privileges the remedy nowadays would be for Parliament to legislate to place the disputed question on a statutory footing. The UK Parliament is also subject to the European Convention on Human Rights and so petitions may be brought before the European Court of Human Rights where an individual could claim that Parliament has been in breach of the Convention.

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<sup>12</sup> <https://www.publications.parliament.uk/pa/cm201516/cmselect/cmproced/649/64905.htm>

<sup>13</sup> Richard Gordon Q.C and Sir Malcolm Jack KCB, PhD, FSA “Parliamentary privilege: Evolution or codification?” (The Constitution Society Report, 2013) p22

<sup>14</sup> <https://www.publications.parliament.uk/pa/cm201516/cmselect/cmproced/649/64905.htm>

<sup>15</sup> *R v Chaytor* [2010] UK SC 52

### **4.3 Developments relating to parliamentary powers and privileges over the past 10 years**

In 2012, the then Government published a green paper (consultation document) on parliamentary privilege. The impetus for this was the number of concerns about the powers and privileges of Parliament which had come to the fore in recent years, as highlighted by:

- The examination by a committee of the issues of privileges relating to police searches on the parliamentary estate in 2010;
- The criminal prosecution of a group of former Members in 2010 for falsely claiming expenses, during which an unsuccessful attempt was made to have the charges dismissed on the ground of parliamentary privilege (the Chaytor case referred to above);
- A Committee of Privileges report in 2011 on allegations that some Members' phones had been illegally accessed by journalists.

A central theme arising from these concerns was the need to take forward the recommendations of a Joint Committee of Parliamentary Privilege in 1999 for a privileges bill which would codify parliamentary privilege in a modern context. The Government's 2012 proposals rejected the idea of a comprehensive codification of privilege but did include draft legislation for changes in specific areas, such as select committee powers.

In response to the green paper, Parliament established a Joint Committee on Parliamentary Privilege which published its own report with recommendations in July 2013. As yet, this report has not been agreed by either House and so the recommendations have not been implemented. In September 2016, the Committee of Privileges published a report on the conduct of witnesses before a select committee which called for action to be taken on the Joint Committee's recommendations.

### **4.4 Contempt of Parliament procedure**

The procedure for considering a breach of privilege by Members depends upon the type of allegation. In cases not involving select committees, a complaint must be made in writing to the Speaker. If the Speaker gives his/her permission, the Member making the complaint is allowed to raise the matter on the floor of the House and, following the granting of precedence by the Speaker, may then table a motion for an early date proposing that the matter be referred to the Committee of Privileges for investigation or resolved in some other way.

Where an allegation concerns interference with the work of a select committee, the committee concerned may make a special report to the House and the matter automatically stands referred to the Committee of Privileges. Once the Committee of Privileges has completed its inquiry, it reports back to the House with recommendations for sanctions where necessary.

It is then for the House to consider the Committee's report and its recommendations. The sanctions available in such cases range from demanding an apology from the Member to suspending a Member from the House for a specific period. The Member may also be admonished, either in person by the Speaker in the Chamber or by means of a House resolution. A suspension entails the loss of salary for the period specified.

#### **4.5 Forceful removal of members from the House**

Standing Order No. 43 gives the Speaker the power to order a Member whose conduct is grossly disorderly to withdraw and to order the Serjeant-at-Arms to take action in pursuance of that order. If the Member refuses to leave, the Member may be “named” by the Chair, following which a motion to suspend the Member from the service of the House (Standing Order No. 44) is immediately moved. The suspension lasts for five sitting days on the first occasion and twenty sitting days on a second occasion. During this period the Member is not allowed to enter the precincts and will not be paid his or her salary. The Member is required to withdraw immediately from the Chamber and will be removed by the Serjeant-at-Arms if necessary.

In a case of grave disorder, the Speaker can also adjourn the House without putting the Question or suspend the sitting (Standing Order No. 46). Where a Member had been suspended pursuant to a resolution to agree a recommendation from the Committee of Privileges, the Serjeant-a-Arms would have implicit power to use force if necessary to enforce the judgement of the House.

### **5. PARLIAMENT OF CANADA**

#### **5.1 Provisions for parliamentary powers and privileges**

The privileges of the British House of Commons were made applicable to Canada by the Constitution Act, 1867. The Preamble of that Act, which states that Canada has a “Constitution similar in Principle to that of the United Kingdom”, entrenched a Westminster-style parliamentary system, including the historical privileges necessary for such a system to function. As well, section 18 of the Act granted the Parliament of Canada the right to define its privileges by statute as long as these privileges never exceeded those enjoyed by the British House of Commons at the time of Confederation:

*“The Privileges, Immunities, and Powers to be held, enjoyed, and exercised by the Senate and by the House of Commons and by the Members thereof respectively shall be such as are from Time to Time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the Members thereof.”* The House of Commons of Canada has not made statutory provision for Parliamentary privilege.

#### **5.2 Limitations on parliamentary powers and privileges**

Parliamentary privilege is limited by section 18 of the Constitution Act, 1867 which provides that Parliament may not confer on itself any greater privileges than those enjoyed by the House of Commons of the United Kingdom, at the time of the Confederation of Canada in 1867. Canadian Parliamentary privilege is also limited by the Preamble of the Constitution Act, 1867, which provides for a Westminster parliamentary system, including privileges based on necessity. It is the prerogative of the House to determine how it will exercise these privileges and if it wants to insist on them or not. Given that the privileges enjoyed by Parliament are part of the general and public

law of Canada, the courts must judicially take notice of, interpret and defend these privileges as they would any branch of law.

### **5.3 Developments in relation to parliamentary powers and privileges over the last 10 years**

Speakers' decisions/rulings over the last several years can be grouped into two broad categories: those relating to the rights of the House and those relating to the rights of individual Members. Recent Parliaments have seen clashes between the Government and Opposition, often over privilege matters. Recent Speakers' decisions have focussed on the protection of the rights and privileges of the House and its Members.

With regard to the collective rights of the House, prima facie questions of privilege that have been significant include:

- a) the House's right to order the production of documents relating to the detention of combatants by Canadian Forces in Afghanistan, and similar orders regarding the production of documents over cost estimates for a variety of Government policy initiatives. Events arising from one such case subsequently led to the adoption by the House of a motion of no-confidence in the Government and the dissolution of the Fortieth Parliament;
- b) Other prima facie questions of privilege concerning the rights of the House included those related to: the Government's disclosure of the contents of a bill prior to its introduction; the use of the title "Member of Parliament" by non-Members; and the disclosure of confidential information; and access to the Parliamentary precinct by Members.

In addition, there were also several prima facie questions of privilege concerning matters of contempt. These included questions regarding a Member touching the Mace; motions to find certain public officials in contempt; and allegations that Ministers and Members had deliberately misled the House; the Government's disregard for an order to produce documents; and an incident where the House found a prima facie question of privilege against the Prime Minister for the "physical molestation" of another Member.

There have also been questions of privilege focusing on the individual rights of Members. Generally, they were argued from the perspective that Members had been impeded in carrying out their duties. These included questions of privilege relating to the exemption of Members from being summoned to a court proceeding for 40 days before and after a parliamentary session; the disclosure of confidential information from a party caucus meeting within the Parliamentary precinct; on several occasions, the denial of access to the Parliamentary precinct to Members during official visits by foreign dignitaries; and the unjust damaging of reputations of Members of Parliament.

### **5.4 Contempt by members**

A Member wishing to raise a question of privilege in the House must first convince the Speaker that his or her concern is prima facie (on the first impression or at first glance) a question of privilege. The Speaker will determine whether the matter is of such a nature to entitle the Member who raised the question to move a motion which will have priority over a given day's order of business. Then, the House must take the matter into immediate consideration. Ultimately, it is the House which decides whether a breach of privilege or a contempt has been committed.

Matters relating to privilege may also arise in standing, special, legislative and joint committees, and in a Committee of the Whole House. However, the procedures for dealing with such situations

in committee differ from the general procedure followed in the House. Generally, matters arising from committee proceedings must first be raised in committee. If a committee is of the view that the matter touches on a privilege, or is related to a contempt, it must report the matter to the House, which will then allow the House the opportunity to consider the matter if the Speaker is of the view that it is, *prima facie*, and related to privilege.

If a Member believes that a breach of privilege or a contempt has occurred, but does not feel that the matter should have priority in debate, the Member may follow an alternate route for bringing the matter before the House. He or she may place a written notice of a motion on the Notice Paper.

### **5.5 Forceful removal of members from the Chamber for breach of privilege, contempt, disruptions**

Through its tradition of parliamentary privilege, the House of Commons of Canada can enforce the removal of a Member for breaches of privilege or contempt. One of the House's collective rights is the exclusive right to determine its own membership, meaning the House has the final word in deciding who can sit in the House. Also, through the House's right to discipline, it can censure, reprimand, summon individuals to the Bar of the House, punish (by incarceration) persons guilty of breaches of privilege or contempt, and also the power to expel Members guilty of conduct that the House determines breaches privileges of the House, or is contemptuous of the House.

## **6. NEW ZEALAND PARLIAMENT**

### **6.1 Provisions for parliamentary powers and privileges**

In 2014, Parliament passed the *Parliamentary Privilege Act 2014*. Section 3 of the Act sets out its purposes:

(1) The main purposes of this Act are to—

(a) reaffirm and clarify the nature, scope, and extent of the privileges, immunities, and powers exercisable by the House of Representatives, its committees, and its members; and

(b) ensure adequate protection from civil and criminal legal liability for communication of, and of documents relating to, proceedings in Parliament.

(2) The subsidiary purposes of this Act, to help it to achieve its main purposes, are to—

(a) reaffirm generally in a single Act and clarify the purpose and certain other aspects of, but avoid comprehensive codification of, parliamentary privilege; and

(b) provide for Article 9 of the Bill of Rights 1688 to be taken to have, for the avoidance of doubt, a specified effect (in addition to any other operation, and subject to specified overriding offence provisions); and

(c) define, for the avoidance of doubt, “proceedings in Parliament” for the purposes of Article 9 of the Bill of Rights 1688, and in particular to alter the law in the decision in *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713 (SC); and

(d) abolish and prohibit evidence being offered or received, questions being asked, or statements, submissions, or comments made, concerning proceedings in Parliament, to inform or support “effective repetition” claims and liabilities in proceedings in a court or tribunal and exemplified by the decision in *Buchanan v Jennings* [2004] UKPC 36, [2005] 2 All ER 273 (PC); and

(e) replace with modern legislation the law formerly contained in the Legislature Act 1908, the Legislature Amendment Act 1992, and certain provisions of the Defamation Act 1992.

## 6.2 Limitations on parliamentary powers and privileges

Section 10 of the *Parliamentary Privilege Act 2014* defines ‘parliamentary proceedings’ for the purposes of 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”, and the Act.

## 6.3 Recent developments in relation to parliamentary powers and privileges

The *Parliamentary Privilege Act 2014* implemented the recommendations made by the Privileges Committee in its 2013 report, *Question of privilege concerning the defamation action Attorney-General and Gow v Leigh*.<sup>16</sup> The report considered the question of privilege in relation to a decision of the Supreme Court in *Attorney-General and Gow v Leigh*.<sup>17</sup> This decision appeared to represent a significant shift in the interpretation by the courts of the privileges, powers, and immunities essential to the effective functioning of Parliament. In this case, a public official (Ms Leigh, a communication adviser in climate change issues) in the Ministry of Environment wrote to the Privilege Committee to complain about the Minister’s reference to her during a parliamentary question session in the House. She was advised about the process for having a person’s response incorporated into the parliamentary record. The Minister later made a personal explanation to the House and apologised to Ms Leigh for the comments he had made on 22 November 2007. Thereafter, Ms Leigh then issued proceedings in the High Court claiming that Mr Gow (Deputy Secretary at the Ministry) had defamed her in his oral briefing and in his written briefing note. Ms Leigh argued that the Minister’s answers in the House were a re-publication of Mr Gow’s statements.

The High Court accepted that the Minister’s statements in the House were protected by Article 9 of the Bill of Rights 1688<sup>18</sup>. In the High Court, it had been argued that Article 9 not only protected what the Minister had said in the House but also protected the information asked for and communicated for the purposes of the replies to oral questions in the House. The High Court also concluded that Article 9 would preclude any argument that the Minister’s

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<sup>16</sup> [https://www.parliament.nz/resource/en-nz/50DBSCH\\_SCR5877\\_1/0483d5db5207dc363545cec3b127a5bef8d46ef8](https://www.parliament.nz/resource/en-nz/50DBSCH_SCR5877_1/0483d5db5207dc363545cec3b127a5bef8d46ef8)

<sup>17</sup> *Attorney-General v Leigh* [2011] NZSC 106

<sup>18</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.”

statements amounted to a re-publication of Mr Gow's comments. The Court of Appeal, on the other hand, disagreed with this argument and held that this was an occasion of qualified rather than absolute privilege. The Attorney-General and Mr Gow appealed to the Supreme Court on the conclusion that the occasion on which Mr Gow communicated with the Minister was not one of absolute privilege.<sup>19</sup>

The Supreme Court dismissed the appeal and concluded that statements made by an official to a Minister for the purposes of replying to questions for oral answer were not themselves parliamentary proceedings. Such statements could be the subject of court proceedings as they were not protected by absolute privilege. This court decision was referred to the Privilege Committee to consider the potential effect it might have on the future operations of the House.

The Committee made a number of recommendations, including that:

- a) the House respectfully disagree with the Supreme Court decision in *Attorney-General and Gow v Leigh* in applying the test of necessity to ascertain the scope of Parliament's privilege of freedom of speech. The Committee was of the view that the issue was not what a person outside the House needs as protection, but rather whether the supply of information to Ministers under an obligation to address the House in answer to parliamentary questions is an integral part of a proceeding in Parliament. The Privilege Committee concluded that the judgment of the *Leigh* case has a potentially chilling effect on the ability of the House to receive the information it needs to operate effectively. Further, it is questionable whether the courts' jurisdiction is such that they can challenge the extent of parliamentary privilege in this manner.
- b) the Government introduce a Parliamentary Privilege Bill to clarify for the avoidance of doubt the nature of parliamentary privilege in New Zealand;
- c) the Parliamentary Privilege Bill contain a clear statement of purpose to aid in determining the extent and scope of parliamentary privilege; and
- d) the Parliamentary Privilege Bill make explicit that a member of Parliament, or any other person participating directly in or reporting on parliamentary proceedings, who makes an oral or written statement that affirms or adopts what he or she or another person has said in the House or its committees will not be liable to criminal or civil proceedings unless the statement in and of itself could be defamatory.

Other issues which the Privileges Committee has considered in recent years include:

- reflections by members on the Speaker in his capacity as Speaker;
- using social media to report on the proceedings of Parliament;
- agreements for policing, execution of search warrants and collection and retention of information by the New Zealand Security Intelligence Service;
- use of intrusive powers within the parliamentary precinct; and
- freedom of speech by members in the context of court orders.

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<sup>19</sup> [https://www.parliament.nz/resource/en-nz/50DBSCH\\_SCR5877\\_1/0483d5db5207dc363545cec3b127a5bef8d46ef8](https://www.parliament.nz/resource/en-nz/50DBSCH_SCR5877_1/0483d5db5207dc363545cec3b127a5bef8d46ef8)



## 6.4 Contempt of Parliament

The *Standing Orders of the House of Representatives*, 2014 edition-

Standing Order 409 provides:

### 409 Contempt of House

- (1) The House may treat as a contempt any act or omission which—
  - a) obstructs or impedes the House in the performance of its functions, or
  - b) obstructs or impedes any member or officer of the House in the discharge of the member's or officer's duty, or
  - c) has a tendency, directly or indirectly, to produce such a result.
- (2) In deciding whether or not to treat any act or omission as a contempt, the House may consider—
  - a) the conduct of any person taking part in parliamentary proceedings:
  - b) the nature of any action taken against any person on account of that person's actions when taking part in parliamentary proceedings.

Standing Order 410 gives a list of examples of contempt. Standing Orders 401 to 408 set out the procedure to be followed in the case of an allegation of contempt.

Section 22 of the Parliamentary Privilege Act 2014 empowers the House to impose a fine of up to \$1,000 in respect of a Member found to be in contempt of the House.

## 6.5 Rules and Orders or legislation providing for forceful removal of members from the Chamber for breach of privilege, contempt and disruptions

Standing Orders 89 to 96 deal with disorderly conduct by a member in the House. The Speaker may order a member whose conduct is disorderly to withdraw immediately from the House. A member whose conduct is grossly disorderly may be suspended from the House for a period ranging from 24 hours to 28 days. If a member who has been suspended for grossly disorderly conduct refuses to obey a direction by the Speaker to leave the Chamber, the Member is automatically suspended for the rest of the calendar year.

*Parliamentary Practice in New Zealand*, 3<sup>rd</sup> ed., 2005 states in chapter 11:

*If a member who is suspended refuses to withdraw voluntarily from the House at once, the Serjeant-at-Arms will be called on by the Speaker to enforce the House's direction. Should force prove to be necessary, the Speaker calls the House's attention to this fact and the contumacious member is automatically suspended from the service of the House for the remainder of the calendar year (similar to Standing Order 111 of the Kenyan National Assembly).*

Section 14 of the *Members of Parliament (Remuneration and Services) Act 2013* provides for deductions to be made from the salary of a member who has been suspended from the House.

## **7. PARLIAMENT OF AUSTRALIA**

### **7.1 Provisions for parliamentary powers and privileges**

The Houses of the Commonwealth Parliament (House of Representatives and Senate) enjoy immunities from the ordinary law as well as powers to protect the integrity of their processes. The primary immunity of the Houses is the freedom of parliamentary debates and proceedings from question and impeachment in the courts. The primary powers of the Houses are the ability to compel the attendance of witnesses, the giving of evidence and the production of documents, and the ability to judge and punish contempt.

Section 49 of the Australian Constitution states that the powers, privileges and immunities of the Commonwealth Parliament are the same as those of the House of Commons of the United Kingdom at the time the Commonwealth was established on 1 January 1901.

Section 49 of the Constitution also provides that the Commonwealth Parliament may declare its own privileges if it chooses to do so, and section 50 provides that each House may make rules and orders with respect to the mode in which its powers, privileges and immunities may be exercised and upheld.

Parliament made a declaration of its privileges via the *Parliamentary Privileges Act 1987*. Although not exhaustive, the Act declared several important privileges, including the scope of freedom of speech in Parliament, abolished others, including contempt by defamation, and defined penalties that either House may impose for contempt.

As a supplement to the *Privileges Act 1987*, the Senate agreed to a series of resolutions in February 1988 to establish procedures with regard to: the protection of the rights of witnesses; the investigation of contempt; and criteria for determining matters relating to contempt. These resolutions also provide a 'right of reply' mechanism for persons adversely affected by a reference in the Senate.

### **7.2 Recent developments in relation to parliamentary powers and privileges**

#### *a) Parliamentary privilege and the execution of search warrants*

The extent to which parliamentary privilege provides an effective immunity to Members of Parliament and their staff from compulsory production of documents, via subpoenas and orders for discovery issued by courts or tribunals, or via search warrants, has been a developing area of parliamentary privilege for several decades. The recent execution of search warrants by the Australian Federal Police on the office of a Senator and the home of a staff member, and the execution of another search warrant on an email server within Parliament House itself, has again brought this question to the fore. According to the Background Paper on Parliamentary Privilege and the execution of search warrants on Members (prepared by the Clerk's Office), there may be an effective immunity from compulsory production of documents where those documents are sufficiently closely connected to proceedings in Parliament.

As a consequence of the judgement in *Crane v Gething* (2000) 97 FCR 9, in which it was found that the court did not have jurisdiction to determine a claim of parliamentary privilege in such circumstances, it currently falls to the House of Parliament concerned and the Executive to resolve disputes regarding claims of privilege over documents seized during the

execution of search warrants. In 2005, a memorandum of understanding was agreed between the Presiding Officers of the House of Representatives and the Senate, the Attorney-General and the Minister for Justice to detail the procedure to be followed by the Australian Federal Police in such cases.

#### *b) Current issues before the Committee of Privileges*

The Committee of Privileges had received two referrals arising from the recent execution of search warrants. The first effectively implements the method for determining claims of privilege suggested in the Clerk's Office background paper, while the second tasks the committee with determining whether any contempt were committed either in the course of executing the search warrants or through any disciplinary action taken against those who are alleged to have provided information to the Senator.

The committee has also reported on matters related to false or misleading evidence given to Senate committees (131<sup>st</sup>, 133<sup>rd</sup> and 162<sup>nd</sup> reports) and the possible interference with, or imposition of penalties on, witnesses before Senate committees (141<sup>st</sup>, 151<sup>st</sup> and 161<sup>st</sup> reports). Other topics reported on by the committee since 2005 include: use of CCTV material in Parliament House (160<sup>th</sup> report); the adequacy of government guidance for officers giving evidence and providing information (153<sup>rd</sup> report); possible improper influence of senators (150<sup>th</sup> report); statutory secrecy provisions affecting parliamentary committees in a tax law amendment bill (144<sup>th</sup> report); and effective repetition (134<sup>th</sup> report).

### **7.3 Contempt by members**

Section 4 of the *Parliamentary Privileges Act 1987* contains a definition of contempt of Parliament, which states that a conduct cannot be a contempt unless it "amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member".

The Senate agreed to a series of privilege resolutions in February 1988. These resolutions include detailed procedures relevant to how the Senate deals with contempt. The resolutions include:

- procedures for protecting witnesses before the Privileges Committee (resolution 2)
- criteria to be taken into account when determining matters relating to contempt (resolution 3)
- criteria to be taken into account by the President when determining whether to give precedence to a motion arising from a matter of privilege (resolution 4)
- general guidance on acts that the Senate may treat as contempt (resolution 6)
- procedures governing how matters of privilege can be brought before the Senate (resolution 7)
- and procedures governing motions that determine a person has committed a contempt or motions to impose a penalty for contempt (resolution 8).

In the most extreme circumstances, the Senate and the House of Representatives has the power to punish contempt by imposing a prison sentence of up to six months or a fine of up to \$5,000 for individuals and \$25,000 for corporations (section 7 of the *Parliamentary*

*Privileges Act 1987*).<sup>20</sup> The Senate has never imposed such punishments, but has instead relied on lesser punishments, such as admonishments.

#### **7.4 Rules and Orders or legislation providing for forceful removal of members from the Chamber for breach of privilege, contempt and disruptions**

Standing Order 203 provides the President of the Senate with the power to report to the Senate that a senator has committed an offence where that senator: persistently and wilfully obstructs the business of the Senate; is guilty of disorderly conduct; uses objectionable words, and refuses to withdraw such words; persistently and wilfully refuses to conform to the standing orders; or persistently and wilfully disregards the authority of the chair. Once reported, the senator must be present in the Chamber and make an explanation or apology, following which a motion may be moved to suspend the senator from the sitting. The motion must be determined immediately and without amendment or debate.

Standing order 204 details the terms of suspension in such cases, and allows the removal of a senator from the Chamber should they enter during the term of their suspension:

1. The suspension of a senator on the first occasion shall be for the remainder of that day's sitting, on the second occasion for 7 sitting days, and on the third or any subsequent occasion for 14 sitting days, where such suspensions occur within the same calendar year.
2. A senator who has been suspended shall not enter the Chamber during the period of the suspension. If a senator enters the Chamber during the senator's suspension, the President shall order the Usher of the Black Rod to remove the senator from the Chamber.

Although senators may be suspended for significant periods of time under the terms of Standing Order 204, section 8 of the *Parliamentary Privileges Act 1987* states that, 'a House does not have power to expel a member from membership of a House.'

## **8. OBSERVATIONS AND RECOMMENDATIONS**

Parliamentary privilege exists for the purpose of enabling the Houses of Parliament and Members of Parliament to carry out effectively their functions. The primary functions of the Houses are to inquire, to debate and to legislate, and parliamentary privilege therefore facilitates and protects these functions. The challenge arises when these privileges and immunities are abused by Members. Furthermore, where there is a potential clash between human rights and the absolute freedom of parliamentary privilege, then the courts must intervene. Judicial examination, however, must be limited to ensuring that Parliament does not seek to exercise its powers in an unlawful way. It is not for the courts to sit in judgement on individual actions taken within the parliamentary process. The courts no doubt have a role in assisting the articulation of the extent of parliamentary privilege, but it is for the Parliament itself to determine how it exercises that privilege.

This paper, while in no way pretending to be comprehensive, has attempted to review the experiences of other Parliaments in respect of parliamentary privilege. To this end, we sought

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<sup>20</sup>[http://www.aph.gov.au/About Parliament/Work of the Parliament/Parliament at Work/Parliamentary Privilege](http://www.aph.gov.au/About%20Parliament/Work%20of%20the%20Parliament/Parliament%20at%20Work/Parliamentary%20Privilege)

to enquire into what provisions other Parliaments make in relation to parliamentary privileges; whether Parliaments place restrictions on members' privileges and, if so, how this is done; what developments there have been in Parliaments with regard to parliamentary privileges; how do Parliaments deal with contempt issues; and whether the Rules or legislation make provision for the forceful removal of members from the Chamber.

Based on the responses of the five Parliaments, it is evident that the experiences and challenges faced by the South African Parliament, in respect of parliamentary privileges and immunities, are not unique. The responses seem to indicate that other Parliaments have similar statutory and Rules provisions with regard to parliamentary privilege, limitations on freedom of speech, Rules provision for the forceful removal of Members from the Chamber for misconduct, and also have to deal with court challenges in respect of their decisions and processes. Overall, the experiences and developments obtaining in other Parliaments, as far as parliamentary privilege is concerned, will serve to inform and enlighten the review exercise currently undertaken by the Ad Hoc Committee on Review of the Powers and Privileges Act.

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## **ANNEXURE A**

### **QUESTIONNAIRE**

1. How does your Parliament make provision for parliamentary powers and privileges?
2. Does your Parliament place any limitations on parliamentary powers and privileges, if so, how is this done? (e.g. members' right to freedom of speech)
3. What developments have there been in terms of parliamentary powers and privileges in your Parliament over the last 10 years?
4. How does your Parliament deal with contempt by members?
5. Does your Rules and Orders or legislation provide for forceful removal of members from the Chamber for breach of privilege, contempt or disruptions? If not, what mechanisms are in place to deal with "disturbance" or "gross misconduct" during House proceedings?

## **ANNEXURE B**

### ***TERMS OF REFERENCE OF THE AD HOC COMMITTEE ON THE REVIEW OF THE POWERS AND PRIVILEGES ACT***

#### **POWERS, PRIVILEGES AND IMMUNITIES OF PARLIAMENT AND PROVINCIAL LEGISLATURES ACT (NO. 4 OF 2004)**

##### **A. BACKGROUND**

1. In view of the Constitutional Court judgment handed down on 18 March 2016, in *Democratic Alliance v Speaker of National Assembly and Others* [2016] ZACC 8, there was a need to review provisions of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act (the Act).

2. In this matter, the Constitutional Court held the following:

"The omission of the words "other than a member" after the word "person" at the beginning of section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, Act 4 of 2004, is declared to be inconsistent with the Constitution.

Section 11 of the Act is to be read as though the words "other than a member" appear after the word "person" at the beginning of the section."

3. The Act needs to be amended through the introduction of a committee bill.

##### **B. TERMS OF REFERENCE**

1. Review the Act in its entirety and, in doing so, must take into account –

a. The Constitutional Court judgement; and

b. any other case law, existing legislation, and international best practice relating to parliamentary powers and privileges.